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ETHICS *in* PRACTICE

Lawyers' Roles, Responsibilities, and Regulatio

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Ethics in Practice

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Law, as Reinhold Niebuhr once noted, is a "compromise between moral ideas and practical possibilities."[1] The same is true of legal ethics. How lawyers reconcile the tension between moral aspirations and pragmatic constraints is important not just for the profession but also for the public. Lawyers play a crucial role in the structure of our private affairs and social institutions. This role carries multiple, sometimes competing responsibilities to clients, courts, and society generally. Lawyers also face conflicts between their professional obligations and personal interests. A central challenge of legal practice is how to live a life of integrity in the tension between these competing demands.[2]

This essay, like the collection that it introduces, provides an overview of ethics in practice. Most issues are matters of long-standing concern: Plato's condemnation of advocates' "small unrighteous souls" has echoed for centuries.[3] But while lawyers' ethics have never lacked for critics, only recently have they become a subject of formal rules and significant study. Not until 1969 did the American Bar Association (ABA) adopt a Model Code of Professional Responsibility with binding disciplinary rules. And not until 1974 did the ABA require law schools to offer instruction in legal ethics. Yet the decades that followed have witnessed an outpouring of codification, commentary, and curricular initiatives on professional responsibility. In the mid-1980s, the ABA adopted a revised set of standards, the Model Rules of Professional Conduct, and national, state, and local bar organizations launched a wide range of professionalism efforts: commissions, courses, centers, conferences, and codes.[4]

Despite this cottage industry, chronic ethical dilemmas remain unresolved. Part of the problem involves a lack of consensus about what the problems are, and what values should be most central to professional life. But at least some aspirations are broadly shared. The public deserves reasonable access to legal assistance and to

legal processes that satisfy minimum standards of fairness, effectiveness, and integrity. And the profession deserves conditions of practice that reinforce such standards in the service of social justice.

Such values, however self-evident in theory, have proven difficult to realize in practice. Much of the difficulty involves the bar's failure to address the institutional and ideological structures that compromise moral commitments. The discussion that follows focuses on these structures: the economic conditions, adversarial premises, and regulatory frameworks that shape ethics in practice. Until the bar addresses the underlying forces that drive professional choices, a wide gap will persist between the ideals and institutions of lawyers' working lives.

The Economic Structures of Practice

In some respects, the bar is a victim of its own success. No occupation offers a surer path to affluence and influence. Law is the second highest paying profession, and lawyers play leading roles in the nation's political and economic life.[5] Yet the expectation of doing well *and* doing good has proven increasingly difficult to realize, at least at the level that most practitioners hope to achieve. The last half century has brought fundamental changes in the structure of professional practice that are at odds with professional values. Competition and commercialism are increasing; collegiality and civility are headed in the opposite direction. Most practitioners agree that those trends will continue.[6] There is little corresponding consensus about what, if anything, to do about it.

Legal practice has become increasingly competitive along multiple dimensions. Over the past three decades, the legal profession has more than doubled in size. The growing number of lawyers has intensified competition and diminished the informal reputational sanctions once available in smaller professional communities. Heightened price consciousness among corporate clients, together with the erosion of anticompetitive restraints, also has forced closer attention to the bottom line. These pressures have led to more instability in client and collegial relationships and more constraints on professional independence. Sophisticated purchasers are increasingly likely to shop for representation on particular matters, rather than to build long-term relationships with a single lawyer or law firm.

Such trends have yielded some benefits in terms of increased efficiency and responsiveness to client concerns. But they have come at a considerable cost. As private practice becomes more competitive and transactional, lawyers face greater pressure to accept troubling cases or to satisfy clients' short-term desires at the expense of other values. Without a stable relationship of trust, it is risky for counsel to protest unreasonable demands or to deliver unwelcome messages about what legal rules or legal ethics require. In the study of litigation abuse described in Austin Sarat's essay, one participant put it bluntly: there is "no market for ethics."[7] If clients want to play hard ball, lawyers may come to see it as the only game in town.

Increases in the size and competitiveness of legal workplaces have had other unwelcome effects. As organizations grow larger, collegiality and collective responsibility become more difficult to sustain. So too, as partnership becomes harder to achieve and less likely to insure job security, fewer lawyers feel long-term institutional loyalty. Such environments offer inadequate incentives for mentoring junior attorneys and monitoring collegial conduct. It is, in short, a culture of increasing competition and declining commitment; clients are less committed to lawyers, lawyers are less committed to firms, and partners are less committed to associates.

Preoccupation with the bottom line has compromised other commitments as well, and one obvious casualty is pro bono work. Few lawyers come close to satisfying the ABA's Model Rules of Professional Conduct, which provide that "a lawyer should aspire to render at least 50 hours of pro bono publico legal services per year," primarily to persons of limited means or to organizations assisting such persons.[8] In fact, most attorneys offer little such assistance; the average for the profession as a whole is less than one half hour a week.[9] Part of the reason involves firm policies that fail to count pro bono activity toward billable-hour requirements or to value it in promotion and compensation decisions.[10]

Such policies undermine lawyers' personal and professional values. Pro bono contributions play an important, however partial, role in meeting the bar's unrealized commitment to equal access under law. Such work also has been crucial in giving purpose and meaning to professional life. Practitioners who lack the time or support for such experiences often feel short-changed. Indeed, the greatest source of disappointment among surveyed lawyers is the sense that they are not "contributing to the social good."[11] The bar's failure to provide more support for pro bono activities represents a significant lost opportunity for the profession as well as the public.

Another troubling byproduct of the preoccupation with profit has been the escalation of working hours. Over the last half century, lawyers' average billable hours have increased from between 1,200 and 1,500 hours per year to between 1,800 and 2,000. What has not changed are the number of hours in a day. To charge honestly at current levels, given average amounts of nonbillable office time, requires 60-hour weeks.[12] Expectations at most large firms are even greater. Such sweatshop schedules have compromised professional values in several respects. It has become increasingly difficult to insure equal opportunity for lawyers with substantial family and community commitments. Excessive workloads also create pressures to inflate hours and contribute to psychological difficulties that impair performance.

Working schedules are a major cause of the continued glass ceiling for women in the legal profession. Although 45 percent of new entrants to the bar are women, they fail to advance as far or as fast as men with similar credentials and experience.[13] As is clear from the gender bias task forces reviewed in Deborah Hensler and Judith Resnik's essay below, women remain significantly underrepresented in positions carrying greatest power, status, and economic rewards. Part of the explanation lies in fe-

male attorneys' disproportionate share of family obligations and the unwillingness of legal employers to make appropriate accommodations. Most law firms are what sociologists label "greedy institutions."[14] They preach an ethic of total availability and equate reduced schedules with reduced commitment. Lawyers with competing values generally end up with second-class status. Many drop off partnership and leadership tracks, leaving behind a decision-making structure insulated from their concerns.

That process takes a toll, not just on those with family commitments but on the profession as a whole. Lawyers have fewer opportunities for the community involvement, public service, and personal enrichment that build professional judgment and sustain a socially responsible culture. Even when measured in more narrow economic terms, current workplace priorities yield short-term profits at the expense of long-term gains. Employers who allow flexible and reduced schedules typically find increases in efficiency, morale, recruitment, and retention.[15] The inadequacy of such opportunities in legal practice, together with the escalation of "normal" working hours, also carries a substantial cost. Overwork is a leading cause of lawyers' job dissatisfaction, and their exceptionally high rates of stress, depression, and substance abuse.[16] Such personal problems are, in turn, a primary cause of neglect, incompetence, and related performance problems.[17]

The preoccupation with profit and billable hours contributes to other troubling conduct, particularly on matters involving legal fees. As Chief Justice Rehnquist has observed, if practitioners are expected to meet current billing requirements, "there are bound to be temptations to exaggerate the hours put in."[18] These temptations have fostered a range of abuses, reflecting everything from flagrant fraud and "creative timekeeping" to intentional inefficiency. The frequency of such abuses is difficult to gauge and police because it is often impossible to verify whether certain tasks are necessary and whether they require, or actually consume, the time charged for completing them. However, 40 percent of surveyed lawyers acknowledge that some of their work is influenced by a desire to bill additional hours, and auditors find questionable practices in about a quarter to a third of the bills that they review.[19] Such practices include inflating hours, overstaffing cases, performing unnecessary work, or double billing multiple clients for the same task. Under an hourly billing system, the temptation is to leave no stone unturned as long as lawyers can charge by the stone. In a few egregious cases, personal expenditures have been recast as litigation expenses: dry cleaning for a toupee, or running shoes labeled "ground transportation."[20] Such examples, together with the high cost of routine legal services, have fueled public skepticism about the fairness of lawyers' fees. Fewer than 5 percent of Americans believe that they get good value for the price of legal services.[21]

Although corporate clients have become more adept at monitoring and comparing prices, some abuses remain difficult to detect. Unsophisticated one-shot purchasers are especially vulnerable. Many of these individuals lack adequate information to assess the reasonableness of charges for nonroutine services. And in most

class action litigation, no individual plaintiff will have sufficient incentives to challenge attorneys' fees. Nor will any one else. As Susan Koniak's and George Cohen's essay in this volume makes clear, opposing parties may agree to unduly generous compensation for counsel if it substantially reduces remedies for the class.[22] Overburdened trial courts often are reluctant to second guess such settlement provisions if the effect will be to prolong time-consuming litigation.

This absence of oversight creates obvious potential for abuse, particularly in contingent fee cases. For middle- and lower-income clients, the only way to finance litigation is generally through contingency agreements. These arrangements give counsel a share of any recovery, and no payment if the case is unsuccessful. Although such fee agreements are a crucial means of providing access to legal assistance, they often present conflicts of interest. Attorneys generally would like the highest possible return on their work; clients would like the highest possible recovery. For most claims of low or modest value, lawyers want a quick settlement. It frequently does not pay to prepare a case thoroughly and hold out for the best terms available for the client. Conversely, in high-stakes cases, once lawyers have invested substantial time, they may have more to gain from gambling for a large recovery than clients with inadequate incomes and immediate needs.[23]

A related problem is that a lawyer's return bears no necessary relationship to the amount of work performed or to the risk actually assumed. In many cases where liability is clear and damages are substantial, the standard one-third recovery will provide a windfall for the attorney. If defendants make an early settlement offer, plaintiffs' lawyers can end up with huge fees for minimal services. In some widely publicized cases, the amount of work actually done was so insignificant that it would amount to an hourly rate between $20,000 and $35,000.[24] In theory, clients can challenge contingency arrangements that yield unreasonable fees. In practice, few individuals do so because litigation is expensive and judges have been unreceptive. Courts lack the capacity to monitor even a small fraction of the approximately one million new contingent-fee cases filed each year.[25]

Trial judges also lack the ability or inclination to insure effective representation in other contexts, particularly in criminal cases involving appointed counsel for indigent defendants.[26] Yet the economic conditions of practice for these lawyers work against adequate trial preparation. Most cases are handled either by grossly understaffed public defenders or by private practitioners who receive minimal flat fees or low hourly rates. Compensation generally is capped at wholly unrealistic levels, often a $1,000 or under for felony cases. Thorough preparation is a quick route to financial ruin.[27] Defendants who hire their own counsel do not necessarily fare better. Most of these individuals have incomes just over the poverty line and cannot afford substantial legal expenses. Their lawyers typically charge a flat fee, payable in advance, which creates obvious disincentives for extensive work. These economic conditions help account for the high frequency of plea bargains in indigent criminal defense. About 90 percent of defendants plead guilty, and in the large majority

of these cases counsel have interviewed no prosecution witnesses and filed no defense motions.[28]

These are not, however, the cases that attract media attention. The result is a wide gap between public perception and daily practice. Most Americans believe that the justice system coddles criminals and that lawyers routinely get their clients off on technicalities. In the courtrooms that the public sees, zealous advocacy is the norm. O. J. Simpson's lawyers left no angle unexplored. But their reputations were on view and their client could afford to pay. Neither is true in the vast majority of criminal cases. For many defendants, it is better to be rich and guilty than poor and innocent.

Yet seldom are judges with already unmanageable caseloads willing to oversee counsels' performance. In one representative survey, courts rejected 99 percent of claims alleging ineffective assistance of counsel.[29] The extent of judicial tolerance is well illustrated by a Texas murder case, in which a defense lawyer fell asleep several times during witnesses' testimony and spent only five to seven hours preparing for trial. In rejecting claims of ineffective representation, the judge declared that "[t]he Constitution says that everyone is entitled to an attorney of their choice. But the Constitution does not say that the lawyer has to be awake."[30]

Nor does the Constitution say that the poor are entitled to any legal assistance for civil matters. In the absence of explicit guarantees, or adequate government funding for poverty law programs, over four-fifths of the legal needs of the poor remain unmet.[31] Many middle-income Americans also are priced out of the market for services. An estimated one-third of their personal legal problems are not addressed and many collective concerns go unremedied.[32] Less than one percent of the nation's lawyers are engaged in full-time public interest practice, and the resources to pursue legal issues of broad social importance fall far short.[33] Not only do a vast array of needs lack any representation, but others are ineffectively addressed because the parties cannot afford the necessary assistance. Equal access to justice is what we enshrine on courthouse doors, not what we institutionalize in practice.

These inadequacies in legal services pose ethical issues for lawyers on both an individual and collective level. What are lawyers' responsibilities when they personally confront situations in which important interests are inadequately represented? And what are lawyers' responsibilities when they design rules for the profession in a world of unequal representation? Prevailing adversarial structures have worked against ethically satisfying responses. A system that presupposes equal, zealous representation of opposing interests copes poorly in a world of unequal resources, information, and incentives.

The Structure of an Adversarial System

The central premise of the American legal system is adversarial; it assumes that the pursuit of truth and protection of rights are best achieved through partisan presentations of competing interests. Under this framework, the basic obligation of American lawyers is to advance their clients' objectives "zealously within the bounds of the law."[34] According to the Preamble of the Model Rules of Professional Conduct, "when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done."[35]

There are a number of difficulties with this assumption. The first is that it equates procedural and substantive justice. Whatever emerges from the clash of partisan adversaries is presumed to be just. But even if both parties are well represented, the result may be inequitable because the underlying law or process is flawed. Wealth, power, and prejudice can skew legislative and legal outcomes. Decision makers may lack access to relevant information; single-interest groups may exercise undue influence over governing laws; unconscious race or gender bias may compromise trial judgments; and formal rules may be under- or overinclusive because the costs of fine tuning are too great. Moreover, the assumption that lawyers' role is simply to advance their clients' interests misdescribes a central aspect of the professional relationship. As William Simon's essay in this volume makes clear, attorneys' presentation of information and options inevitably helps shape clients' objectives.

Other defenses of zealous advocacy rest on equally questionable assumptions. The claim that adversarial clashes are the best means of determining truth is not self-evident or supported by any empirical evidence. Why should we suppose that the fairest possible outcomes will emerge from two adversaries arguing as unfairly as possible from opposing sides? It is not intuitively obvious that self-interested advocacy will yield more accurate accounts than disinterested exploration, particularly when the advocates have unequal information and resources. The vast majority of countries do not have an adversarial structure; they rely primarily on judges or investigating magistrates, not partisan advocates, to develop a case.[36] Nor do lawyers generally rely on adversarial methods outside of the courtroom; they do not hire competitive investigators.

An equally fundamental difficulty follows from a qualification that bar ethical codes acknowledge but do not adequately address. For situations when an opposing party is not "well represented," the Model Rules Preamble offers neither guidance nor reassurance. Yet, as noted above, unequal access to justice is the rule not the exception in the American legal system. In a society that tolerates vast inequalities in wealth and costly litigation procedures, it is likely that in law, as in life, the "haves come out ahead."[37] Among bar leaders, the usual "solution to this problem is not to impose on counsel the burden of representing interests other than those of his client, but rather to take appropriate steps to insure that all interests are effectively represented."[38] How that representation can realistically be achieved and financed is a matter conveniently overlooked.

Prevailing ethical rules also fail adequately to address the structural incentives and strategic opportunities that undermine the search for truth. Although bar rhetoric casts lawyers as "officers of the court" with a "special responsibility for the quality of justice," that role in practice is highly limited.[39] Apart from prohibitions on mis-

conduct such as fraud, perjury, and knowing use of false testimony, which are applicable to all citizens, ethical codes impose few concrete obligations concerning the pursuit of truth. For example, attorneys may present evidence that they reasonably believe (but do not know) is false; they may withhold material information; they may pursue strategies primarily designed to impose expense and delay as long as that is not their only purpose; and they may mislead opponents or decision makers through selective presentation of facts and artful coaching of witnesses.[40] As Geoffrey Hazard notes, the adversary system in practice is less a search for truth than an exercise in theater, in which lawyers present clients in their "forensic best," and victory, not veracity, is the ultimate goal.[41]

Similar problems arise with the bar's traditional rights-based justifications for zealous advocacy. Such justifications implicitly assume that *any* legal interest deserves protection. This assumption confuses legal and moral rights. Some conduct that is socially indefensible is technically legal, either because it is too costly or difficult to prohibit, or because decision-making bodies are uninformed or compromised by special interests. An ethic of undivided client loyalty has encouraged lawyers' assistance in some of the most socially costly enterprises in recent memory: the distribution of asbestos and Dalkon Shields; the suppression of health information about cigarettes; and the financially irresponsible ventures of savings and loan associations.[42]

To justify zealous advocacy in such contexts requires selective suspension of the moral principle at issue. If protecting individual rights is the preeminent value, why should the rights of clients trump everyone else's? Yet under bar ethical codes and prevailing practices, the interests of third parties barely figure. As a practical matter, this difference in treatment makes perfect sense. Clients are, after all, the ones footing the bill for advocates' services. But from a moral standpoint, such selective concern often is impossible to justify, particularly when the client is an organization. A corporation's "right" to maximize profits through unsafe but imperfectly regulated methods can hardly take ethical precedence over a consumer's or employee's right to be free from reasonably avoidable risks. Moreover, an attorney's refusal to assist legal but morally dubious conduct does not necessarily compromise individual rights. Unless the lawyer is the last in town, his or her refusal to provide representation will not foreclose client choices. It may simply prompt clients to rethink the ethical consequences of their conduct or incur the costs of finding alternative counsel.

The over-valuation of client interests is especially unsettling on issues of confidentiality. The ABA's Model Rules, like its earlier Model Code, prohibit lawyers from revealing confidential information except under highly limited circumstances. The Model Rules do not *require* disclosure of confidential information except where necessary to prevent fraud on a tribunal. Nor do the Rules even *permit* such disclosure to prevent noncriminal but life-threatening acts or to avert massive economic injuries.[43] Although a growing number of states have expanded the circumstances in which disclosure is permissible, few have adopted any broad mandatory provisions.

It bears note that the most widespread and longstanding exception to confidentiality obligations is for lawyers attempting to defend their own conduct or to collect unpaid fees.[44]

From the profession's perspective, these rules make sense. They give lawyers maximum scope to protect their own interests and those of paying clients. From the public's perspective, however, it is not self-evident why attorneys have the right to reveal anything to collect a bill but not the responsibility to prevent far more significant injuries. Bar ethical rules have, for example, authorized withholding information that would exonerate a wrongfully convicted defendant facing execution or that would reveal substantial health or product safety risks.[45] Nothing in the bar's traditional defense of confidentiality offers adequate justification for such practices.

The most common rationale for confidentiality protections parallels the most common rationale for the adversary system. The argument is that legal representation is essential to protect individual rights, and that effective representation depends on clients' willingness to trust their lawyers with confidential information. This claim is not without force, but it fails to justify the scope of current confidentiality protections. Concerns about individual rights cannot explain why confidentiality principles should shield organizational misconduct. Nor do such concerns explain why the rights of clients should always take precedence over the rights of innocent third parties, particularly where health, safety, or financial livelihood are at risk. The exceptions to current confidentiality obligations are equally hard to justify. If less self-interested decision makers were responsible for formulating the rules, it seems highly unlikely we would end up with the current version. Would any group other than judges require disclosure to prevent a fraud on a court but not to save a life? Would anyone outside the bar permit disclosures to help lawyers collect a modest fee but not to prevent a massive health or financial disaster? Indeed, in one of the only comparative surveys on point, over four-fifths of nonlawyers believed that lawyers should disclose confidential product safety information, while three-quarters of lawyers indicated they would not make such disclosures under current rules.[46]

Attorneys generally claim that unless they can promise confidentiality, clients would withhold relevant information. But current rules are riddled with exceptions and indeterminacies that few clients comprehend. It is by no means clear that adding some further limitations would frequently foreclose attorneys' access to crucial facts. In one New York study, about two-thirds of clients reported giving information to their lawyers that they would still have given without a guarantee of confidentiality.[47] Even individuals who might want to withhold compromising information may be unable to do so either because their lawyer will have other sources for the information, or because their need for informed legal assistance will outweigh the risks of disclosure. Historical, cross-cultural, and cross-professional data make clear that practitioners have long provided assistance on confidential matters without the sweeping freedom from disclosure obligations that the American bar has now obtained. Businesses routinely channeled compromising information to attorneys be-

fore courts recognized a corporate privilege. And many individuals are reasonably candid with accountants, financial advisers, private investigators, and similar practitioners who cannot promise protection from disclosure obligations.[48]

Both in theory and in practice, the bar's traditional defenses of adversarial practices fall far short. The premium placed on client interests, however economically convenient for the profession, poses substantial costs for society. Current norms offer ample opportunities to evade, exhaust, and exploit opponents. The result is a justice system that too often fails to deliver justice as most participants perceive it. Three-quarters of Americans believe that litigation costs too much and takes too long; 90 percent believe that wealthy litigants have unfair advantages.[49] The problems are especially pronounced in large cases, where pretrial discovery abuses remain common.[50] All too often, the pursuit of truth is waylaid by the "antics with semantics" that current rules have failed to control.[51]

In the long run, the profession as well as the public pays a price for such conduct. As Robert Gordon's essay makes clear, the legal system is a common good that cannot function effectively in the face of unrestrained partisanship. Failure to observe basic principles of honesty and fairness erodes the procedural frameworks and cultural values on which the justice system depends.[52] Excessively adversarial ideologies and institutions also have constrained the profession's capacities in problem solving. Carrie Menkel-Meadow's essay identifies the inadequacies of partisan principles in preserving relationships, providing remedial flexibility, expressing community values, and enabling party participation.[53]

Yet these inadequacies are readily overlooked by a profession that has come to see adversarial advocacy as an end in itself. The result is what David Luban describes as a "corruption of judgment."[54] Lawyers' rationalizations for minor abuses and injustices create a climate in which serious ethical lapses no longer appear serious. Over time, deception and delay, inequalities in access and outcomes, come to seem like inevitable byproducts of adversarial processes. If they are a problem, they are someone else's problem. Judges and clients blame lawyers; lawyers blame clients, judges, and other lawyers. A constant refrain in studies of adversarial misconduct is that it is always "the other fella's fault."[55]

G. K. Chesterton observed that abuses in the legal system arose not because individuals were "wicked" or "stupid," but rather because they had "gotten used to it."[56] The problem is compounded when those same individuals are responsible for their own regulation.

The Structure of Professional Regulation

Leaders of the organized bar have long asserted that their organization is not, after all, "the same sort of thing as a retail grocers' association."[57] If they are right, it is for the wrong reasons. Lawyers no less than grocers are motivated by parochial concerns. What distinguishes professionals is their ability to repackage occupational interests as societal imperatives. The American bar retains far more control over its own regulation than any other occupational group. This freedom from external oversight too often serves the profession's interests at the expense of the public's.

The self-regarding tendencies of self-regulating processes are, however, matters that the bar discretely overlooks. Rather, the profession has long insisted that its regulation should remain under professional control. Courts have asserted inherent authority to regulate the practice of law and have delegated much of that power to the organized bar. According to the Preamble of the ABA's Model Rules, self-regulation "helps maintain the profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice."[58] Although this argument has considerable force, it cannot justify current regulatory structures. Protecting the bar from state control serves important values, but total professional autonomy and government domination are not the only alternatives. Many countries with an independent bar have more public accountability than the American legal profession and have involved more nonlawyers in the oversight process. Unlike regulatory bodies in these countries, the ABA Commissions that drafted the Code and the Model Rules, as well as the "Ethics 2000" Commission considering revisions, have been composed almost exclusively of lawyers.[59]

This bias in the drafting phase is exacerbated by a ratification process in which only the bar is entitled to vote. Although final approval rests with state supreme court judges, they are, by training and temperament, members of the profession, sympathetic to its interests, and often dependent on its good will for their reputation and support. Such a decision-making framework is hardly conducive to a disinterested accommodation of the interests at stake. Nothing in the history of the bar's own self-regulation suggests that lawyers are exempt from the natural human tendency to prefer private over public ends and to lose sensitivity to interests at odds with their own.

Part of the problem is tunnel vision. Without doubt, most lawyers and judges involved in bar regulation are committed to improving the system in which they work. What is open to doubt is whether a body of rules drafted, approved, and administered solely by the profession is the most effective way of realizing that commitment. No matter how well intentioned, lawyers regulating lawyers cannot escape the economic, psychological, and political constraints of their position. Those constraints compromise both the content and enforcement of ethical standards.

Bar leaders have long proclaimed that the primary purpose of regulation is to protect the public. In fact, the debates over ethical standards make clear that on many issues the overriding purpose has been to protect the profession *from* the public. Lawyers' concerns about liability to clients and third parties have dominated debates over advocacy, confidentiality, competence, and fees. The result has been to codify the minimum requirements that a highly self-interested constituency is pre-

pared to see enforced in disciplinary or malpractice proceedings. In response to practitioners' objections, the Model Rules drafting commission dropped provisions requiring disclosure of material facts or information necessary to prevent imminent risks of life or substantial bodily harm. Also deleted were provisions mandating written fee agreements, cost-effective services, and fairness and candor in negotiating behavior, as well as prohibitions on drafting unconscionable clauses and procuring unconscionable results.[60]

The bar similarly has resisted proposals, including some from its own expert commissions, designed to increase public access to legal services. Opposition from lawyers has repeatedly blocked proposed requirements of even minimal contributions of pro bono services.[61] Bar objections also prompted ABA leadership to bury a report by its Commission on Nonlawyer Practice. The report's hardly radical recommendation was that states reconsider their sweeping prohibitions on lay competition in light of consumers' interest in obtaining affordable services as well as protection from unqualified or unethical providers.[62] Despite the vast range of unmet legal needs among low- and middle-income consumers, the organized bar has resisted such recommendations. It has also blocked proposals to license nonlawyer specialists, to permit greater competition from already licensed groups like accountants or real estate brokers, and to provide substantial courthouse assistance to pro se litigants.[63] Although the profession has long insisted that its concern is consumer protection and that the "fight to stop [nonlawyer practice] is the public's fight," the public itself has remained notably unsupportive of the campaign.[64] On the rare occasions when their views have been solicited, Americans have rated the performance of lay providers of routine services higher than lawyers and have overwhelmingly agreed that many legal tasks could be completed as effectively and less expensively by nonlawyer specialists.[65] Evidence concerning the performance of such specialists here and abroad similarly suggests that consumers would benefit from less restrictive rules on lay practice.[66]

They would also benefit from more adequate disciplinary and malpractice structures. "Too slow, too secret, too soft, and too self regulated"—that is how the public views the discipline system, according to a prominent 1992 ABA commission report. As the commission also acknowledged, much of this popular criticism is "justified and accurate."[67] Similar acknowledgments have surfaced in virtually every major study that the bar has undertaken. Yet all of those studies have recommended that the profession retain control over the regulatory process. In one particularly striking survey, only 20 percent of lawyers believed that the disciplinary system did a good job, but some 90 percent believed that the bar should continue to conduct disciplinary activities.[68]

In justifying this continued authority, bar leaders have emphasized the importance of insuring that "those individuals . . . who pass judgment on attorney conduct be knowledgeable regarding the practice of law."[69] But in fact, the disciplinary complaint processes proceed on precisely the opposite basis. They rely almost exclusively on clients as a source of information about ethical violations. Those with the most knowledge concerning practice standards—lawyers and judges—rarely report misconduct. And ethical rules requiring attorneys to make such reports are almost never enforced.[70]

This failure to disclose misconduct reflects a combination of social, psychological, and economic factors. Part of the problem involves the difficulty that Geoffrey Hazard's essay describes: many legal-ethics standards, like other ethical principles, are formulated in broad abstract terms. How they apply in particular cases is often difficult to determine. What constitutes an "incompetent" performance or "unreasonable" fee are highly fact-specific questions, and lawyers usually have no incentive to acquire the relevant information. Disciplinary structures reflect what economists view as classic free-rider/common action-problems. Attorneys who report misconduct benefit society and the profession as a whole, but seldom gain any personal advantage.

As a consequence, bar agencies depend almost exclusively on complaints from clients, along with felony convictions, as a basis for discipline. These sources are highly inadequate. Clients frequently lack sufficient information or incentives to file grievances. Some forms of attorney misconduct, such as discovery abuse, benefit clients; other violations are difficult to detect or prove. Bar disciplinary agencies dismiss about 90 percent of complaints without investigation because the facts alleged do not establish probable cause or fall outside agency jurisdiction.[71] Grievances involving neglect, "mere" negligence, or fee disputes generally are excluded on the ground that disciplinary agencies lack adequate resources and other remedies are available through malpractice suits or alternative bar-sponsored arbitration processes.[72] However, malpractice litigation is too expensive for most of these matters. Seldom does it make sense to sue unless the conduct is egregious, the damages are substantial, and the lawyer has malpractice insurance. Over a third of the bar does not. Nor do most states offer alternative dispute-resolution programs to resolve minor grievances. The programs that are available almost always are voluntary, and clients most in need of assistance seldom find their attorneys willing to cooperate.[73]

A further problem involves the inadequacy of sanctions. Less than 2 percent of complaints result in public discipline such as reprimands, suspensions, or disbarment.[74] Although some grievances clearly are without basis, and reflect dissatisfaction with outcomes rather than deficiencies in attorney performance, the infrequency of significant sanctions also reflects fundamental problems in the regulatory process. Most disciplinary agencies are underfunded and understaffed.[75] To varying degrees, these agencies depend on good relations with the profession, which controls their budget and monitors their performance. Many of the judges and bar leaders who regulate the regulators have a "there but for the grace of God go I" attitude toward all but the most serious misconduct.

Similar problems arise with malpractice litigation as a remedy for incompetent or unethical conduct. Despite the recent growth in claims, a large number of valid

grievances are never filed because the stakes are insufficient or the attorney has no malpractice insurance and it is seldom worthwhile to sue uninsured lawyers. About half of the claims that are filed fail to satisfy the profession's highly demanding standards of proof.[76] To obtain any remedy, plaintiffs must show not only that their lawyers' performance fell below prevailing practices, but also that it was the sole cause of quantifiable damages. That burden generally requires a trial within a trial; claimants need to establish that but for the lawyer's malpractice, they would have been successful in the matter on which they sought legal assistance. For criminal matters, barriers to recovery are even higher and usually insurmountable: clients must prove that they actually were innocent of the crime charged and that their attorney's inadequate performance was responsible for their conviction.[77] In many jurisdictions, not even violations of bar ethical rules are sufficient to establish malpractice. The rules themselves emphasize that they are not intended to define standards for civil liability, and some courts have excluded evidence of noncompliance.[78]

Malpractice case law also imposes undue limits on who can recover for violations of professional standards. The bar has long resisted extending liability to nonclients, and courts have usually agreed. Litigants typically cannot recover for dishonest or abusive conduct by their opponents' lawyer on the theory that concern about such remedies might interfere with zealous advocacy. Similar reasoning in some jurisdictions has served to deny third-party claims by buyers or investors who reasonably relied on attorneys' negligent misrepresentations. These decisions hold lawyers to lower standards than used-car dealers.[79]

Long-standing inadequacies in bar regulatory frameworks argue for a more accountable alternative. If, as the profession insists, its ultimate objective is protecting the public, then the public should have a greater role in the process. No occupational group can make unbiased judgments on matters where its own status and livelihood are so directly at issue.

Alternative Frameworks

Bar discussions of the "crisis of professionalism" generally vacillate between sweeping descriptions of the problem and dispiritingly ineffectual proposals to address it. That mismatch is not entirely surprising. Lawyers as a group are diverse, divided, and anything but disinterested on matters affecting self-regulation. The politics of professional reform make it easier to lament lost ideals than to invite the cost and conflict involved in institutionalizing them. But more could be accomplished if a greater number of lawyers, individually and collectively, addressed the structural sources of the ethical problems they confront.

An obvious place to start is the economic conditions of practice. The tension between profit and professionalism is too self-evident to overlook, but also too uncomfortable to acknowledge fully. The result has been various strategies of confession and avoidance. So, for example, the ABA's Commission on Professionalism framed

the central question: "Has our profession abandoned principle for profit, professionalism for commercialism?" The answer, it turned out, "cannot be a simple yes or no."[80] The commission's report acknowledged that economic pressures were compromising ethical values. But, like other professionalism initiatives, its impact has been largely symbolic and its efforts to "rekindle" a sense of social responsibility through education and exhortation have fallen far short.

Significant progress will require more fundamental changes in the conditions of practice. Most of the necessary reforms follow directly from the diagnosis set forth above. Lawyers' working environments should aim to foster a decent quality of life, a basic equality of opportunity, and a commitment to social justice. Such environments will require realistic billable-hour requirements and adequate accommodations for those with significant family and pro bono commitments. Part-time schedules should be plausible options, and public service should be rewarded in practice as well as principle. Although such reforms are not without short-term costs, the long-term gains are likely to be considerably greater. More humane and flexible schedules yield improvements in job satisfaction, morale, recruitment, retention, and efficiency.[81] And pro bono service provides opportunities not only for personal fulfillment but also for valuable training, contacts, and recognition.[82]

If these benefits are as substantial as recent research suggests, the question then becomes why so many legal workplaces have failed to respond. Why have lawyers so often opted for short-term profits at the expense of broader values? At least part of the explanation may lie in the widespread tendency to overvalue money in comparison with other workplace characteristics that are in fact more likely to yield enduring satisfaction. People generally believe that 25 percent more income would significantly increase their happiness and that more money is the change in circumstance that would most improve the quality of their lives.[83] They are generally wrong. As a wide array of research makes clear, people quickly adjust to higher earnings and their expectations and desires increase accordingly.[84] At attorneys' income levels, the cliche is correct: money does not buy happiness. The priority that many lawyers and law firms attach to salaries compromises other goals that are more central to fulfillment, such as time for families and friends, and choice of work that is morally and intellectually satisfying.

A related problem is that individuals who fail to find such meaning in their legal practice often feel a sense of deprivation that fuels heightened financial demands. Attorneys working too hard on matters they care too little about have greater needs to live well outside work. Patterns of compensatory consumption can then become self-perpetuating. As lawyers become accustomed to high incomes, luxuries become necessities and relative salaries become ways of keeping score. The problem is compounded by surveys that rank law firms based only on profit, and by the difficulties of gaining consensus within any particular firm about the relative importance of other values. Since almost everyone gives high priority to money, it can displace goals on which preferences are more divided.

Changing these priorities is no easy task, but some modest progress may be possible through better information. Few law school curricula or continuing legal education programs address issues of workplace structure and career satisfaction, and few efforts have been made to rate employers on values other than profitability. If more comparative data were available on quality of life and pro bono issues, it might provide significant leverage for reform.

Lawyers and legal employers could also be rated along other ethical dimensions. For example, information could be centrally compiled and published on matters such as disciplinary violations, malpractice judgments, and judicial sanctions for discovery abuse. Bar leaders and regulatory bodies could work together to develop best practice standards on ethical issues and procedures for certifying compliance. These standards could include educational programs, practice guidelines, oversight committees, mentoring strategies, and reporting channels. Voluntary bar associations in particular substantive fields could also adopt heightened ethical requirements. Organizations such as the American Academy of Matrimonial Lawyers, and the ABA Tax Section already have developed more specific and morally demanding codes than the prevailing Model Rules.[85] Lawyers' willingness to comply with such codes and to meet best practice standards could serve as a reputational signal for clients, courts, and colleagues. Analogous approaches have had modest positive effects in other contexts where organizations have been evaluated on ethical dimensions, such as compliance with environmental standards or international bribery and sweatshop prohibitions. Developing reputational rewards and sanctions for the legal profession could push in similar, socially responsible directions.

A further set of reforms should focus on adversarial institutions and ideologies. A more ethically satisfying framework would build on one central premise: lawyers should accept personal moral responsibility for the consequences of their professional actions. Attorneys' conduct should be justifiable under consistent, disinterested, and generalizable ethical principles. These principles can, of course, recognize the distinctive needs of lawyers' occupational role. Morally responsible decision making always takes into account the context in which a person acts. The extent of attorneys' responsibilities for client conduct would depend on their knowledge, involvement, and influence, as well as on the significance of values at stake. So, for example, the importance of protecting free speech for unpopular causes or fair trials for criminal defendants may justify zealous representation despite other costs. But such cases should not set the standard for partisanship in cases where no such principles are at stake.

Unlike the bar's prevailing approach, this alternative framework would require lawyers to assess their conduct in light of all the societal interests at issue in particular practice contexts. An advocate could not simply retreat into some fixed conception of role that denies personal accountability for public consequences or that unduly privileges the interests of lawyers and clients. Nor should attorneys invoke some

idealized model of adversarial and legislative processes to justify zealous advocacy. Rather, they must assess their actions against a realistic backdrop in which wealth, power, and information are unequally distributed, not all interests are adequately represented, and most matters never will reach a neutral tribunal. Client trust and confidentiality are entitled to weight, but they must be balanced against other equally important concerns. Lawyers also have responsibility to prevent unnecessary harm to third parties, to promote a just and effective legal system, and to respect core values such as honesty, fairness, and good faith on which that system depends. "What if everyone did that?" should become a common check on adversarial excesses. Attorneys need to consider the cumulative impact of their individual decisions on the effectiveness of legal processes.

Bar leaders often object that these responsibilities are too vague to serve as the basis for an ethical code, or that lawyers have no special right or expertise to determine what justice requires. But these objections are highly selective. We routinely ask judges, juries, and prosecutors to pursue "justice" or to determine "fairness," and we impose significant penalties on businesses for not acting in "good faith." Lawyers charge substantial fees for interpreting such requirements. The interpretative process is no different when lawyers' own actions are involved. Attorneys should consider the justice of their actions, not because they have special moral expertise, but because they deserve no special moral exemption.

Under this alternative framework, lawyers' ethical responsibilities should extend not only to the cases that they accept and the strategies that they pursue, but also to the structure of the justice system. As architects of ethical codes and legal procedures, lawyers should help to develop a range of "appropriate dispute resolution processes" that can respond to the particular individual and societal interests at stake.[86] For many controversies, it may be possible to craft structures in which money matters less and the merits matter more than is currently the case. The adversary system is not an end in itself and the bar should take a leadership role in developing more cost-effective alternatives.

A final cluster of reforms should focus on bar regulatory structures. Increasing the public accountability of professional oversight should be a key priority. The design of an adequate system does, however, present special challenges. Political control of regulatory processes does not guarantee public protection. Legislatively created oversight agencies often suffer from the same problems of understaffing, underfunding, delays, and capture by regulated groups as bar authorities.[87] And governmental control of regulatory structures pose risks of retaliation against lawyers representing unpopular causes. Yet some progress is likely through frameworks that balance concerns for both public accountability and professional independence. One promising proposal by a California task force would have created a regulatory commission subject to state supreme court control but independent of the organized bar. That commission would have included both lawyers and nonlawyers with expertise in con-

sumer protection; some members would have been chosen by the legislature, some by the governor, and others by the judiciary.[88] Such structural reforms could produce a more responsive system than the prevailing one.

However these accountability issues are resolved, fundamental changes are essential on other fronts. First, disciplinary agencies need more information about misconduct. One obvious strategy is to enforce rules requiring lawyers to report ethical violations by other lawyers. Illinois, the only state that has attempted to do so, has seen a dramatic increase in such reports after its supreme court suspended an attorney for failing to disclose fraud by his client's previous lawyer.[89] Bar agencies also could take more proactive steps to identify disciplinary violations. For example, enforcement officials should initiate investigations based on judicial findings of malpractice, overcharging, and discovery abuse.[90] Disciplinary agencies could also encourage reports from clients by publicizing complaint processes, helping parties file grievances, and requiring attorneys to distribute a "consumer bill of rights" including information about remedial options.

A related set of reforms should focus on improving responses to reported misconduct. Bar disciplinary systems need significantly more professional staff, investigatory resources, and remedial options. Only a few jurisdictions allow permanent disbarment, no matter how serious the offense, or authorize discipline for law firms as well as individual lawyers. Such sanctions should be universally available. Firms should be liable where responsibility for misconduct is broadly shared and reflects failures to provide adequate education, supervision, reporting channels, or remedial responses.[91] Malpractice standards also should be strengthened and all attorneys should be required to carry liability insurance. Remedies should be available for violations of bar ethical rules and for performance that does not conform to reasonable persons' expectations.[92]

Courts and administrative agencies also should become more involved in enforcing ethical standards. The judiciary should have expanded responsibilities and resources to monitor the litigation misconduct, fee-related abuses, and ineffective representation noted earlier. Government agencies should play a more active role as employers, purchasers, and regulators. Agencies can demand a higher standard of conduct than bar disciplinary rules require, both for their own employees and for private practitioners who provide government-subsidized legal services. Further efforts should also be made along the lines developed by the Securities and Exchange Commission and the Office of Thrift Supervision to hold lawyers accountable for facilitating client fraud.[93]

Finally, more attention should focus on increasing access to justice. Obvious strategies include more procedural simplifications, additional pro bono and government-subsidized services, and greater reliance on qualified nonlawyer providers. Although the organized bar needs to play a central role in these reform efforts, decisions about lay competition should not rest with those whose status and income is so directly at risk.

This is not a modest agenda, and significant progress will require sustained effo on the part of both the profession and the public. These efforts should start with l schools. Although ABA accreditation standards require schools to offer instruction professional responsibility, the vast majority satisfy their obligation with a sin mandatory course that focuses on bar disciplinary codes. Too often, the result is "le ethics without the ethics."[94] Students learn what the codes require but lack founc tions for critical analysis. Topics like access to justice, the quality of professional life, the limits of bar regulation generally receive inadequate attention. Most students too little theory and too little practice; classroom discussions are too far removed fro real life contexts and too uninformed by insights from other disciplines, other profe sions, and other cultures. Few schools require pro bono service or make systematic forts to integrate legal ethics into the core curricula. This minimalist approach to pr fessional responsibility marginalizes its significance. Educational priorities a apparent in subtexts as well as texts. What the core curriculum leaves unsaid send powerful message that no single course can counteract.

Research on ethics in practice has been similarly neglected. On many key issu our knowledge base is embarrassingly thin. We know too little about strategies th might prevent misconduct or improve regulatory processes. Despite an enormo expenditure of effort on drafting and redrafting ethical rules, little attention has f cused on how those rules play out in practice. Do differences in state confidentiali rules significantly affect lawyer-client communication or protections for third pa ties? What efforts by courts and disciplinary agencies have been most effective controlling discovery abuse? We also know too little about how to educate and enl the public on a plausible reform strategy. Lawyer bashing is in ample supply b thoughtful critiques and constructive proposals are not.

Any adequate reform agenda will require a clearer understanding of lawye ethical problems and the tradeoffs involved in addressing them. Professional respo sibility is an evolving ideal in which both the profession and the public have a con mon stake. The challenge is for these constituencies to work together toward sta dards that can be justified in principle and reinforced in practice. That agenda do not seem unduly idealistic. On matters of public interest not involving their ow regulation, lawyers have been crucial in bridging the gap between ideals and insti tions. By turning similar energies inward, the bar may narrow the distance betwe ethical aspirations and daily practices.

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PART I

Public Responsibilities in Professional Practice

2

The Law as a Profession

ANTHONY T. KRONMAN

I.

The field of legal ethics, or professional responsibility as it is often called, ap consist of an immense accumulation of rules. This is how the subject looks dents when they first approach it, and the manner in which it is taught, a later tested on bar examinations, tends to confirm this impression.

In this century, legal ethics has indeed become an increasingly rule-boun pline. The number of rules governing the ethical conduct of lawyers has grow mously, and the rules themselves have become more and more detailed. The of Legal Ethics, which was promulgated by the American Bar Association consisted of a few hortatory injunctions. By contrast, the Model Rules of sional Conduct, adopted by the ABA in 1983, has the appearance of a full code. It is tempting to assume that one becomes an ethical lawyer by maste complex body of rules that govern a lawyer's relations with clients, adversari cials, and other third parties, and to infer that these rules define, perhaps exha subject of professional responsibility.

But that is too narrow a view. One becomes a professionally responsible by entering the profession, a process that includes the mastery of certain ru which taken as a whole is better conceived as the process of acquiring the hal culture. This culture provides the setting for the rules of legal ethics, and the ing of these rules cannot be grasped, nor conflicts among them meaningfully apart from the culture in which they are set. Every education in legal ethics this sense be an induction into a culture, into a distinctive way of life, into the sion of law—a concept that cannot be reduced to the rules of legal ethics, bu is indispensable to their understanding and application.

The way in which lawyers acquire a sense of professional responsibility resembles the process by which we learn to speak any natural language, like English or Arabic or Italian. Every language has its rules of grammar, and these must be studied at some point in the process of learning to speak it, if one aspires to speak the language in a formally correct manner. But fluency can never be achieved by studying these rules alone. That requires something more. It requires the speaker to be at home in the habits of the language, to have acquired these habits himself, to be a participant in what Wittgenstein called the "form of life" that every language represents.[1] The legal profession is also a form of life, and a lawyer's sense of professional responsibility can no more be reduced to a knowledge of the rules of legal ethics than command of English can be reduced to a knowledge of the rules of English grammar.

But a form of life can be strong or weak. It can grow, acquiring new vitality and incorporating additional areas of human experience within its range. Or it can shrink, losing potency and territory, and eventually wither and die. Today, for example, the form of life which the language of Homeric Greek once vividly expressed has disappeared, and only the grammar of the language remains—only the rules of its construction, its semantics and syntax, from which we must attempt to reconstruct, artificially and incompletely, some notion of the vanished form of life that formed the setting of the language—that formed the language—a world now irrecoverably lost.

Among American lawyers at the end of the twentieth century, there is a growing fear that something like this may be happening to the culture of professionalism that formed the setting within which the rules of legal ethics have evolved. These rules are today vastly more numerous and detailed than they were a hundred years ago, but the culture in which they are set, and are meant to express, is thought by many lawyers to be weakened and in danger of collapse. There is a widespread anxiety, within the legal profession, that professionalism itself has lost much of its vitality and meaning for lawyers, and like a language that is falling out of use but whose formal rules of grammar survive, may soon become a dead culture whose outlines can still be seen in the now-inert rules of legal ethics to which the culture of legal professionalism once gave meaning and life. Judging by the frequency with which it is discussed at bar association meetings, and other informal gatherings of lawyers, and by the number of books and articles devoted to it, no topic possesses a greater urgency for lawyers at century's end than the death of legal professionalism.[2] The demise of professionalism in other fields—in medicine, for example—has of course been a subject of anxious discussion, too.[3] But the amount of time that lawyers have devoted to the subject, and the intensity of the concerns they have expressed about it, reflect a particularly acute disturbance in the self-understanding and self-confidence of the legal profession, whatever the situation may be in other fields, and whether or not the present crisis of legal professionalism—for *crisis* is the right word to describe the cultural anxieties that lawyers are now experiencing—is part of a wider crisis of professionalism generally.

Despite the breadth and seriousness of this crisis, however, the concept of legal professionalism itself has not been well examined. Many have complained, with justification, about its demise, but few have attempted to say what it is, and even fewer have tried to explain why anyone outside the profession should be at all concerned about its continuing vitality.[4] This is what I hope to do in my brief introduction to this collection of essays.

I seek, first, to identify those features of law practice that make it a profession as distinct from a business or trade, and that explain the "status pride" of lawyers—the high self-regard they experience as the members of a profession.[5] Second, I aim to describe the contribution that legal professionalism makes to the wider social order in which lawyers work, a contribution of importance to those outside the profession as well as those within it. In a concluding section I shall quickly survey the forces that today put the culture of legal professionalism under such stress, and that together have provoked the anxieties that so many lawyers, in every branch of the profession, now share.

II

Every profession is a job. Every professional makes a living by doing what he does. But not every job is a profession. Not every job is a way of life. The word *profession* suggests a certain stature and prestige. It implies that the activity to which it is attached possesses a special dignity that other, nonprofessional jobs do not. For centuries, the practice of law has been considered a profession, both by lawyers and laypeople, and legal education has always been thought of as a form of professional, and not merely vocational, training. What lies behind these ancient assumptions? What makes the law a profession?

My answer to this question has four parts. The practice of law has four characteristic features that make it a profession and entitle those engaged in it to the special respect this word implies.

The first characteristic is that the law is a public calling which entails a duty to serve the good of the community as a whole, and not just one's own good or that of one's clients. In the second chapter of *The Wealth of Nations*, Adam Smith makes the famous observation that "it is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest."[6] Smith goes on to explain how each of these, pursuing his business with an eye solely to his own advantage, produces by means of an invisible hand an addition to the public good. With lawyers, it is different. Like the butcher, the brewer, or the baker, the lawyer also expects an income from his work. Like them, the lawyer generally is not motivated by benevolence to do what he does. But, in contrast to Smith's tradesmen, it *is* a part of the lawyer's job to be directly concerned with the public good—with the integrity of the legal system, with the fairness of its rules and their administration, with the health and well-being of the community that the laws in part

establish and in part aspire to create. We say that every lawyer is "an officer of the court."[7] What we mean is that lawyers, like judges, are bound by their position to look after the soundness of the legal system and must take steps to insure its justice—conscious, direct, and deliberate steps, not those indirect and unanticipated ones that lead the butcher and his friends from a preoccupation with their own advantage to the surprising and wholly unintended production of a public good.

This is not to say that lawyers are exclusively concerned with the public good. Of course they are not. Lawyers represent clients and causes whose partisan interests often contribute nothing to the public good and sometimes conflict with it. But a lawyer must always keep at least one eye on the public good, and make sure it is well-protected against the assaults of private interest, including those of his own clients. And a lawyer must do this not just occasionally, not just in the fraction of time he devotes to pro bono activities, but constantly and consistently, in every moment he is practicing law. A lawyer who is doing his job well dwells in the tension between private interest and public good, and never overcomes it. He struggles constantly between the duty to serve his client and the equally powerful obligation to serve the good of the law as a whole. Adam Smith's tradesmen do the latter automatically and unthinkingly by doing the former, and so never experience a tension between the two. The lawyer does because, unlike the butcher, brewer, and baker, he is charged with a conscious trusteeship of the public good that cannot be discharged by any mechanism other than his own direct intervention. This is what is implied by the claim that every lawyer is an officer of the court, and the law a public calling, the first of the four features of law practice that explains its standing as a profession.

The second is the nonspecialized nature of law practice. The legal profession remains, to a surprising degree, a generalist's craft, whose possessor can move from one field to another—from criminal law to bankruptcy to civil rights—with only modest readjustments. The law is not a form of technical expertise but a loose ensemble of methods and habits easily transported across doctrinal lines, and a lawyer is not a technician, trained to do one thing well, but a jack (or jill) of all trades. Here again, the practice of law differs from the other activities that Adam Smith takes as his paradigm of modern economic life: pinmaking, for example, a process marked, he says, by the division of tasks into ever finer parts, each the province of a specialist with a tremendously developed but excruciatingly narrow expertise.[8] Lawyers, by contrast, perform a range of different tasks—counseling clients, drafting documents for them, negotiating and litigating on their behalf, touching, in the process, on a dozen different areas of law—and move about among these tasks with a flexibility unthinkable in Adam Smith's pinmaking factory.

The education that lawyers receive reflects this. The purpose of a legal education is not to produce experts, as many nonlawyers wrongly believe. It is to train students, as the saying goes, to think like lawyers, which means: to be attentive to the facts and to know which ones, in any given situation, are important; to be able to tell a story with the facts, to master the power of narration; to recognize what others hope to

achieve, even—or especially—when they have a hard time defining their own aml tions; and to appreciate, empathically, a range of purposes and values and ide wider than one's own. The man or woman who lacks these qualities will never thi like a lawyer, no matter how much doctrinal knowledge he or she possesses. By co trast, the man or woman who possesses these qualities need have only the most e mentary knowledge of legal rules and procedures to be well-prepared for the practi of law, to have the kind of preparation that the best law schools provide. From t standpoint of the pin factory and all the other modern forms of enterprise whc success depends upon the division of labor and the cultivation of a deep but narr expertise, the fact that the law remains a generalist's craft can only be interpreted a sign of its dilettantism and amateurish backwardness. But viewed in another ligl with pride and not embarrassment, the nontechnical nature of his work constitute second enduring source of the lawyer's claim to be a professional with a freedom a range of activity that specialization destroys.

A third source of the lawyer's professionalism—related to this second one—the capacity for judgment. I said that the goal of legal education is not to impar body of technical knowledge but to develop certain general aptitudes or abilities: t ability, for example, to see facts clearly, and to grasp the appeal of points of view o doesn't embrace. To do this requires more than intellectual skill. It also requires t development of perceptual and emotional powers, and hence necessarily engag parts of one's personality other than the cognitive or thinking part. A good legal ed cation is a process of general maturation in which the seeing, thinking, and feeli parts of the soul are reciprocally engaged. It is a bad mistake to think that legal trai ing sharpens the mind alone. The clever lawyer, who possesses a huge stockpile technical information about the law and is adept at its manipulation, but who lac the ability to distinguish between what is important and what is not and cann sympathetically imagine how things look and feel from his adversary's point of vie is not a good lawyer. He is, in fact, a rather poor lawyer, who is more likely to do l clients harm than good. The good lawyer—the one who is really skilled at his job— the lawyer who possesses the full complement of emotional and perceptual and i tellectual powers that are needed for good judgment, a lawyer's most important a valuable trait.[9] And because of this, the process of training to become a lawyer, a the subsequent experience of being one, gather the soul's powers in a way that co firms one's sense of wholeness as a person and the sense of being wholly engaged one's work—in contrast to all activities that can be mastered by the mind alo which often produce, among the technicians who perform them, a sense of part engagement only. The good lawyer knows that he needs all his human powers to his job well, and the knowledge that he does gives his work a dignity no experti however demanding intellectually, can ever possess. This is the third feature of l practice that entitles us to call it a profession.

The fourth, and last, concerns time, and the location of law within it. Every tivity has a past. Every activity therefore has a history, which can be studied and wr

ten down in books. I am sure that even pinmaking has been studied by historians. But the law has a special relation to the past. The law's past is not only something that can be observed from the outside; it also possesses value and prestige within the law itself. In pinmaking, the fact that pins were made a certain way before is no argument at all for continuing to make them this way now. We may do so, out of habit, but prior practice has no normative force in pinmaking, or computer chipmaking, or any other line of manufacture. Put differently, precedent is not a value in these activities; at most, it is a fact. By contrast, precedent *is* a value in the law: not always the final or weightiest value, but a value that must always be taken into account. The fact that a law has been in existence for some time is always a reason for continuing to respect it, and this reason must be considered and weighed even when we reject it.

The law is internally connected to its past—connected by its own defining norms and values—and not just externally connected, as every enterprise is, through the story an observer might tell about its development over time. To enter the legal profession is therefore to come into an activity with self-conscious historical depth, to feel that one is entering an activity that has long been under way, and whose fulfillment requires a collaboration among many generations. It is to know that one belongs to a tradition. By contrast, in many lines of work—even those with a long history—all that matters is what is happening now, and the temporal horizon of one's own engagement in the work shrinks down to the point of the present. I imagine the experience of those in the computer industry, which seems to undergo a revolution every two years, to be like this, though I am only guessing. What I do know, from my own experience and from the experience of my students, is that the work of lawyers joins them in a self-conscious colleagueship with the dead and the unborn,[10] and that this widening of temporal outlook is part of what lawyers mean when they describe their work as a profession.

I have now identified the four features of law practice that make it a profession. The practice of law is a public calling and a generalist's craft that engages the whole personality of the practitioner and which links him to a tradition that joins the generations in a partnership of historical proportions. Together, these four features give the practice of law a dignity that is the source of the lawyer's professional pride, of his belief that what he does for a living constitutes a way of life with special worth. They form the basis of the culture of professionalism in which this approving self-image is anchored and through which it is transmitted from one generation of lawyers to the next. It is therefore easy to understand why the weakening of this culture must be of great concern to lawyers, for their own high self-regard—the special value they assign their work and hence themselves—is rendered less secure by the enfeeblement of the culture of professionalism that supports and affirms it.

III

But why should anyone else care whether legal professionalism is alive or dead? That is a harder question to answer.

It is appropriate to begin by recalling how large a role lawyers play in Amer life. Despite the fact that we have always viewed our lawyers with a measur distrust—inevitable, even salutary, in a democracy in which lawyers possess the to the house of the law and, with that, a disproportionate share of power—we l also assigned them a leading role in arranging our affairs, both public and pri Fearing and even occasionally loathing lawyers, we have nevertheless entrusted t with great powers and responsibilities, and made them, to a remarkable degree stewards of our republic. Behind all the cynicism and fashionable disgust, behin the complaints—many of them justified—about the excesses of the adversary sy and the partisan exploitation of loopholes and technicalities, lies this basic fa trust, the huge trust we have placed in our lawyer play a central role in the design and management of our society, and if one asks a partial answer would be that we have done so because the same four feature legal professionalism that constitute the basis of their status pride also equip t to play a leading role in the government of society, a role that lawyers become able to perform in proportion to the weakening of their professional culture. Le explain.

We live today in a sprawling, heterogeneous, and highly interdependent soc the most complex society the world has ever known. The great nineteenth-cen European sociologists who observed the development and growth of this novel cial order were struck by its economic and cultural connections and by the assin tive powers linking its many parts, powers that have increased in strength with spread of democratic institutions and, above all, with the expansion of the capit system of production. But these same observers were also impressed by the disi grative forces at work within our modern world, and by the need to find a cour weight that might resist them.

The forces of disintegration they identified were four. The first was priva tion, the tendency in a large free-enterprise economy for individuals to con themselves exclusively with their own private welfare, and to neglect or forget tirely the claims of public life, which the Greeks and Romans, and their hum successors, had pursued with such memorable passion.[11] The second was specia tion, whose inexorable tendency is to separate those in different lines of work an reduce their fund of shared experience, the common world of similar endeavo The third was alienation, the sense of detachment from one's work, and second from other human beings, the experience of being only partially engaged by—hence only partially revealed through—the activities that constitute one's livir And the fourth disintegrative force that Tocqueville, Marx, Durkheim, Maine, Weber identified as a threat to the farflung interdependencies of modern social was forgetfulness, the loss of a sense of historical depth, and the consequent dis nection of the present moment—characterized by the idiocy of material comfo from all that went before or is to follow, from the pain of the past and the callin the future.[14] We are witnessing, these thinkers said, the evolution of a form of

more complex and interconnected than any seen before, but in the heart of this new order lurk forces of disintegration powerful enough to nullify its achievements: the forces of privatization, specialization, alienation, and forgetfulness, the loss of one's sense of location in time.

To each of these four forces of disintegration, one of the four elements of legal professionalism may be paired as a remedy of sorts. Thus, for example, the lawyer's obligation to promote the public good—the public nature of his calling—may be thought of as a counterweight against the strictly private concerns of his clients, who for the most part want only to succeed within the framework of the law but take no interest in the well-being of the law itself. Lawyers serve the private interests of their clients, but they also care about the integrity and justice of the legal system that defines the public order within which these interests are pursued. In this way, they provide a link between the realms of public and private life, helping to rejoin what the forces of privatization are constantly pulling apart.[15]

To the disintegrative effects of specialization, the generalist nature of law practice offers valuable resistance. Because they represent clients of many sorts, in many different lines of work, lawyers are in a position to evaluate the social order from a broader point of view unrestricted by the narrowing assumptions and experience of any single expertise, and to provide a kind of connective tissue among different forms of enterprise, which lawyers are often called upon to join, through a sort of shuttle diplomacy and the transactional schemes they design. If their commitment to the ideal of justice prepares them to provide a horizontal linkage upward from the realm of private concerns to that of public values, the fact that theirs is a generalist's craft equips lawyers to provide vertical linkages across the increasingly specialized world of work.

So far as alienation is concerned, it would of course be foolish to suggest that lawyers can combat its spread or soften its effects. We have all experienced, to one degree or another, the sense of separation from the world which the word *alienation* implies, and have known the loneliness associated with it, and there is little that lawyers, or anyone else, can do to change this basic fact of modern life. But to the extent the law remains a profession that engages the whole person, that calls upon all the powers of the soul—perceptual and emotional as well as intellectual—it offers those who enter it the hope of a complete engagement in their work, an engagement that is the antithesis of alienation, and which provides an image, at least, of what unalienated work can be.

And, finally, the historical traditions of the law, which give the lawyers who work in it a self-conscious sense of their location in a continuing adventure with a past and future as well as a present, are a counterweight against the forgetfulness, the obliviousness to time, that characterizes our life today, with its rush of transient moments, each disconnected from the rest, in a contented but timeless present where the partnership among the generations—"the great primaeval contract of eternal society," as Burke called it[16]—is literally disintegrated, and forgotten. Much of the shallowness of our life—our fickle fascination with celebrities, for example, and the brevity of their fame—is the result of this loss of a sense of location in time. All those forms of work for which a sense of historical depth continues to be needed should be valued for the resistence they offer to the temporal flattening of experience. Among these forms of work, the practice of law remains especially important.

The four features of law practice that make it a profession are significant, therefore, not only because they justify the status pride of lawyers (which others often find grating), but also because each in a different way helps to ameliorate one of the four disintegrating forces which the very developments that have produced our wealthy and complex world have themselves unchained. The legal profession is an integrative force in a world of disintegrating powers, and this is one reason why, despite the natural suspicion that lawyers arouse in a democratic society like our own, they have been entrusted with such large responsibilities in matters of governance. It is also why everyone—and not just lawyers—should be concerned by a threat to the culture of legal professionalism. For the values that define this culture are the key to the work that lawyers do in bridging the divisions of our world, divisions whose disintegrative effects are at once the most familiar and most dangerous features of modern life.

IV

But are these values threatened today? Can we be confident that the culture of legal professionalism will survive? Is the self-esteem of lawyers secure? Will they continue to be able to play the same socially valuable role they have played in the past? I am troubled by doubts. I fear that things are changing rapidly, and for the worse. I am worried that legal professionalism is in danger—deep danger—and I want to conclude by briefly explaining why.

In the last quarter-century, the American legal profession has been transformed by a series of sweeping changes that have compromised each of the four features of law practice that justify its claim to be a profession. In the first place, the commercialization of law practice, especially in its upper reaches, at the country's largest and most prestigious firms, has introduced an element of competitiveness that has caused many lawyers in these firms to view their public responsibilities as a luxury they can no longer afford in the frantic scramble to attract business by appealing to the self-interest of clients.[17] This tendency has been exacerbated, I am bound to say, by the official pronouncements on legal ethics made by the American Bar Association and other organized groups, which increasingly endorse the view that lawyers serve the public best by serving the private interests of their clients with maximum zeal, in effect treating lawyers like Adam Smith's tradesmen, who count on an invisible hand to transmute their pursuit of private advantage into a benefit for the community as a whole.[18]

At the same time, the pressure for increased specialization in law practice has

been growing, and it is uncertain how much longer this pressure can be resisted. In part, the demand for specialization reflects a change in the relationship of lawyers to clients, who today increasingly expect their lawyers to supply highly specialized instructions for a narrowly defined range of problems, and not the general, all-purpose advice that legal counselors a generation ago were often asked to provide. The sheer increase in the number and complexity of legal rules to which we are subject today has also increased the pressure for specialization. Vast quantities of new laws are enacted each year, and countless courts issue innumerable opinions construing them. In the expanding world of law, it seems increasingly unrealistic to expect any one lawyer ever to master more than a small portion of it, and so the demand for specialization grows, and with it, the demand for a more specialized law school curriculum.

Today, a higher percentage of lawyers work in large institutions—law firms of fifty or more—than ever before. This shift has meant, inevitably, an increase in bureaucracy and management, something every large organization requires. The result has been the development of a culture—again, most visible in the country's leading firms—marked by the managerial delimitation of assignments and responsibilities, by the substitution of teams for individuals, and by the emergence of relatively inflexible hierarchies of command in place of the older collegial arrangements that existed even in the largest firms two decades ago. Is it any surprise that many lawyers in these firms—the young lawyers especially—report a growing sense of detachment from their institutions, and from the work they do within them? Is it any surprise they complain, as workers in bureaucracies often do, about their diminished feeling of personal fulfillment and growing sense of alienation?[19]

And finally, like everything else in our world, the practice of law is today in danger of losing its temporal range and shrinking down to a series of disconnected points. The growing volume of law and the multiplication of decisions interpreting it has weakened the precedential value of each single judgment—since one can now often find many conflicting answers to the very same question—and this weakening of precedent has cut the practice of law off from its normative base in the past.[20] Technology has also, in a different way, foreshortened the temporal horizon of lawyers. The phone (now portable), the fax (now ubiquitous) and the computer (now able to generate documents and changes in documents at the speed of light) have together had the effect of accelerating the practice of law to the point where many lawyers today complain that their clients expect an instantaneous reply to every question and give them no time to think. The result is a fragmentation of experience, and the narrowing of one's temporal frame of reference, an inward state of mind that is outwardly reflected in the growing tendency of lawyers to move from one firm to the next with dizzying speed (a pattern that suggests the weakening of interest in, and attachment to, any institution that outlasts oneself).

In short, lawyers are today less public spirited and connected to their past, and more specialized and alienated from their work, than they were a quarter-century ago. Each of the four pillars of legal professionalism is today under assault. No one

will deny that the legal profession has made dramatic gains during this same period most notably by opening its doors (part way at least) to groups that had been barred from the profession by a prejudice unworthy of lawyers. But the profession to which these groups have with such justice been admitted is now in danger of losing all of the characteristic features that make it a profession and not just a job. If this happens, it will be a terrible irony for the profession's newest recruits and a blow to the self-esteem of all lawyers. But more important, it will be a blow to America, for the features of legal professionalism that are under such strain today have been a vital integrating force in the construction of our country and our way of life. If the pillars of legal professionalism crumble, we will all be hurt. The disintegrating tendencies of modern life will all meet with less resistance. The common ground on which we all depend will shrink and become less stable. The collapse of the culture of legal professionalism is something none of us can afford, and the challenge it presents, which transcends the field of legal ethics narrowly conceived, is one that lawyers and nonlawyers alike have a stake in meeting.

Notes

This essay was previously published, in a slightly altered form, as Anthony T. Kronman, *Chapman University School of Law Groundbreaking Ceremony, Chapman L. Rev.* 1 (1998).

1. Ludwig Wittgenstein, *Philosophical Investigations* ¶ 19, at 8e (G.E.M. Anscombe trans. Macmillan 2d ed. 1967) (1953).

2. See, e.g., Mary Ann Glendon, A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society (1994) (documenting the current "crisis" in legal professionalism); Arlin M. Adams, "The Legal Profession: A Critical Evaluation, Remarks at the Tresolini Lecture at Lehigh University" (Nov. 10, 1988) in Dick. L. Rev. 643 (1989) (observing how rising commercialism has eroded legal professionalism); Norman Bowie, The Law: From a Profession to a Business, 41 Vand. L. Rev. 741 (1988) (describing the shift from law as a profession to law as a business); Chief Justice Warren E. Burger, The Decline of Professionalism, 63 Fordham L. Rev. 949 (1995) (observing that "the decline of [legal] professionalism has taken on epidemic proportions"). See also ABA Commission on Professionalism, "In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism," reprinted in 112 F.R.D. 243, 251, 254 (1986) (asking, "[h]as our profession abandoned principle for profit, professionalism for commercialism" and "what, if anything, can be done to improve both the reality and perception of lawyer professionalism"); and Colin Croft, Note, "Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community," 67 N.Y.U. L. Rev. 1256 (1992) (tracing the history of legal professionalism and its decline and suggesting a model structured on a deliberative moral community). See generally Jonathan Harr, A Civil Action (1995) (chronicling an environmental lawsuit wherein leukemia-stricken families find themselves at the mercy of greedy and frequently unprincipled lawyers); Sol M. Linowitz & Martin Mayer, The Betrayed Profession: Lawyering at the End of the Twentieth Century (1994) (exploring the conflict between lawyers' role as advocates and their status as independent professionals); Lincoln Caplan, "The Lawyers' Race to the Bottom," N.Y. Times, Aug. 6, 1993, A29 (arguing that "the practice of law has become hollow at its core").

3. Even more so than in law, the decline in medical professionalism has been linked to rising commercialism (and the growing prevalence of health management organizations). See,

e.g., John H. McArthur and Francis D. Moore, "The Two Cultures and the Health Care Revolution: Commerce and Professionalism in Medical Care," 277 *JAMA* 985–87 (1997) (arguing that commerce's "invasion" of medical care has eroded medicine's professional tradition); Linda Emanuel, "Bringing Market Medicine to Professional Account," 277 *JAMA* 1004–5 (1997) (arguing that doctors must impose limits on profit-seeking behaviors to protect medical professionalism); Richard Gunderman, "Medicine and the Pursuit of Wealth," 28 *Hastings Center Rep.* 8–11 (decrying rising greed in the medical profession and physicians' consequent abandonment of their nobler aims); and George D. Lundberg, "The Business and Professionalism of Medicine," 278 *JAMA* 17803–4 (1997) (noting that while medicine has always been a balance between a business and a profession, the scales have tipped dangerously toward the business end during the 1990s).

4. A variety of scholars and professional organizations have noted the general lack of clarity about the nature of legal professionalism. See, e.g., ABA Commission on Professionalism, 261 (declaring that "[p]rofessionalism is an elastic concept the meaning and application of which are hard to pin down"); and Commission on Lawyer Professionalism, Florida Bar, Professionalism: A Recommitment of the Bench, the Bar, and the Law Schools of Florida 11 (1989) (acknowledging that "there is no universally accepted definition of 'professionalism'").

Available definitions of legal professionalism are frequently highly controversial. See Richard A. Posner, "Professionalism," 40 *Ariz. L. Rev.* 1, 15, 17–19 (1998) (arguing that the "final end" of legal professionalism should be "the transformation of law into a goal-oriented policy science consecrated to the perfection of instrumental reasoning"); and Richard L. Abel, "A Critique of Torts," 37 *UCLA L. Rev.* 785, 790–91 (1990) (interpreting legal professionalism as an artifice devised by lawyers to "separate[] tort victims from the means of redress" and thus "expropriate[] a fourth to a half of . . . victim[s'] recovery"). Rob Atkinson documents several competing views of legal professionalism in "A Dissenter's Commentary on the Professionalism Crusade," 74 *Tex. L. Rev.* 259, 271–76 (1995) (arguing that protagonists in the contemporary "professionalism crusade" "use the terms 'profession' and 'professionalism' in four overlapping but distinct senses": "'Professionalism' as Description[,] . . . 'Professionalism' as Explanation[,] . . . 'Professionalism' as Locus of Regulation [and] . . . 'Professionalism' as Focus of Aspiration").

5. Max Weber, *Economy and Society* 1307 (1914; Guenther Roth and Claus Wittich, eds., Ephraim Fischoff et al., trans., Bedminster Press, 1968).

6. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 14 (1776; Edwin Cannan, ed., Random House, 1937).

7. See Model Rules of Professional Conduct: Preamble ¶ 1 (1995) ("A lawyer is . . . an officer of the legal system"); Burger, *Decline*, 949 ("The bedrock of our profession from Blackstone's day has been the professional ideal: the lawyer as an officer of the court").

8. Smith, *Inquiry*, 4–5.

9. I have described at greater length the all-important, but mysterious, faculty we call judgment in Anthony T. Kronman, *The Lost Lawyer*, 16, 56–101 (1993).

10. See Edmund Burke, *Reflections on the Revolution in France*, 85 (1790; J. G. A., Pocock ed., Hackett 1987).

11. See Alexis de Tocqueville, *Democracy in America*, 540-41 (13th ed., 1850; J. P. Mayer, ed., George Lawrence, trans., HarperCollins, 1969).

12. See Emile Durkheim, *The Division of Labor in Society*, 294–95 (1893; W. D. Halls, trans., Free Press, 1984).

13. Karl Marx and Frederick Engels, *The German Ideology*, 53–56 (1846; C. J. Arthur, ed., Lawrence & Wishart, trans., International Publishers, 1970).

14. For an imaginative exploration of the struggle to retain historical depth in the face of

a government campaign to induce mass forgetting, see Milan Kundera, *The Book of Laug and Forgetting* (1978; Michael Henry Heim, trans., Alfred A. Knopf, 1980). Hannah Ar provides an equally inspired meditation on the roles of memory and forgetfulness in her e on "The Gap Between Past and Future"; see especially Hannah Arendt, *Between Past and ture*, 6 (1954; Penguin Books, 1977).

15. See Robert W. Gordon, "Corporate Law Practice as a Public Calling," 49 *Md. L.* 255 *passim* (1990); Robert W. Gordon, "The Independence of Lawyers," 68 *B.U. L. Rev.* 1 13 (1988).

16. See Burke, *Reflections*, 85.

17. See Gordon, "Corporate Law Practice," 257.

18. See Model Rules of Professional Conduct: Preamble ¶ 7 (1995) ("when an oppo party is well represented, a lawyer can be a zealous advocate on behalf of a client and a same time assume that justice is being done"). As Robert Gordon observes:

> Even the ABA's Model Rules of Professional Conduct were drafted (largely upon the insistence of the trial bar) to give primacy to the advocate's role and to reduce dissonance between pursuit of law-embodied norms and the client's immediate interests in favor of acquiescence to the client. *See id.* Under these rules, for example, lawyers are not to counsel or assist clients to engage in criminal or fraudulent conduct, *see id.* Rule 1.2, but have no positive duty to urge compliance or to go beyond "purely technical" advice, *see id.* Rule 2.1 cmt., if that is all the client wants; *see id.* Rule 1.2, and have virtually no formal leverage over clients who persist in illegal conduct, since they may disclose misconduct to outsiders only in extreme situations, *see id.* Rule 1.6, and may not even resign unless the company's highest authority resolves to proceed with a "clear" violation of law likely to result in "substantial injury" to the organization, *Id.* Rule 1.13. The lawyer who cannot count upon factual uncertainty, legal ambiguity, and vaguely worded client assurances that it will clean up its act, to relieve her of any pressure to invoke these (in any case nonobligatory) sanctions is sadly deficient in the casuistical and rationalizing defense-mechanisms of her profession.
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> Gordon, "Corporate Law Practice," 279.

Meanwhile, the codes of professional responsibility prepared by some state bar asso tions imply that lawyers' role as officers of the court is subsumed in their role as zealous a cates. See, e.g., New York State Bar Association Code of Professional Responsibility EC (1996) (describing the lawyer's duty to the legal system as consisting of zealous representa within the bounds of the law).

19. See, e.g., Boston Bar Association Task Force on Professional Fulfillment, *Exp tions, Reality and Recommendations for Change*, vi-vii, 7–11 (1997), describing the "gro sense of isolation and alienation expressed by many attorneys," in particular, young assoc at large firms; and Chief Judge Carl Horn, "Restoring the Foundations: Twelve Steps To Personal Fulfillment in the Practice of Law" 10 *S.C. Law.* 32, 35 (1998): "The survey data anecdotal evidence [show] . . . that many lawyers are working harder but enjoying it n less."

20. See Grant Gilmore, *The Ages of American Law*, 70–71, 80–81 (1977).

3

Why Lawyers Can't Just Be Hired Guns

ROBERT W. GORDON

My theme in this essay is the public responsibilities of lawyers—their obligations to help maintain and improve the legal system: the framework of laws, procedures, and institutions that structures their roles and work.

Ordinarily this is a theme for ceremonial occasions, like Law Day sermons or bar association dinners or memorial eulogies—when we are given license to rise on the wings of rhetorical inspiration far above the realities of day-to-day practice. I want to try to approach the subject in a different spirit, as a workaday practical necessity for the legal profession. My argument is simple: that lawyers' work on behalf of clients positively requires—both for its justification and its successful functioning for the benefit of those same clients in the long run—that lawyers also help maintain and refresh the public sphere, the infrastructure of law and cultural convention that constitutes the cement of society.

The way we usually discuss the subject of lawyers' public obligations—outside ceremonial rhetoric—is as a problem in legal "ethics." We often hear things like, "Lawyers must be zealous advocates for their clients, but of course lawyers are also 'officers of the court'; and sometimes the duties mandated by these different roles come into conflict and must be appropriately balanced." And indeed some of the most contentious disputes about "ethics" in the legal profession concern such conflicts between the "private" interests of lawyers and clients and their "public" obligations to adversaries, third parties, and the justice system itself—issues like: When, if ever, should lawyers have to disclose client fraud or wrongdoing or withdraw from representing clients who persist in it? When, if ever, should they refuse to pursue client claims they believe legally frivolous? Or act to prevent clients or their witnesses from giving perjured or seriously misleading testimony or responses to discovery requests?

These are important issues, no doubt about it, but in this essay I want to look at them in a larger and slightly different perspective than we can usually get from the "legal-ethics" debates. For one thing, "ethics" isn't quite what I want to talk about. I suspect that most lawyers, when they hear "ethics," think, first, that something cosmically boring is about to be said, which one would only listen to in order to satisfy a bar admission or continuing legal education requirement; or else that they are about to hear some unwelcome news about a conflict of interest disqualifying them from taking on a client. "Ethics" has come to mean either: (1) the detailed technical rules in the professional-ethical codes; or, alternatively, (2) a strictly personal morality, the morality of individual conscience, an aspect of personal character which people just have or don't have, and if they have it, acquired it, if not in kindergarten, at least well before they became lawyers. The responsibilities of lawyers I'm talking about in this essay are of a different order; and I'll call them "public responsibilities" instead of ethics, to emphasize that they are responsibilities that attach to lawyers both in their functions as lawyers and as "citizens" who benefit, and whose clients benefit, from participation in the political, legal, social, and cultural order of a capitalist constitutional democracy, and who thereby owe that order some obligations to respect and help maintain its basic ground rules.

The order is *capitalist:* that is, constituted by the basic ground rules of a system of private property and market exchange. This is not, contrary to the antigovernment rhetoric we hear a lot of these days, a state of nature, but an order created and maintained by both coercive and facilitative government actions—the enforcement of rules of property, contract, tort, commercial law, employment law, and unfair competition; the facilitation of collective action through corporations, cooperatives, partnerships, and collective bargaining.

The order is also *democratic:* meaning that the ground rules that constitute the "private" economy and society are subject to revision and modification by democratically elected representative institutions and by the administrative bureaucracies that these legislatures create to carry out legislation.

Finally, the order is *constitutional:* in that its exercises of collective power are supposed to be limited by a set of fundamental substantive and procedural constraints—enforced in our system in the last instance by courts but supposedly respected by all power-wielding bodies, private as well as public.

The general premise of a liberal polity in short is that freely chosen goals (or "self-interest," if one prefers that reductive way of speaking) are to be pursued within a framework of constraints—established by norms, customary practices, rules, institutions, and procedures and maintained by systems of culture and morals backed by social sanctions and, selectively, by law.

Let's focus first on capitalism. Even the most libertarian theorists of capitalism, like Milton Friedman, for example, would stipulate that capitalism works only if there are strong conventions maintaining the framework of order within which, supposedly, self-interested behavior will add up to the general welfare. If individual

players resort to theft, trespass, corruption, force, fraud, and monopoly; if they regularly inflict uncompensated harms upon others, and consistently get away with it, the order will collapse. The order of law, it has come to be pretty clear, is not enough in itself to sustain a market economy: a capitalist system also requires what might be called an order of custom—a cultural infrastructure of norms, learned dispositions to respect property and keep promises and pay taxes and refrain from private violence to settle disputes, and of a certain degree of mutual trust — confidence that others will, within limits, for the most part, also respect the norms. The law without the custom supporting it doesn't work, because no legal system can maintain order against persistent and pervasive violations or evasions. Without social conventions in place to maintain the framework, no state can be legitimate or strong enough to supply one. There will be no reliable system of contract enforcement, no effective safeguards against theft, fraud, and violence, no protection of consumers or labor against being cheated or abused, no effective protection of the environment, no way of extracting taxes to pay for public goods like law enforcement. Yet custom also needs the support of law. Norms of cooperation and mutual trust create openings for opportunists and free riders to abuse them, and outside of close-knit communities nonlegal social sanctions will not adequately police against such abuses. Although compliance with the framework norms has to be largely voluntary, you need coercive law to demonstrate the costs of abuse and also to reaffirm the norms against the moral "outsiders," the amoral calculators who would otherwise profit from everyone else's trusting law-abidingness.

Readers will recognize here an exaggerated—but only slightly exaggerated—description of the current Russian scene. The Russians are trying to run a market economy with no customs or traditions supporting a private framework of constraints on opportunistic behavior in those markets; and also without the legitimacy and support for the state authority to supplement and supply the deficiencies of the private framework. Framework functions that we take for granted—like routine security for personal safety and business assets, and routine contract enforcement—since they are not being supplied by custom or law enforcement, are hired out instead to private purveyors of violence, Mafiosi or ex-KGB thugs.

Let us return now to the developed capitalist economies such as ours. Such an economy in short depends as much on common agreement to abide by its ground rules as it does on competition and innovation, on the substructures of trust, cooperation, and law that maintain that agreement. These frameworks are public goods or common property; they are like the air we breathe.

Now where do lawyers come into the picture? Lawyers have a dual role. They are agents of clients, and in that role help clients to pursue their self-interest—to manipulate the rules and procedures of the legal system on their behalf, to negotiate through bureaucratic labyrinths, to repel assaults on persons or property or liberty.

But lawyers must also be agents of the common framework of institutions, customs, and norms within which their clients' interests must be pursued if the premises underlying all these individual exercises of freedom are to be made good. Let try to develop this argument for the "public" side of lawyers' obligations.

The dominant ideology of the legal profession, the norm of zealous advocacy adversary ideal, tends to obscure the public side of the ledger. But that side is alw present, and is not adequately described by the ritualistic phrase "officer of court." Much of the lawyer's role that is usually thought of as simply zealous rep sentation is actually also designed to carry out the public framework-regarding ai of the legal system. The obvious example is criminal defense. Our own painful h tory and the experience of most other nations today teach that the criminal just system is prone to systematic abuses. Police will break down doors at night, det suspects in secret, and coerce confessions; prosecutors will fabricate evidence or su orn perjury of witnesses. Against such abuses, legal reformers over time have enac both substantive and procedural safeguards. The defense counsel's primary role to act as the outside monitor; he is the gadfly who keeps the system honest, and sures that the police and prosecution go by the book in their treatment of suspe and collection of evidence. In this sense defense counsel is a public agent of framework.

So, too, in the civil justice system. Lawyers serve as public agents in helpi clients to vindicate claims given by the substantive law; and in preventing gove ment agents or adversaries from abusing the law, or from gaining advantages that not permitted by law. In short, the lawyer's role is part of the foundation of a capit ist democratic system.

The term *ethics* doesn't really capture these public functions of the lawyer. Th are functions of *citizenship* in the broad sense, of obligations to the framework of and custom that makes the overall social system—a market economy within the r of law—work.

Well, what obligations can be derived from the role? At minimum, one wo think, a set of negative obligations: in the words of the Hippocratic oath, "First, no harm." Meaning, in this context, what the philosopher Jon Elster calls "everyc Kantianism"—refrain from actions which if multiplied and generalized wo weaken or erode the essential framework of norms and customs.[1] Why are these s cially obligations of lawyers? In part of course they are not, they are obligations on citizens. (By citizens, incidentally, I don't mean technically born or naturalized ci zens, but all people who benefit from participation in the framework; so a forei company doing business in the United States or a lawyer for that company would a citizen in this expanded sense.) But lawyers do have special obligations: they are a unique position to safeguard framework arrangements, because they are also i unique position both to ensure that those arrangements are carried into effect and sabotage them. All procedures that exist to vindicate claims given by the substanti law, especially complex and expensive ones like litigation or administrative rule ma ing, also deliver resources for strategic behavior—delay, obstruction, confusion the record, raising costs to adversaries. The resources of law, in unscrupulous han

can be used to nullify law. This is why we are told that outlaw organizations like the Mafia reportedly offer a key role to the *consigliere*—the lawyer who keeps the law at bay, so that the organization can operate outside the law.

But let us take a less extreme example. Suppose that the lawyer does not represent a persistently outlaw client—the enterprise that lurks at the margins of organized society, taking advantage of its rules and customs to rip off a surplus for itself—but the more usual client, like the ordinary business firm, whose interest is sometimes in vindicating, but also sometimes in avoiding, requirements of the substantive law: in enforcing some contracts but evading obligations under others, in protecting itself against employee theft or sabotage but in circumventing labor law to forestall union organizing campaigns, in seeking compensation for torts committed against it but immunity for its own torts. If lawyers employ every strategy to defeat the claims they don't like, they will erode the process's value for its good uses as well as its bad ones. Outcomes become expensive, time-consuming, and arbitrary. They reward wealth and cunning, and bear less and less relationship to judgment on the merits. Without controls, the system can rapidly deteriorate to a tool of oppression and extortion. By raising the enforcement costs of regulation, lawyers can encourage defiance of regulation by their competitors as well as themselves, and begin a race for the bottom in which nice guys finish last, the law-observing client is an innocent simpleton, a loser in the Darwinian struggle.

The legal-social framework is a common good, and self-interested individual behavior can destroy its value for everyone. Extreme adversariness in litigation or regulatory compliance settings is problematic not just because it is incredibly unpleasant and full of posturing and bad manners, but because it erodes the conditions of the economy and social order. Repeated lying in negotiations can destroy fragile networks of trust and cooperation that alone make negotiation—especially between relative strangers—possible. Strategic contract-breaking reduces the value of all contracts everywhere that are not already backed by strong customary sanctions.

Many lawyers at this point are tempted to say: We admit all this, but enforcing the framework norms isn't our business; it's the specialized role of public enforcement agents—judges, prosecutors, agency bureaucrats, and other officials. But if you accept any of the argument so far, this just has to be wrong. A legal system, like a social system, depends largely on voluntary compliance with its norms. When compliance is replaced by underground resistance—or only nominal compliance—when drivers stop at the red lights only when they think a cop is looking, or are prepared to exhaust the traffic court's limited resources by arguing the light was green—the system has broken down. Suppose that, as happens in many of the world's societies, individuals and businesses began serious cheating on their taxes. In a world in which there are resources to audit only 1 per cent of returns, the result is total system breakdown. Taxes that depend on self-reporting can no longer be collected. Some people are not very frightened by this particular prospect; but they might be if other enforcement mechanisms broke down—if, for instance, gangs of the physically strong,

financed by the wealthy, started preying on their families and businesses, counted on lawyers to stall enforcement of the legal controls on their predation.

In any case, lawyers, especially lawyers for powerful clients, are rarely just pas law-takers: they are active law-makers, designers of contractual and associatic arrangements that create or limit rights and duties and dispute-settlement mo and that are binding on trading partners, employees, suppliers, or customers. employment lawyers who draft contracts requiring employees to waive rights gi by state labor law and submit all disputes to arbitrators chosen by the employer; HMO lawyers who draft clauses forbidding doctors under contract to the organ tion from disclosing to patients that the organization policies will not authorize tain treatments—these attorneys are engaged in what the "legal process" scho Hart and Sacks called "private legislation".[2]

Lawyers have to help preserve the commons—to help clients comply with letter and purpose of the frameworks of law and custom that sustain them all; their obligation is clearly strongest where there is no adversary with access to same body of facts to keep them honest, and no umpire or monitor to ensure c formity to legal norms and adequate protection of the interests of third parties the integrity of the legal system.

Of course I realize that the view that I'm putting forward, a view which assi to lawyers a major role as curators of the public frameworks that sustain our cc mon existence, is drastically at odds with a view that is widespread if not domin in the legal profession. This view, which I'll call the libertarian-positivist view, hc that the lawyer owes only the most minimal duties to the legal framework—the ties not to violate plain unambiguous commands of law, procedure, or ethics, no tell plain lies to magistrates, and perhaps also not to offer such outrageously strai interpretations of facts or law to tribunals as to amount to outright misrepreser tions—and owes no duties to the social framework at all, if performing them wo conflict with his client's immediate interests. In this view the lawyer and client alone together in a world where there are some positive rules: the lawyer's job i help the client get what he wants without breaking the rules—or at least with breaking them when anyone's likely to notice—though it's all right to bend them.

The problem I have with using the libertarian-positivist starting point is tha a democratic society it seems wrong to conceive of the law and the state wholly as versaries, the "other," a bureaucratic maze to be adroitly negotiated on behalf of o clients—and especially wrong if one's clients are members of groups who do in have some access to political power. We are after all members of a common polit community, with agreed-upon procedures for establishing and changing its co mon frameworks. I would argue for the lawyer's starting from an opposite presun tion from the libertarian one—though also rebuttable in particular contexts—a sumption that the law very imperfectly sets forth an approximately agreed-u minimal framework of common purposes, a social contract. I don't mean a fra work of "thick" moral norms such as a communitarian or civic republican wo

imagine, but neither do I mean just a "thin" obligation to obey only the plainest unambiguous commands in circumstances where violations are likely to be detected. The domain of these obligations lies somewhere between morality and resentful minimal compliance with rules. The metaphor I'd suggest is that of a relational contract—the long-term contract calling for repeated occasions for performance, a contract structured by norms of trust, reciprocity, and fair dealing. A contract partner is not expected to sacrifice her self-interest to the other party's, but does have a duty of good-faith observance of the principles and purposes of the contractual framework that has been set up to serve their mutual advantage. With most clients, including business clients, the lawyer could start with the presumption that many good lawyers do indeed begin with—that the client is not out to get away with anything he can in pursuit of his objectives, but wants to abide by the spirit of the framework and be a good citizen—and face the more difficult dilemma of whether to advise him how to get around the rules only if he makes the intention to evade them manifest, after being advised to comply.

I readily acknowledge that there's nothing simple or straightforward about complying with framework norms in the modern regulatory state—often just figuring out what they are is a considerable undertaking. Regulatory regimes tend to be appallingly complex and technical, crammed with loopholes and ambiguities, sometimes put there by regulated interests, often inadvertent. Regulatory statutes are often utopian; full compliance is impossible. They are often in part only symbolic—sweeping commands considerably qualified or even retracted in practice by a large discretion or ridiculously low budget for enforcement. Nonetheless, I think in most contexts lawyers can fairly readily tell the difference between making good-faith efforts to comply with a plausible interpretation of the purposes of a legal regime, and using every ingenuity of his or her trade to resist or evade compliance.

And just as clearly, I'd maintain, lawyers have another obligation as well—though this is an obligation that they can discharge through collective action, through organizations, surrogates, or representatives as well as personally: and that is the obligation to work outside the context of representing clients to improve, reform, and maintain the framework of justice. One thing this obligation unmistakably calls for is helping to remedy the maldistribution—really nondistribution—of legal services to people with serious legal problems but without much money. But another is to help fix legal processes that waste everyone's money in administrative costs or otherwise systematically produce unfair results. Again, I would guess that many lawyers see this kind of framework repair and reform work as a kind of pro bono philanthropy: they are glad that some prominent lawyers are doing it, but see it as an optional task for the private bar. From this view, working on the framework is only in the actual job description of public officials—legislators, administrators, judges. And again, I would argue, that view can't be right—for reasons of both history and principle.

As a matter of tradition, in America private lawyers have assumed a large share

of the public role—sufficiently long-standing and ingrained into customary practice so that you could reasonably call it a *constitutional* role—of safeguarding the framework and adapting it to changing conditions. This role devolved on lawyers at the founding of the republic, when private lawyers assumed the major share of responsibility for making the legal case for the Revolution and in drafting the basic charters of government, the state and federal constitutions. In the early decades of the republic, private lawyers undertook the task of producing an Americanized common law to serve as the basic ground rules for commercial life. In the Progressive era, the creation of the modern state, government through administrative commissions and professional associations, was also largely the work of practicing lawyers—though academic lawyers also got into the act in a big way in drafting the legislation of the New Deal and staffing its agencies. Lawyers have of course dominated the legislative bodies of the country, especially at the federal level, for its entire history. Lawyers temporarily on leave from practice have run the foreign policy of this country for most of its existence.[4] Private lawyers don't play this role in every society; they have played it in America, primarily because with our Revolution we rejected the European model of government through a centralized bureaucracy staffed by an elite career civil service. Our senior levels of statecraft have had to come from part-time volunteers—more often than not lawyers—like Alexander Hamilton, Thomas Jefferson, John Adams, Daniel Webster, John Quincy Adams, Charles Evans Hughes, Elihu Root, Henry Stimson, Dean Acheson, John J. McCloy, John Foster Dulles, Cyrus Vance, and Warren Christopher, just for a short list.

But there is more to this story than the conspicuous lawyer-statesmen on the commanding heights of government. It's no accident that most of the names I've just mentioned were primarily active in foreign policy. In the domestic field, after the basic institutions of government had been established, Americans of the Jeffersonian persuasion turned away from Hamilton's aristocratic model of "energetic government" managed by elites drawn from professional classes.[5] Under the new ethos America was to be dominantly a commercial republic, one in which happiness was to be pursued by those free to pursue it (which at the time meant mostly white males) through labor, trade, manufactures, land cultivation, and speculation. From an early date the market economy, the sphere of "free enterprise," was naturalized, made to appear as if it were a machine that would run of itself. The background frameworks that it presupposed and helped make it run, the infrastructures of law and government and custom, because they were relegated to the background, became invisible to many of the enterprisers who depended on them without realizing it.

In fact, of course, those networks of law and government and custom were everywhere: the United States was even at the outset a thoroughly "well-regulated society"[6]—every aspect of social life was criss-crossed with legal and customary regulations of family and employment relations; of land use and common resources; of nuisances, contracts, and debt collection. Much of this regulation was decentralized and localized—government by local commissions and juries, by public enforcement

actions brought by private informers and prosecutors, by county courts, and the case-by-case governance of the common law; or by special bodies like corporations created by government to serve public purposes.[7] In a country lacking strong centralized bureaucracies, the operation of these regulatory bodies and processes was to a large extent, by default, given over to lawyers. Tocqueville commented on this fact, that lawyers were the de facto governing class, and shrewdly guessed the reason for it: in a commercial society, as Adam Smith had warned, most people's energy and attention turns inward upon their private ambitions—getting ahead, making money; in such a society, people are likely to turn away from public life, to neglect or ignore (what I have been calling) the frameworks of law, government, and public custom on which a successfully functioning system of market exchange ultimately must depend. Enter lawyers—a professional class by training and usage devoted to the legal framework and to assuming a natural leadership role in civic life.[8]

Now obviously there's a lot of disagreement about how well lawyers have discharged the public stewardship that fell into their hands at the founding of the republic. There is nothing new in complaints about lawyers—that they exact a heavy monopolists' rent for running the public machinery, that they are excessively devoted to clumsy, cumbersome, expensive procedures, that they sow complexity, confusion, and ambiguity wherever they go, that they gratuitously stir up trouble, all for their own interest and profit. Some critics persistently charge that the regulatory frameworks they have built and interpret to clients tend to shackle and overburden enterprise; while others charge to the contrary, that lawyers have managed the framework far too often to the particular benefit of their principal business clients. These are complex debates that I clearly can't try to resolve here. The point I want to make is that, whatever you think of how lawyers have taken care of their civic responsibilities, those responsibilities, in our political-economic structure, are inescapable. If lawyers do not perform them, no one else can fully substitute.[9]

So it's absurd to pretend, as libertarian lawyers often like to do, that private lawyers just take care of their clients while relinquishing the public realm to officials. In fact, of course, lawyers are anything but inactive toward the public sphere. The public framework is dynamic, malleable, negotiable. Lawyers don't just passively follow framework rules: they take on active political roles—trying to change the ground rules in their clients' favor.

Here it seems to me is the area where the lawyers have to do the most complex balancing of their roles as agents for clients and agents of the general long-term welfare of the legal system and the public sphere. Adversary practice at the individual case or transactional level is relatively cabined and contained. At the policy level, where clients are pushing for major legislative change or alteration in basic doctrine, zealous representation of immediate client interests with no regard for anything or anyone else has the potential to turn political life into an uncontained war of all against all—litigation writ large, a Darwinian zero-sum struggle among social groups for their share of the pie—at the expense of the institutions of restraint, co-

operation, and social bargaining that link the fates of the fortunate elites to those o the middling ranks and lower orders and thus promote the general welfare. The cla sical fears are of "rent-seeking" politics, of groups seeking public favors that milk tl government for spending levels that threaten either fiscal crisis or confiscatory leve of taxation that destroy incentives to save and produce. The opposite, and in tl United States more likely, danger is of public paralysis, brought about by groups th so successfully resist taxation or regulation that they exercise a practical veto on tl government's being able to provide the public goods of defense, justice, orde ecosystem protection, health and safety, and the conditions of equal opportuni that most people in fact want provided; or simply of the capture of the legal syste by the powerful, who use it to grab the largest shares of income, wealth, and publ resources for themselves, and to neutralize and repress any other groups who migl try to challenge their claims. An example of such wasteful struggle from our own hi tory would be labor-capital relations in the United States between 1877 and 1937, r lations of fairly constant zero-sum warfare, interrupted by intermittent truces an periods of exhaustion, polarizing public opinion, sharpening class conflict, leadir to enormous losses through work stoppages and, just as important, to enduring leg cies of bitterness and mutual distrust whose effects are still being felt in some indu tries today.[10]

How to reconcile these interests? What should a lawyer do whose client wan the public framework altered in its favor, when the lawyer has reason to believe th the change may do serious damage to the commons, the public sphere? Louis Bran deis, one of the earliest lawyers to address this problem, believed that in his own tin most of the country's top legal talent had been recruited to the service of a single fa tion of civil society, that of large corporate interests. He believed that on issues o major framework change lawyers had sometimes to take a completely independe view from their clients—that they ought not to be partisan at all.[11]

Perhaps unfortunately, the Brandeis view has never taken hold and is probab no longer a practical option, if it ever was. My own view is that in the policy arena, i in ordinary transactional and litigation work, the lawyer is entitled to pursue tl client's interests but without risking sabotage of the general public–regarding norn of the framework that link the client's interest with that of other social groups in long-term relational bargain. Any number of examples would serve, but since it's hot topic, let's take tort reform. Companies and their insurers want to minimize li bility; plaintiffs want to ensure that they are compensated. To some extent these in terests conflict, though the parties have common interests, even if it's sometim hard for them to see this, in making products safer while reducing the costs of pro ucts and the transaction costs of the injury compensation system. What are tl lawyers involved in tort litigation actually doing? Very little that's constructive. Th plaintiffs' bar fights to hold on to the current system, remarkably unconcerned wit its inherent problems: the vast majority of victims of personal injury, other tha auto accident victims, are unable to reach the justice system to obtain any compens

tion at all, and the tort system is so expensive that half or more of its recoveries are eaten up in administrative costs, including payments to lawyers.[12] The defendants' bar has if anything been even less constructive in its public positions. Corporate and insurance counsel help to propagate the wildly exaggerated myths that the United States is in the midst of a personal-injury "litigation explosion" and "liability crisis" that add billions to the costs of products and seriously injure American competitiveness. (These are, by the way, clearly myths: filings for individual personal-injury tort claims have fallen, not risen, in the last decade; the big increases in federal civil suits are mostly increases in inter-corporate contract claims. The myths also tend to include in the count of the greatest "costs" of the system the *benefits* that victims receive in compensation for injuries.[13]) These interests promote political "reforms" of the process that would limit liability and reduce damages without substituting alternative proposals for ensuring that the system will in fact adequately compensate for injuries and keep in place incentives to make safer products; or for universalizing access to medical care so that treating accident victims could be financed outside the tort and workers-compensation systems. (In my view corporate counsel are more at fault in this debate than the plaintiffs' bar, because their own livelihoods would not be jeopardized by sensible and just reforms. One cannot expect complete objectivity from parties under threat of extinction.)

In my model, the lawyers ought to see the parties to policy conflicts like the conflict over the tort system much as one would see parties to a long-term relational contract. The aim is to make a good deal for one's clients *in the context of an ongoing relation with other interests*, not to extract everything possible for one's own side; and to build long-term collaborative relationships. The kind of negotiation I have in mind resembles that undertaken toward the beginning of this century by the National Civic Federation, a sort of private-corporatist institution that brought together (relatively) progressive employers and (relatively) conservative unions and had their lawyers try to work out institutional solutions for social disputes. The NCF was one of the main backers of the first Worker's Compensation system that moved industrial accidents out of the tort system, which was expensive and risky for both employers and employees.[14]

I think it will be apparent that what I have been mainly arguing for so far is a remarkably conservative view of the legal framework, and a very conservative role for the legal profession: oriented toward maintenance and improvement of existing frameworks. I should make clear that I think the current set of rules, procedures, institutions, and conventions of democratic capitalism is a very long distance away from a legal/social framework that would effectively realize the promise of American life. Nothing I've said should be taken as designed to restrain lawyers from working to revise the framework's ground rules, especially if they fight for revision openly rather than through surreptitious undermining of the system. And I certainly don't want to exclude the possibility that at any time, including our own time, aspects of the framework may be fundamentally unjust or unsound, and thus in need of radical

revision; and that in such times lawyers may legitimately feel a calling to a activist, framework-transforming politics. There are times when the lawye demanding conceptions of their calling may demand principled resistance t norms they believe to be unwise or unjust. There are times when fire must b with fire, unscrupulous tactics met with fierce counter tactics—though law this justification far too often as an excuse for antisocial behavior, which n avoided by collaborative efforts to reform systems. There are times when wh ments of society must be mobilized to overturn an unjust order. Lawyers hav important parts in such movements—like the movements to abolish slav racial segregation—and will, one hopes, do so again.

But in our time, even the most conservative view of the lawyer's publ tions, that he is to respect the integrity and aid the functioning of the existin and its purposes, has become controversial—in a way that would really hav ished the lawyers of the early republic, the lawyers of the Progressive peri leading lawyers generally up until around 1970 or so, who took the idea of th lic functions completely for granted.[15] The dominant view of most lawyers not all, but seemingly most—is one that denies the public role altogether if to conflict with the job of aggressively representing clients' interests the client perceives them.

Yet, as I've said, a legal system that depends for its ordinary enforcemer formation and advice transmitted by the private bar, that depends for its nance and reform on the voluntary activities of the private bar, and that l lawyers to design the architecture of private legislation, cannot survive the r relentless battering and ad hoc under-the-counter nullification by lawyers wholly uncommitted to their own legal system's basic purposes. Lawyers probably do serve the civic frameworks better than they occasionally like to they refrain from pushing every client's case, in every representation, up to ju of the point where no plausible construction of law or facts could support seems clear that like many other groups in American social life, the legal pr in the last twenty years or so has adopted an increasingly privatized view o and functions. The upper bar in particular has come to see itself simply as a of the legal-and-financial services industry, selling bundles of technical " ables" to clients. There are many reasons for this trend, chief among which i creasing competition among lawyers (and in European markets, between and accountants) for the favor of business clients. That competition has many benefits with it in more efficient delivery of services, but one of those cannot be said to be incentives to high-minded public counseling or the exp of time on legal and civic reform.

Our legal culture, in short, has mostly fallen out of the habit of thinkir its public obligations (with the significant exception of the obligation of p practice, which has gained increasing attention from bar associations and l firms). I expect therefore that if the idea of lawyers as trustees for the public

the framework norms and long-term social contracts that keep our enterprise afloat—is going to stage a comeback, the impulse will have to come from some set of external shocks, such as legislation or administrative rules or rules of court that explicitly impose gatekeeper obligations on lawyers as independent auditors of clients' conduct. We have seen some steps taken in that direction already, in rules regulating tax shelter lawyers, securities lawyers, and the banking bar.

It would be much better, however, if the impulse were to come from the legal profession itself—especially to build and to finance organizations in which lawyers can carry out their public function of recommending improvements in the legal framework that will reduce the danger of their clients' and their own subversion of that framework. Many of the existing bar organizations, unfortunately, are losing their capacity to fulfill that function. Even the august American Law Institute has become a place which lawyers, instead of checking their clients at its door, treat as just one more forum for advancement of narrow client interests.[16]

Think of lawyers as having the job of taking care of a tank of fish. The fish are their clients, in this metaphor. As lawyers, we have to feed the fish. But the fish, as they feed, also pollute the tank. It is not enough to feed the fish. We also have to help change the water.

Notes

An early version of this essay was given as a Daniel Meador Lecture at the University of Alabama School of Law. Thanks to Deborah Rhode for helpful comments.

1. See Jon Elster, *The Cement of Society: A Study of Social Order* (Cambridge: Cambridge University Press, 1989), 192–95.

2. Henry Hart and Albert Sacks Jr., *The Legal Process: Basic Problems in the Making and Application of Law* (Westbury, N.Y.: Foundation Press, 1994; William N. Eskridge Jr. and Philip P. Frickey, eds.; prepared for publication from 1958 Tentative Edition), 183–339.

3. The best account and critique I know of this "dominant view" is in William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge: Harvard University Press, 1998), 30–46.

4. James Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little, Brown, 1950), 352–56; Mark C. Miller, *The High Priests of American Politics: The Role of Lawyers in American Political Institutions* (Knoxville: University of Tennessee Press, 1995), 57–75.

5. Joyce Appleby, *Liberalism and Republicanism in the Historical Imagination* (Cambridge: Harvard University Press, 1992), 271–76, 304–19, 326–39.

6. This phrase, and the content of much of the paragraph that follows, is taken from William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).

7. See generally Novak, *People's Welfare*; and Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774–1861* (Cambridge: Harvard University Press, 1969).

8. Alexis de Tocqueville, *Democracy in America* (New York: Alfred A. Knopf, 1946; Phillips Bradley, ed., Henry Reeve, trans.), 1:208, 272–80; 2: 98–99.

9. In this century lawyers have been displaced from their once near-total dominance of

legislative and appointive positions, policy elites, and reform vanguards. They now share tl roles with other public actors, such as economists, think-tank intellectuals, issue and area : cialists, lobbyists, and grass-roots organizers. Nonetheless the role of lawyers, as public cials, public-interest advocates, and private lawyers advising clients, remains critical, espec as translators of public initiatives into legislative form, administrative rule and procedure, practical enforcement.

10. For an epic history, see David Montgomery, *The Fall of the House of Labor* (C bridge: Cambridge University Press, 1987).

11. See Louis Brandeis, "The Opportunity in the Law," in Brandeis, *Business: A Profes* (Boston: Small, Maynard, 1914), 329, 340–41.

12. See Deborah R. Hensler et al., *Compensation for Accidental Injuries in the Ur States* (Santa Monica: Rand, Institute for Civil Justice, 1991).

13. The literature on the tort "crisis" is enormous. For useful surveys of the data anc sessment of the various positions, see Marc Galanter, "Real World Torts: An Antidote to Ai dote," 55 *Maryland Law Review* 1093 (1996); and Deborah Rhode, "Too Much Law, Too L Justice," *Georgetown Journal of Legal Ethics* (forthcoming).

14. The NCF has been sharply criticized, with reason, as a basically conservative org zation that promoted Workers' Compensation schemes in large part to co-opt and blunt edge of movements for more generous industrial-accident compensation schemes. See, James Weinstein, *The Corporate Ideal in the Liberal State, 1900–1918* (Boston: Beacon Pi 1968). It takes something like the partisan posturing of belligerents in the current battle the tort system to make the NCF look good.

15. One of the best statements to be found anywhere on the lawyer's public funct appeared in the report that launched the American Bar Association's 1969 Model Cod Ethics. "Professional Responsibility: Report of the Joint Conference [on Professional Resp sibility of the American Bar Association and Association of American Law Schools, Lo Fuller and John D. Randall as co-chairs]," 44 *American Bar Association Journal* 1159 (19 "Thus partisan advocacy is a form of public service so long as it aids the process of adjud tion: it ceases to be when it hinders that process, when it misleads, distorts and obfusc when it renders the task of the deciding tribunal not easier, but more difficult. . . . [lawyer as negotiator and draftsman] works against the public interests when he obstructs channels of collaborative effort, when he seeks petty advantages to the detriment of the la processes in which he participates. . . . *Private legal practice, properly pursued, is, then, its public service*" [emphasis added]. "Professional Responsibility," 1162.

16. On politics within the American Law Institute, see Alan Schwartz and Robei Scott, "The Political Economy of Private Legislation," 143 *University of Pennsylvania Law view* 595 (1995).

PART II

Ethical Theory, Ethical Rules, and Ethical Conduct

4

Moral Thinking in Management

An Essential Capability

LYNN SHARP PAINE

In recent years, many corporate leaders have begun to pay serious attention to ethics.[1] Some have introduced special ethics or values programs in their organizations. Many have created corporate ethics offices, board-level ethics committees, or company task forces to deal with difficult ethical issues their companies are facing. Training programs to heighten awareness of ethical issues and integrate ethical considerations into decision making are becoming more common. Such company initiatives vary widely in their design and effectiveness. But most of them rest on the idea that attention to ethics will strengthen the organization and contribute to its performance in the marketplace. In short, many are coming to believe that ethics is good for business.

These initiatives defy conventional wisdom which says that ethics and business are inimical, that business ethics is a contradiction in terms, or that business is a moral "free-zone" where ethics has no place. They also fly in the face of arguments purporting to show that moral thinking by corporate decision makers is illegitimate, a violation of their fiduciary duty to shareholders. Recent interest in business ethics has even prompted some experts to become concerned that companies are embracing ethics for the wrong reason. According to these critics, ethics is something companies should care about because it is right, not because it will enhance their effectiveness. It is said to be naive and career-threatening or, alternatively, incompatible with a truly moral perspective to believe that moral thinking can contribute to business success.

I want to argue that the business leaders who are taking ethics seriously are on the right track. I am not suggesting that every company ethics initiative is effective, or that the right thing to do is always the most profitable thing to do. But I will argue that the basic idea behind these initiatives is correct: moral thinking is an essential

capability for corporate decision makers. Moreover, though this is not a theme I will develop here, it is a capability that must be supported by the formal and informal systems of an organization if it is to be exercised effectively.[2] I suggest that if anyone is naive or at risk, it is those who consider ethics and moral thinking (terms I use interchangeably) unrelated to or inconsistent with good management.

This essay will explain what moral thinking is, show why it is an essential capability, and address the most common reasons for considering it inappropriate or irrelevant to managerial practice. If the argument is correct, it has far-reaching implications not only for corporate managers but also for their advisers. It has particular relevance for corporate attorneys—both in-house and outside counsel—who play an increasingly important role in corporate decision making and who are frequently called on to advise management on matters of ethics.

What Is Moral Thinking?

To understand why moral thinking is an essential capability for corporate decision makers, it is necessary to have a conception of what moral thinking is all about. In the broadest sense, of course, moral thinking is about how we ought to live—as a society, as individuals, and as individuals in relation to one another. These are rather large questions to which few people give systematic or sustained thought. Nevertheless, they are questions that cannot be easily avoided. In fact, we address them repeatedly in our day-to-day choices and decisions. The thought processes and criteria we use to make such choices reflect the nature of our commitments to one another and to certain personal and social ideals. They embody our understanding of our authority to act and our responsibilities to others.

When I use the term "moral thinking," I am referring to the various thought processes used in everyday life to give explicit voice to such considerations. Although the concept of morality may be understood very broadly to include purely personal and self-regarding concerns, a central problem of morality is how we should live in relation to others—others with whom we interact personally, as well as those more distant who may be affected by what we do. A central purpose of morality is to manage that problem in a way that enhances the well-being of individuals and their communities.

It is sometimes thought that morality or ethics is concerned only with what is good for others as distinct from what is good for oneself. This way of thinking, which sets morality in opposition to self-interest and personal well-being, should not be confused with the conception of morality offered here. The moral point of view requires not that individuals deny their personal needs and aspirations and consider only the interests of others, but rather that individuals see their personal interests and objectives in relation to those of others.

Moral thinking, then, is the vehicle through which the individual seeks an accommodation between self and others. To look at a problem or choice from the

moral point of view is to invoke a perspective that relates the actor to those who
be affected by the actor's choices. This may be done directly by considering the
fected parties; or indirectly through the various norms and ideals that govern our
havior in relation to others.

Two modes of moral thinking are particularly important. One mode invo
seeing our choices through a filter of moral principles—general principles of so
morality as well as the special principles associated with the roles we occupy
with our personal ideals. This mode, which may be called "principled thinking
what we do when we rule out a course of action because it would be deceptive,
fair, unlawful, a breach of trust, a violation of rights, and so on. Or when we embr
a possibility because it is our duty, would help someone in need, or would realize
important ideal. For some people in some contexts, this type of thinking is intuit
It may happen spontaneously, without conscious deliberation. For others, or in ot
cases, however, it may require focused attention and careful deliberation. It is not
ways a clear-cut matter to determine, for instance, whether a statement would
misleading or a course of action would violate an obligation of confidentiality.

A second mode of moral thinking involves a very different thought process. T
mode, which may be called "consequentialist thinking," utilizes our capacity to th
ahead and to anticipate the impact of our actions. It involves several distinct act
ties: projecting the likely consequences of alternative choices; achieving a sym
thetic understanding of the rights and interests of those affected by the choice;
identifying the course of action likely to do the most good, considering imparti
the legitimate claims of each affected party. While principled thinking calls on u
find consistency between our day-to-day conduct and the demands of our guid
principles, consequentialism calls on us to attend to the broader social impact
what we do.

Each of these modes serves a different, but equally valuable, function. In gene
principled thinking is what we do every day as we size up our choices against imp
tant values, obligations, and ideals. This type of routine, day-to-day, moral think
has been called "level one" thinking.[3] As mentioned earlier, it is frequently an
stinctual rather than an explicit deliberative process: we shy away from breakin
promise or revealing a confidence more out of habit than analysis.

However, level one is not the whole of moral thought. Level-one thinking w
principles is only possible if we have previously internalized or in some other
adopted a "code of conduct" comprising the principles we regard as moral impe
tives. This is where consequentialism has its greatest value. It provides a critical
"second level" perspective from which to evaluate and select our level-one prin
ples.[4] This higher-order perspective is also essential for adjudicating among lev
one principles when they conflict—as they inevitably do. When we must choose
tween breaking a promise to one party and protecting the confidence of anothe
consequentialist approach can help us decide on the better course in the particu
circumstances of the case.

When I urge that moral thinking is an essential capability for corporate decision makers, I have in mind both modes. As I argue below, these individuals, like others, need routinely to evaluate their actions against a framework of moral principles. They also need an approach to selecting those principles and dealing with conflicts among them. Those who are leaders will very likely be called on to prescribe principles of conduct for their organizations and, in some cases, for the conduct of business in general, on a national or even global basis. As leaders, they will face many decisions that involve trade-offs among competing principles.

While these two modes of moral thinking are usefully distinguished, they are obviously related and overlapping. The correspondence between the two levels and the two modes is only a rough one. Insofar as one's general principles prohibit inflicting harm on innocent people, consequentialist thinking is a necessary component of principled thinking. Consequentialism, moreover, depends on a set of principles for evaluating alternative outcomes. Nevertheless, it is useful to distinguish these modes of moral thought. They involve very different cognitive capacities, decision rules, emotions, and sensitivities. Both are essential elements in a corporate decision maker's repertoire of perspectives.

Moral philosophers have devoted much attention to exploring the relationships between these types of thinking and the problems and conflicts within them. How should decision makers respond when duties conflict? Should they act in fulfillment of duty if it will bring about a great harm? Should rights be violated in order to bring about a great good? Are all types of moral thinking ultimately reducible to a single type? These are important questions, but for the purposes at hand, it is not necessary to address them in full. The immediate concern is less with problems internal to moral thinking and more with the role of moral thinking in relation to other types of thinking characteristically used by corporate decision makers.

However, I will note that these modes of thought are best understood not as rivals but as complementary ways of thinking, though they certainly can come into conflict. As a practical matter, the conflict can be quite wrenching. Consider the corporate decision maker who is compelled to choose between acting on an important principle and doing what is best considering the consequences for the affected parties. The decisions of organizational leaders are regularly scrutinized from multiple perspectives, both as particular cases and as instances of the espoused principles of the organization. For this reason, conflicts between principle-based and consequence-based reasoning can be even more acute for organizational leaders than for individuals acting solely in a personal capacity.

Despite the potential for conflict, however, principled and consequentialist thinking are best seen as complementary modes serving distinct purposes. The framework for everyday moral thinking that I recommend to corporate decision makers recognizes a role for both. It might be called "principled consequentialism," given its basic tenet that within a framework of general moral principles, corporate decision makers should seek to define and achieve business goals in ways that advance the well-being of those affected by the company's actions. So, for exampl two possible actions are consistent with the decision makers' rights and obligatic it is morally better to choose that which makes a greater contribution to the w being of those affected. In substance, the general principles to be respected are th of what is sometimes called "common morality" at the core of which are the virt of "conscientiousness": honesty, fidelity to commitments, fair dealing, obedienc law, respect for the rights of others. Successful implementation of this approach quires a readiness and a facility for principled as well as consequentialist thinking a routine basis.

Consider, for instance, the senior executive of a firm specializing in health c medical devices, and personal hygiene products who must decide between fund the development of a deodorant for children or funding a new medical test to ev ate the likely effectiveness of chemotherapy as a treatment for cancer. All other thi being equal, it would be better to choose the product which serves the more imp tant social need, presumably, in this case, the medical test. While few actual cases clear cut in this way, the point is that an assessment of social consequences shoulc part of the decision process. However, welfare enhancement should not be sough the expense of basic obligations of truthfulness. For example, submitting false results to regulatory authorities in order to secure speedy approval of the devic not permissible within this approach, even if the motive is to enhance welfare by ting the product to market sooner.

While principled and consequentialist thinking are in many ways quite differ it should be emphasized that both provide essential connective tissue for coordir ing individual choice with the social context in which it occurs. Moral thinkin both types affirms the individual's connections to the social community and members. An important feature of this moral framework is its rich vocabulary moral assessment. It recognizes conduct that is exemplary or in some degree be than it has to be as well as conduct that is unethical, falling short of minimal requ ments. Such a vocabulary is necessary to create conditions favorable for moral le ership and improvement.

Moral thinking may be contrasted with another important type of thinking n essary for the conduct of life and routinely employed by corporate decision mak strategic or instrumental thinking. This type of thinking has many other nam means-end, pragmatic, purposive, results-oriented. Within a strategic or instrum tal frame of reference, the central question is whether a course of action will achi a desired objective—often, but not necessarily, a self-regarding objective. Strate thinking focuses the attention on an outcome and how it is to be accomplished: building of a bridge, the provision of financial services, the protection of the er ronment, the production of apparel for sale worldwide. Results-oriented thinkin second-nature to managers who are regularly urged to clarify their company's obj tives, translate them into individual performance objectives, and continually me ure progress toward them.

To summarize, my central thesis is that moral thinking as sketched above is as essential for decision makers in profit-making businesses as the strategic or instrumental thinking which comprises the bulk of the curriculum in business and other professional schools today.

Is Moral Thinking Legitimate?

If moral thinking is roughly as I have described it, does it have a role in corporate decision making? Many people would say that moral thinking is something everyone should do—no matter what their profession or vocation. But some maintain—explicitly or implicitly—that moral thinking has little place in the corporation. This objection is grounded in the decision maker's role as a fiduciary for shareholders with an obligation inherent in that role to protect and promote shareholders' interests.

Within free enterprise capitalism as practiced in the United States, shareholders typically entrust their capital to management with the expectation of earning a competitive return and the hope of substantially increasing their wealth. This system grants shareholders the right to demand that managers use their best efforts to achieve this result and that managers not advantage themselves at shareholders' expense. This right correlates with manager's duties of care and loyalty to the corporation, two fundamentals of fiduciary law.[5]

Moral thinking requires decision makers to consider whether their actions respect the rights and interests of all those affected and sometimes to refrain from acting in ways that injure others or infringe their rights. This requirement of moral thinking is sometimes thought to be in conflict with the obligations to protect and promote the interests of shareholders. This objection to moral thinking is, itself, a moral objection based on the view that corporate decision makers have only a single responsibility: to enhance shareholder wealth.

The fiduciary objection is not merely a theoretical possibility. Several years ago, for example, it was raised when I argued on moral grounds that producers of hazardous agricultural chemicals should take steps to reduce the human health and environmental harm caused by the products they were shipping to developing countries.[6] These products were being marketed without adequate warnings to people lacking any knowledge of the risks and trade-offs involved in using them. The result: serious environmental problems and thousands of deaths and illnesses each year.

My argument was criticized on the grounds that it would violate management's fiduciary obligation to shareholders if the corporation voluntarily incurred costs to reduce health and environmental harms associated with these products since the products were quite profitable and entirely lawful under the laws of both exporting and importing countries. In many nations, laws governing the safety of agricultural chemicals do not apply to exports; many importing countries, especially those in the developing world, lack an effective system for regulating hazardous chemicals. The manager's only obligation, argued one commentator, is to maximize shareholder

wealth within the law. It would be wrong to reduce or forego profits to benefit—even to avoid harm to—a third party.

On close examination, however, the single responsibility view can be seen to profoundly incomplete. One can readily grant that by assuming the role of manag executive, or advisor, a person acquires a responsibility to shareholders to pro and enhance the capital they have contributed to the enterprise. We may even say some economists do, that the decision-maker is an agent for the shareholde though lawyers would dispute this characterization at least under some circu stances.[7] Unlike other principals in principal-agent relationships, for example, sha holders have traditionally had no right to direct the operations of the busin Moreover, there is a longstanding debate in the legal literature concerning whet the manager is a fiduciary for shareholders or for the corporation as an institutio If the corporation is conceptualized not as the private property of shareholders as a cooperative venture among suppliers of capital, knowledge, labor, and other sources, the initial plausibility of calling managers the agents of shareholders is e more problematic.

But, even if it is accepted that corporate decision makers are agents of sha holders with a fiduciary obligation to them, it would not follow that these decis makers have no obligations to other parties or that ordinary principles of mora cease to apply to their behavior. In the absence of special circumstances, assuming obligation to one party does not automatically extinguish a person's existing obli tions to other parties. This principle of continuity applies with special force to ol gations flowing from membership in the human community. If, as a human bein person is obligated to respect the rights of others, to refrain from fraud, to avoid i posing unconsented-to harm on innocent people, she does not escape those du by assuming an obligation to promote the interests of a third party. To take an ot ous case, if it is wrong to steal to enrich oneself, it does not become right to stea enrich someone else.

Just as an agency relationship with shareholders does not cancel out decis makers' responsibilities to other parties, it does not insulate shareholders from sponsibilities they would otherwise have as individuals deploying their capital. other words, if there is an ethical problem with undertaking an action on one's o behalf, there is an ethical problem with hiring an agent to do it in one's stead. Thi not a radical or even a novel view. U.S. Supreme Court Justice Louis Brandeis l ago insisted that the shareholder has an "obligation to see that those who repres him carry out a policy which is consistent with the public welfare."[9]

The view that corporate decision makers have a single responsibility is of coupled with the view that shareholders have a single interest: to make as m money as possible while acting within the law.[10] While few would doubt that sha holders wish to acquire wealth, it cannot be assumed that wealth enhancemen their only or even their overriding interest. Shareholders are also citizens of soci parents of children, consumers of goods and services, and employees of compan

As such, they have multiple interests and varying priorities, including an interest in a coherent and effective system of social morality.

It is sometimes supposed that the law of fiduciary obligation effectively rules out moral thinking by corporate decision makers. Yet, as the American Law Institute's authoritative summary, *Principles of Corporate Governance,* makes clear, management may take into account "ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business" even if "corporate profit and shareholder gain are not thereby enhanced."[11]

Of course, reasonable people may disagree about the specific nature and scope of decision-makers' obligations. They may debate whether one course of action is morally preferable to another, just as they debate the market potential for a product or the suitability of a particular organizational structure.

The central point, however, is this: the claim that decision makers have only one responsibility—to maximize shareholder wealth—because they are shareholders' agents does not follow from any traditional or plausible understanding of the agency relationship.[12] Corporate decision makers function in a morally complex world of multiple, and sometimes conflicting, responsibilities flowing from their humanity, from their citizenship, from their social roles, from their agreements and promises, and from their power. Among these is a responsibility to protect shareholders' capital and to use their best efforts to increase shareholders' wealth. Not only do decision makers have discretion in choosing how to create shareholder value, but in doing so they, like others, are subject to the demands of social morality.

To be sure, charting a responsible path through this constellation of moral claims requires more than moral thinking alone. It also requires knowledge, imagination, perseverance, courage, and other important qualities and capabilities. And without an understanding of core business subjects such as marketing, finance, production, and organizational design, the chance of success would appear rather slim.

Is Moral Thinking Important?

Even if it is accepted that moral thinking in corporate decision making is legitimate, many people wonder whether it is really all that important. According to one commonly held view, moral thinking is important when individuals are acting as citizens, as friends, or as family members, but not when they are acting for corporations. In this context, moral thinking is often considered a frill—something nice, but not necessary—on the grounds that corporate decision makers only rarely experience moral problems and can conveniently side-step them when they do.

This position rests on dubious foundations. For one thing, the frequency of felt moral problems is a poor indicator of their importance, given that the failure to experience a moral problem may be due to the decision-maker's lack of receptivity rather than the absence of the problem itself. According to corporate ethics officers, failure to "see" the issue is a common source of ethical problems.[13] And contrary to

the implicit assumption that frequency equates with importance, a single n lapse can in certain circumstances have severe consequences. As a case in point, sider the failure of former Salomon Brothers' executives to report improprieti the company's government trading desk. The handling of this incident, whicl been called the "billion dollar error in judgment," led to a crisis in confidence v cut short several careers and put the firm's very survival in question. Finally, th sumption that moral problems in corporate decision making are extremely r unsupported by the facts. In one reputable large company, for example, the ethi fice received more than 9,000 calls in the course of a year.[14]

More fundamental, however, this position misses the point that there are d ent types of ethical problems, some of which are likely to be less frequent or s and others, more so, when managers routinely practice moral thinking. To asse importance of moral thinking, it is critical to understand how it affects the pres tion and resolution of different types of problems.

One type likely to be less frequent in organizations where moral thinking i tine is the problem of feeling pressured to engage in unethical or ethically que able practices. This result can be seen at Wetherill Associates, Inc. (WAI), a highly successful supplier of electrical parts to the automotive aftermarket.[15] 350-person company founded in 1980 has a well-developed approach to de making, called the "right-action ethic," which directs employees to consider t terests of customers, suppliers, the community, as well as employees and the pany, when making decisions. Employees are told they will never be asked to d thing that is wrong or dishonest. In turn they are expected to practice honest right action in all they do.

Wetherill employees report that one of the things they like best about the pany is the relative scarcity of ethical problems, compared with other environ where they have worked. One long-time employee explains that a major predic in many companies is weighing the seeming advantage of a dishonest act wi advantages of honesty, but at WAI, he says, "This is not a dilemma." One of cofounders notes that in a lot of companies, people "go to great pains to wei cide and justify [a wrong action]. . . . We just don't do it. Decisions becom . . . This simplifies life rather than complicating it."[16]

It would be a serious error to conclude from the scarcity of ethical problem moral thinking is therefore unimportant for WAI. Quite the opposite. Compa ployees, customers, suppliers, and competitors all attribute WAI's successfu into the industry and its remarkable growth to the company's ethical stance a trust and cooperation it has generated. In a mature industry not known fo ethical standards, the company's revenues grew from $1 million to $60 millio first decade and reached more than $150 million by 1997. WAI has also been c with professionalizing the entire industry.

Of course, a commitment to ethical thinking does not eliminate all ethica lems. Moral uncertainty, moral conflict, and moral disagreement may in son

texts become more salient for ethically aware decision makers. In a fast-paced business environment characterized by rapid technological change, these individuals often face conflicts between competing responsibilities or novel moral claims which cannot be resolved by appeal to familiar general level-one principles. Such problems are often complicated by factual ambiguities. Hence, the need for moral thinking at the critical level.

For example, two companies became targets of moral criticism when they announced that they were jointly developing an innovative database product to help small businesses and nonprofit organizations identify potential customers. Critics charged that the product, which contained the names, addresses, estimated incomes, and buying habits for 80 million U.S. households, infringed upon consumer privacy. During the development process, the project managers had consulted a privacy expert and built several privacy protection mechanisms into the product. But once the product was publicly announced, critics argued that it involved the secondary use of consumer data without the data subject's consent. The project's managers had to assess the legitimacy of these privacy concerns and decide whether to ship the product as planned. In the end, they canceled the product. Some managers felt the privacy concerns were valid and could not be addressed adequately within the existing product design.

It is not hard to find obvious candidates for moral thinking: situations in which a moral question is a major, if not dominant, dimension. One needs only to read the newspaper to see the possibilities. Such issues come up regularly in a host of contexts, ranging from the hiring and promotion of employees, to the development and marketing of products, to the restructuring and sale of whole companies. Many of these situations are unavoidable and the stakes can be significant: a product line, a company, human lives. In the face of these facts, it is hard to maintain that ethics is a frill or a topic of minor importance for managers.

Is Moral Thinking Necessary?

But do corporate decision makers really need moral thinking to address problems like these? Can they not be adequately dealt with using familiar economic concepts and analyses: minimize costs, maximize revenues, expand market share, increase profits, maximize net present value, boost return on equity, etc.?

To see some dangers of omitting moral analysis, consider the case of the Beech Nut Nutrition company executive who discovered that a company supplier was providing adulterated ingredients. In fact, the vendor was supplying sugar water instead of apple concentrate for use in bottled apple juice labeled "100% pure" and marketed as "all natural." Struggling to regain profitability after several years of losses, the 900-person company had been anticipating a profit of only $700,000 on sales of about $80 million when the discovery was made. The executive terminated the supplier and returned the unused bogus concentrate, but the question remained: what to do about the bad juice already in the distribution system a inventory.

Company documents and later trial testimony indicate that managemen proached the decision not in moral terms but simply as a problem of cost mini tion. As stated in a summary prepared by the company's lawyers, the comp objectives were "To minimize . . . potential economic loss . . . conservative timated at $3.5 million (the cost of destroying unused inventory); and . . minimize any damage to the company's reputation."[17] In furtherance of these o tives, the company continued sales of the juice and other products made fror adulterated concentrate and sought to prevent regulatory authorities from ga information they would need to remove the products from the marketplace b the inventory was depleted.

The company was successful in delaying regulatory action and successfull gotiated a recall of the then-small amount of remaining questionable inver However, several months after company management thought the matter clo member of the research department alerted regulatory authorities to the full fa the situation. Ultimately legal action, both criminal and civil, was taken again company and its executives, resulting in estimated financial costs of some $25 lion and serious personal costs to everyone involved. Several years after the co sion of legal proceedings, the company was still struggling to regain market and restore consumer trust in the product.

Advocates of a purely economic perspective might argue that the problem perienced by this company flowed not from any flaw in the decision framework but from its improper application. Had the company's managers accurately mated the potential costs associated with each alternative, they would have cho different course of action: probably one consistent with what moral thinking w have yielded.

But a critical question is how decision makers could have arrived at an acc estimate of the potential costs of the alternatives without understanding the r issues involved: that marketing a questionable product as 100 percent pure is dis est; that it is incompatible with the company's obligations to consumers an public; that it is harmful to purchasers of the product, to the nation's system of production and distribution, and potentially to users (such as diabetic babies these features are surely relevant to the decision to continue marketing. More these features generate potential costs to the company such as those associated legal action initiated by public and private parties and with loss of consume public trust. But such features are invisible to decision makers unskilled in n thinking.

More general, and perhaps paradoxical, a thought process focused only o cash value of alternative courses of action is not a reliable guide even to the fina implications of those actions. As U.S. Supreme Court Justice Oliver Wendell Ho Jr. once pointed out, even a dog knows the difference between being kicked

being tripped over.[18] Though this difference may have a dramatic impact on the dog's behavior, it is not captured in the veterinarian's bill for treating the dog's injuries. As in this and other cases involving questionable conduct or wrongdoing, there is no ready monetary measure of the harm done. But there is no doubt that the damage occasioned by wrongs such as fraud, unfairness, or breach of commitment is real, often leading to costly consequences for the wrongdoer, not to mention harm to the victim and to the level of social trust. Moral thinking is clearly related to financial thinking, since it is essential for understanding the full meaning and impact of managerial choices. But moral thinking is not reducible to financial thinking in any way that is useful to a practicing corporate decision maker.

Moral thinking brings a distinctive point of view to the decision-making enterprise, a point of view not fully captured by the traditional business disciplines. It places management decisions squarely within a social and normative context, thus highlighting important factors that might otherwise be overlooked in the search for opportunities, the identification of problems, the analysis of decisions, and the implementation of action. Managers and corporate advisers who avoid moral thinking deny themselves access to this perspective. They run the risk of neglecting important considerations related to the welfare of their organizations, their communities, and their personal lives.

Moral Thinking and Profits

So far, the argument has shown how moral thinking can contribute to better decision making by corporate managers and their advisers. This line of reasoning should not be confused with the mistaken view that there is a one-to-one correspondence between ethical actions and profitable actions. As noted earlier, moral thinking and financial thinking involve differing frames of reference and decision criteria whose application is overlapping but not co-extensive. While many profitable activities are fully consistent with the demands of moral thinking, others are not.

History and experience tell us that unethical behavior can sometimes be financially rewarding, at least so long as its victims are ignorant or powerless. The adulterated apple juice situation illustrates this possibility. It also illustrates the vulnerability of such strategies when they are dependent on secrecy for their success. If it is difficult to maintain the secrecy of individual misconduct, it is even more difficult to conceal corporate misbehavior in today's increasingly transparent business environment. Though ethically weak strategies can sometimes be profitable, they are also subject to a higher level of reputational, legal, market, and political risk than strategies which are ethically sound.

But the relevant question for corporate leaders is not whether it is ever possible to make money by acting unethically. (It is.) The question is whether an ethical orientation enhances or diminishes the organization's ability to sustain itself and create economic value over time. A case-by-case analysis of the advantages and disadvantages of acting ethically cannot address this question adequately because it overl the systemic implications of choosing a basic orientation to other people anc world. As illustrated in the earlier discussion of WAI, the choice affects the habi mind, the search strategies, the identification of opportunities, the informa sources, and the profile of issues and decisions that arise for the organization. It affects how the organization is perceived by others and, hence, the opportunities challenges presented by those outside the organization.

In his book *Moral Thinking*, Professor R. M. Hare suggests an approach to d ing whether it is prudent to be moral: he asks us to consider how we would brin a child if our only objective were to promote that child's interests and well-bei Would we teach her always to seek her own interests? Would we try to instill a s moral principles, but encourage her to ignore them whenever it was in her inte to do so and she thought she could get away with it? Or would we try to instill a commitment to a set of moral principles and encourage respect for the aims needs of others? Professor Hare concludes that he would choose the latter cours a variety of reasons.

We may pose a somewhat analogous question for corporate leaders. If your objective were to secure the long-term survival and profitability of your com what would be your stance on ethics? Would you urge company managers, advi and employees to disregard ethics? Would you urge them to adhere to a set of et principles except when it was more profitable not to do so? Or would you urge t to behave ethically and seek profits in ways that were morally acceptable? I su that anyone who has thought through what it takes to achieve sustained profital would select the latter option.

This conclusion may be surprising or even unpalatable to those who conce ethics as, by definition, in conflict with self-interest. Such an arrangement of the ceptual furniture underlies many allegedly "hard-headed" arguments purporti show that ethics is in conflict with business. For example, Professor Milton Fried writes in a well-known *New York Times* article, "What does it mean to say the co rate executive has a 'social responsibility' in his capacity as a businessman? If statement is not pure rhetoric, it must mean that he is to act in some way that i in the interest of his employers."[20] In a single sentence, Professor Friedman dra sharp line between acts that are socially responsible and those that are in the c pany's interests. His conceptual world is such that self-interested thinking and n thinking generate mutually exclusive classes of acts.

But there is a problem with this conceptual foundation. It presupposes tha interests and needs of the self are independent of the interests and needs of othe this starting point is problematic in the case of the individual person, it is even l so in the case of a corporation which is essentially a collection of relationship such, the interests of the corporation cannot be disengaged from the interests c constituencies. Most effective decision makers realize that the corporation's su depends on securing the trust and ongoing cooperation of participants in all

relationships, whether they be shareholders, customers, employers, creditors, suppliers, or the public. That trust and cooperation, in turn, depend on observing certain ethical principles and serving important interests of each constituency on an ongoing basis.

As noted earlier, moral thinking is not the only thing needed for managerial effectiveness. The best moral thinking in the world cannot save a company whose production methods are too costly, whose marketing is ineffective, or whose information systems are inadequate. But given what moral thinking is about—our relationships and responsibilities to others—the surprising result would be that moral thinking had nothing to do with organizational effectiveness and business success.

Conclusion

My argument for moral thinking in corporate decision making is based on the needs and experiences of corporate managers and their advisers. I have tried to show that moral thinking offers a distinctive way of seeing the world and evaluating choices which is important for corporate decision makers. This bottom-up approach to understanding the importance of moral thinking sheds a somewhat different light from the more usual top-down approach.

The more usual arguments for business ethics start with society's need for the efficient utilization of resources and then reason to the inadequacy of a purely profit-oriented norm of business behavior.[21] As many economists and others have demonstrated, profit-maximizing behavior does not necessarily lead to the efficient use of society's resources nor does it always contribute to social welfare, more broadly conceived. Information asymmetries, externalities, and the absence of vigorous competition all create opportunities for firms to reap profits that are not justified from a resource-efficiency point of view. Hence, the need for moral norms. Many economists have pointed to the role of moral norms of honesty and reliability in sustaining the social trust necessary for economic activity.

By focusing on the everyday problems and challenges faced by corporate decision makers, I have tried to show that the need for moral thinking grows out of the nature of management itself. It need not be seen as some requirement emanating from without.

The importance of moral thinking in corporate decision making relates to what Dr. Martin Luther King Jr. called the "inescapable network of mutuality"[22] in which managers, more than other professionals, succeed or fail. Without the good will and cooperation of other people, they can accomplish very little. And it is hard to see how they could secure the good will and cooperation of others, at least in a modern democratic society, without a well-developed capacity for moral thinking. What is really puzzling is how anyone could take seriously the idea that business is an ethical "free-zone," where moral thinking has no application.

Notes

The original version of this paper was prepared for a conference held at the U Florida in 1994 to honor Professor R. M. Hare, White's Professor of Moral Philoso ford University from 1966 to 1983 and a Graduate Research Professor of Philos University of Florida. The paper, whose title takes its inspiration from Hare's b *Thinking*, was first published in *Business Ethics Quarterly* 6, no. 4 (1996), 477–92. here in modified form.

1. See, e.g., Ronald E. Berenbeim, *Corporate Ethics Practices* (New York: The Board, Rep. No. 986, 1992); *Ethics Policies and Programs in American Business* (W D.C.: Ethics Resource Center, 1990).

2. See Lynn Sharp Paine, "Managing for Organizational Integrity," *Harvard B view* (March–April 1994), 106–17.

3. R. M. Hare, *Moral Thinking: Its Levels, Method, and Point* (Oxford: Clarer 1981). My account of the structure of moral thought draws heavily on Professor H level theory.

4. Hare, *Moral Thinking*.

5. See ABA, "Corporate Director's Guidebook—1994 Edition," 49 *The Busin* 1243, 1252–56 (May 1994).

6. Lynn Sharp Paine, "The International Trade in Hazardous Pesticides: Prior Consent and the Accountability Gap," in *Ethical Theory and Business*, 4th ed. (N Bowie and Tom L. Beauchamp, eds., Englewood Cliffs, N.J.: Prentice-Hall, Inc., 199

7. E.g., Robert C. Clark, "Agency Cost versus Fiduciary Duties," in *Principals a the Structure of Business* (John W. Pratt and Richard I. Zeckhauser, eds., Boston: Har ness School Press, 1985), 56–62.

8. See E. Merrick Dodd Jr., "For Whom Are Corporate Managers Trustees," 4 *Law Review* 1145 (1932).

9. *Guide to a Microfilm Edition of the Public Papers of Justice Louis Dembitz B* the Jacob and Bertha Goldfarb Library of Brandeis University. Document 128. Test fore the Senate Committee on Interstate Commerce, 62nd Congress, 2nd Session, I Persons and Firms Financed in Interstate Commerce 1 (Pt. XVI), pp. 1146–91 (D 1911). Quoted in Robert A. G. Monks and Nell Minow, *Watching the Watchers: Corp ernance for the 21st Century* (Cambridge, Mass.: Blackwell, 1996), 103.

10. E.g., Milton Friedman, "The Social Responsibility of Business Is to Increas its," *New York Times Magazine*, September 13, 1970.

11. American Law Institute, "Principles of Corporate Governance: Analysis ar mendations," vol. 1, §2.01 (1994) at 55.

12. Perhaps the claim is not that agency, as commonly understood, extinguish gations other than furthering the financial interests of shareholders within the law corporate and legal institutions should be structured to make this the case. (Noti point, the argument is shifting to level two: rather than considering management's o within the existing moral structure, the structure itself is being questioned.) To ev proposal would go far beyond the scope of this paper. However, there is little reason that such an arrangement would have much social merit, especially given the state around the world.

13. Source: Author's field research.

14. Ibid.

15. Lynn Sharp Paine, *Wetherill Associates, Inc.*, Harvard Business School case 113 (Boston: Harvard Business School Publishing, 1994).

16. Ibid., 1.

17. *United States v. Beech-Nut Nutrition Corporation*, 871 F.2d 1181, 1186–1187 (2nd Cir. 1989).

18. Oliver Wendall Holmes Jr., *The Common Law* (Boston: Little, Brown and Company, 1881), 3.

19. Hare, *Moral Thinking*, 191–98.

20. Friedman, "The Social Responsibility of Business," 32.

21. See, e.g., Alan Goldman, *The Moral Foundations of Professional Ethics* (Totowa, N.J.: Rowman and Littlefield, 1980), 230–82.

22. Martin Luther King Jr., *Letter from the Birmingham Jail* (San Francisco, Ca.: Harper, 1994).

5

Law Practice and the Limits of Moral Philosophy

GEOFFREY C. HAZARD JR.

> Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me.
>
> —Matthew 25:40

In this essay I explore the relationship between law practice and several virtues ider tified in some main branches of traditional moral philosophy.[1] "Law practice" refe: to the ordinary activities of ordinary lawyers, in the United States in particular bu also in modern political regimes generally. These activities include conducting litig: tion, giving confidential counsel to clients, and drafting legal documents such a contracts, wills, and mortgages. The specific virtues I have in mind are autonom impartiality, and truthfulness. These virtues find expression in classic Greek philosc phy and are an integral part of our moral traditions and are postulates of most cor temporary moral philosophy. Simply stated, my argument is that in the practice c law, considered unromantically, one cannot fulfill these virtues. In my view the sam is true for most roles of people in modern life, so that the contradiction in law prac tice is simply a special case, although a salient one, of a general moral phenomenor The contradiction is between professed moral virtues and the virtues required in ou work and lives. Lawyers' experience is peculiar in that it continually requires kinds c "unvirtuous" conduct that are required less often and less systematically by people i other roles and walks of life.

If this thesis is sound, then much of contemporary moral philosophy is either ir relevant to law practice—and, by extension, to many moral problems of everyda life—or, perhaps worse, an apparatus for disparaging people engaged in doing som of society's dirty work: lawyers as highly compensated untouchables.

The implication of the argument is not that there are no limits to conduct that lawyer—or anyone else—may justifiably undertake. Nor is it that moral reflection i inappropriate, particularly as it reminds us of the human condition that has mad law (and hence law practice) a socially necessary enterprise. It is simply that the gen

eralities in conventional moral philosophy do not much "illuminate" the limits on justifiable conduct or the terms of justification.[2]

By "ethics" I refer to choosing among courses of action where values or moral issues are at stake. Courses of action, or "action," signifies real-world events occurring over real time rather than hypothetical possibilities. "Issues" refers to the dilemmas of assigning priority among interests where all relevant interests cannot be equally conserved or furthered in a specific course of action.

The dominant strand in moral philosophy has struggled to address these problems in terms of universals. That is, problems of assigning priority among competing interests are considered to be susceptible of being addressed and resolved by methods applicable in all contexts wherever value issues or moral issues arise, quite as epistemology and semantics and science proceed in terms of universals. Universality signifies all places and times. Along a different dimension, it also signifies all instances and circumstances. Moral universalism contrasts with "applied ethics," which refers to problems of choice posed in specific historical, cultural, and situational context. The significance of specific context is simple but fundamental: A specific context frames an ethical problem in terms of "local" standards—traditions, understandings, rules of law, ways of life in a specific community, and relationship specific people such as family, neighbors, clients, and fellow countrymen. I use the term "situational standards" to refer such frameworks. The situational standards applicable to lawyers include, notably, the legal profession's codes of ethics.[3]

My view is that the only genuine problems of ethics are those posed in a framework of situational standards. Accordingly, the term "applied ethics" entails a redundancy, in that genuine moral problems or problems of "appropriate conduct" arise only in, and in terms of, standards recognized in a specific institutional context. In support of this disrespectful approach, one can refer back to Aristotle's *Nicomachean Ethics*. In sober conclusion after much circumlocution, Aristotle recognized the determining significance of "particular circumstances":

> [I]t is a hard task to be good. . . . It is for this reason that good conduct is rare, praiseworthy, and noble. . . .
>
> There are times when we praise those who are deficient in anger and call them gentle, and other times when we praise violently angry persons and call them manly. . . . It is not easy to determine by a formula at what point and for how great a divergence a man deserves blame . . . determinations of this kind depend upon particular circumstances. . . .[4]

I also invoke Sir Isaiah Berlin's thesis that the history of philosophy—that is, the analysis of thought at particular historical stages and places—exhausts the possibilities of "philosophy" as regards ethics.[5] By the same token, I submit that moral philosophy divorced from specific historical context is mostly vacuous—a more pointed if less polite way of saying that there are "limits" to philosophy in matters of ethics.[6]

The practice of law is a useful instance through which to develop this thesis.

Practice of law epitomizes the techniques of political discourse in modern life, p ticularly the definition and resolution of disputed issues through formal proced based on objectively manifested evidence, through participants who have defi roles in the process. A substantially similar technique is employed, more or less modern electoral and parliamentary decision making, in business management, in management of public bureaucratic agencies. Although law practice is distinc in being governed by highly specific and long-established standards, the basic c cepts in legal ethics have counterparts in politics and business and bureaucr management. As will be developed below, these concepts are agency, partisansl and confidentiality. All office-holders public and private—hereafter referred tc "politicians"—are partisan agents in that they have special responsibility to limi constituencies, and in that they all are required and expected to withhold sensi information.

Ethics and the Problem of Knowledge

A place of beginning in ethical analysis is the problem of the actor's knowled Ethics involves problems of choice among alternatives apparent at the point wh choice must be made. Alternatives apparent to an actor can be considered hypoth cally or by estimates of a real-world actor's knowledge at the point of choice. Kno edge attributed to lawyers and politicians is especially significant because they of know things that are unknown to others.

Specification of circumstances requires some source from which the speci are to be derived. One source is hypothetical formulation, thus: "*If* A confron situation X, then A should. . . ." By definition such a specification is unreal. bring forth a real ethical problem, it is necessary to posit what Mr. A knew about circumstances confronting him in situation X. Ethical *philosophy* is necessarily hyp thetical when it comes to a factual appreciation attributed to an actor. Whether a set of facts was actually apparent to a real-world actor can be inferred only on t basis of specific circumstantial evidence. Circumstantial evidence is all we have a basis for decisions and evaluations in everyday life, in family matters, and in bu ness, as well as in legal proceedings. But circumstantial evidence by definition cann establish the actual or "real" content of an actor's state of knowledge. According many statements about actors' thoughts and choices, and hence about their ethi are no more than guesses, and sometimes officious for that. It seems to me that t necessary reliance on hypotheticals itself is a source, if not the source, of the sev and insuperable limits to philosophy in ethics.

There is nothing malign about performing ethical analysis on the basis of hyp theticals or, what is much the same thing, doing it on the basis of assumptions abc what a real-world actor knew or was in a position to ascertain. The point is that th is an impenetrable limitation on how "far down" we can go in such a discussion, co cerning real choices available to real actors. There is a fundamental difference—

existential one—between hypothesizing a choice and acting out a choice. The difference is signified in colloquialisms such as "he talks a good game, but . . ." and in the distinction in any calling between a rookie and a veteran. This is the import of an observation by Hilary Putnam: "What some philosophers say about [a morally problematic] situation is that the [actor] should look for a policy such that if everyone in a similar situation were to act on that policy the consequences would be for the best, and then do that. Sometimes that is reasonable; but in [a specific actor's] situation it isn't. One of the things that is at stake in [the specific actor's] situation is his need to decide who [he] *is*."[7]

I take it that by these observations Professor Putnam means, first, that action guided by a Kantian or utilatian policy might be not "reasonable" because the actor discerns herself to be situated differently from the situation specified in the universial. Of course the universal could be redifined to fit the course of action preferred by the actor, but this would only transform the supposed universal into a rule for the specific case. His observation that the actor needs to decide who he "*is*" refers, I think, to the existentialist proposition that a course of action chosen, as distinct from merely hypothesized, effects a transformation of the actor himself. Hence, in choosing a course of action the actor is redefining himself.

Each of us can imagine someone else's mental world—the world of that person's imagination—quite as fiction authors do so, but our estimation of someone else's mental world is itself an act of imagination.

A Lawyer's Imaginary World

Each lawyer has a mental or imaginary world. I use the term "imaginary" to emphasize the creative, dynamic, evanescent, and wholly subjective nature of a state of mind. That state of mind is the resultant of a lawyer's encounters with her surrounding community—clients, opposing counsel, opposite number clients, interacting third parties, government officials, and the transactions giving rise to those encounters. The lawyer's world of course also includes the encounters with the nonprofessional community in which a lawyer is immersed—family, relatives, friends, neighbors, former schoolmates, etc. Each of us makes a unique personal construct out of the buzzing and blurred images through which we experience life. For me at least, the best account of such personal knowledge is that by William James, of which the following is a sample: "No one ever had a simple sensation by itself. Consciousness, from our natal day, is of a teeming multiplicity of objects and relations, and what we call simple sensations are results of discriminative attention, pushed often to a very high degree."[8] The lawyer's mental world is in this respect like everyone else's, but has additional dimensions resulting from professional responsibilities as an advocate or as a legal counselor.

This "interior" focus does not deny that there is a real world out there. I have assumed that the external world really exists, having often stubbed my toe in imitation

of Bishop Berkeley's demonstration. Indeed, no one knows better than lawyer the external world can be decisively real. I mean only to say that each of us r sense of what is "going on out there" as best we can, in a way that we cannot pletely share with others.

The lawyer's mental world has special characteristics derived from the la function in society. These characteristics include:

- acting as agent for another, i.e., a client;
- serving as partisan advocate in systems that have power to inflict serious but lawf consequences on the client;
- giving confidential counsel to a client leading to courses of action that can have s ous adverse effects on others.

As noted earlier, the lawyer's world is simply a special case of the situati which many others find themselves.

Clients

Clients are people whose conduct may be subject to legal question and coerci tervention by government authority. People engaged in more or less transp transactions, with more or less transparent purposes, do not ordinarily need la and hence do not become clients. Most ordinary people in fact employ lawyers c few times during their lives, for example, to draft a will or handle a vehicle prol However, honest people enter transactions or encounter misfortunes that may appear in adverse light, whether by misunderstanding or malevolence, and ofte use a lawyer's help in these contexts. An honest client can have a claim that som refuses to acknowledge, have money that someone else wants, or be at risk of c nal prosecution. Furthermore, many people are not completely honest in their poses in the exacting sense that they are prepared to stand before the commun they would stand before God. Part of lawyers' assistance to clients involves main ing a separation between what is known between lawyer and client and wh known to others.

Agency

An essential characteristic of legal practice is acting for a client, rather than actir one's own account. The lawyer's typical function is endeavoring to induce some party to take actions that could assist the client's interests. People other than la act as agents for others in many everyday relationships. Parents act as agents of in children's education; spouses act as agents in dealings on behalf of families; ployees act as agents for their employers, etc. In this sense, nearly everyone acts agent some of the time. (Indeed, perhaps only academics speaking as such do nc as agents.) The distinctive feature of a "lawyer" is that agency is definitional i

role. To speak of a lawyer without a client may accurately describe a jurist or a legal scholar, but it does not describe a lawyer.

The lawyer's agency function involves taking positions on the basis of loyalty to the client regarding relationships with third persons. Third persons include private parties or governmental officials in a position to affect the client. The paradigmatic government official is of course a judge.[9] The term "judge" generically refers to first instance and appellate decision makers. Government officers can include building inspectors, regulators, and prosecutorial and other officials who may have authority comparable to that of a judge, although their exercise of such authority generally can be subjected to judicial review. Persons who exercise authority within private organizations, such as business corporations or universities or labor unions, have positions similar to government officials. All such personages are potentially subjects of a lawyer's efforts on behalf of his client.

The lawyer's world is best understood by considering it in terms of the judge's world—the mental dynamic of judges and other officials invested by government with power to make authoritative decisions. The judge is central in the legal scheme of things because the judge in the generic sense has authority to determine the relationships that may be coercively enforced between the lawyer's client and other private parties or government officials. The lawyer's function is derivative from the judicial function in that we can envision the functioning of judges without lawyers but not the functioning of lawyers without judges.

A Judge's Imaginary World

A judge's responsibility is to decide disputes over legal rights and duties according to an informed and disinterested interpretation of the law and facts.[10] That task can be compressed into a single function of authoritatively deciding the meaning to be attributed to words (what the law "is") and the meaning of evidence (what the facts "are"). This function takes on practical significance when it is performed in the face of some uncertainty about those issues.

There are essentially two epistemological foundations upon which the judicial function rests. One foundation is religious; the other is secular-procedural.[11] Adjudication based on religious authority is characteristic of relatively small traditional societies, for example the role of King Solomon as recounted in the Bible or that of elders or priests in tribal societies. Exercise of this kind of authority presupposes that all members of the community share most of its experience. As Aristotle observed: "[I]f the citizens of a state are to judge . . . according to merit, then they must know each other's characters; where they do not possess this knowledge the decision of lawsuits will go wrong."[12] This communally shared knowledge reinforces and is reinforced by a religious faith, in terms of which authority is taken to have divinely inspired capacity.[13]

Members of the community in a modern society cannot share most of their experience or obtain knowledge of others' character first hand, and in many countr they no longer have common religious faith. Since the modern unbelieving me tality no longer regards divine inspiration as sufficiently reliable for making fir judgments, the judicial function is performed by functionaries whose connection divine authority is nominal at most. Accordingly, the accepted epistemological fou dation of judicial authority in developed legal systems is secular-procedural, a h manistic technique employing systematic procedures to discern objective manifest tions of the law and facts.

Underlying this procedural foundation is a two-fold assumption. On the o hand, it is assumed that judges are subject to such human failings as incomprehe sion, inattention, impatience, and bias. On the other hand, it is assumed that le procedures can mitigate these failings by requiring the judge to consider plausil alternative versions of the law and the facts. The judge must consider these pla sible alternative versions on the way to, and as the means of, finding the truth of t matter.

Of course, it is possible to adopt different assumptions about judges. With r gard to questions of law, it could be assumed that the judges already know the l well enough, having been systematically and uniformly trained in it. Something li this is the underling theory of civil law systems.[14] The "objective theory" of law i deed can be understood as referring to the fact that, where a judiciary has a homog neous understanding of the law, their legal knowledge *is* the law, not necessarily r quiring illumination by the parties. Even in systems where the judges are presum to know the law, however, the advocates may make suggestions about its applicatio In any event, factual issues cannot be approached on the same assumption. In t Western tradition, the defendant in a criminal case, and interested parties in a ci case, can offer competing evidence.

This is an appropriate point to note, that "local" standards specify the rol of judges. There is no single, universal concept of the judicial function. The role a king-judge in a closed religious society obviously differs from that of judge in modern secular society. Modern societies also reflect significant variations in juc cial role, particularly differences between the common-law judges and their civ law counterparts. Thus, a lawyer's brief addressing the rule governing child cu tody would be contempt of court, or worse, if submitted to King Solomon, where failure to submit such a brief before a common-law judge could be profession malpractice.

Rhetoric and Truth

The recognized possibility that a judge can be wrong is the predicate for the requir ment that judges consider plausible alternatives. This requirement is the mirror ima of the right to be heard. Lawyers as advocates effectuate the right to be heard by pr viding the judge with plausible alternatives concerning the law and the facts. (An a

vocate who provides an *implausible* alternative has failed in her preliminary responsibility to refrain from "frivolous" contentions, a matter to which I return below.)

The advocate engages in what is classically categorized as rhetoric, as distinguished from philosophic or scientific discourse. In philosophic discourse, according to this categorization, the protagonist and all participants in the inquiry directly seek truth, without regard to consequences. The rhetorician, in contrast, addresses a doubtful matter with a precommitment to consequence. The distinction is classically drawn in Plato's *Gorgias*, where Socrates says: "I . . . begin by asking, whether [the rhetorician] is as ignorant of the just and unjust . . . as he is of medicine and the other arts; I mean to say, does he know anything actually of what is good and evil . . . just or unjust; or has he only a way with the ignorant of persuading them . . . .?"[15] Aristotle had a more analytic and somewhat less disparaging characterization: "[Rhetoric's] function is . . . concerned with . . . deliberation about matters that appear to admit of being one way or another. . . ."[16]

An advocate as agent for the client, when appearing before the judge in a contested matter, is precommitted to the proposition that the client's cause is just according to the law and the facts, and accordingly that the client should prevail. The advocate's engagement is to present to the judge, with fullest lawful force and skill, a plausible version of legal and factual issues that will have favorable consequence for the client. The judge, on the other hand, is engaged in directly questing the truth.

The relationship between judge and advocate thus involves a profound paradox: The advocate is to provide a nondisinterested and precommitted version of the doubtful matter in order to facilitate the judge's arrival at a disinterested conclusion proceeding from an uncommitted predisposition. The explanation for the paradox is of course the recognition that judges are not divinely inspired and the related supposition that they are less likely to commit error if presented with alternative versions. The same reasoning leads to recognition that the advocate should be *obliged* to present a partisan version, as distinct from some "neutral" or disinterested exposition similar to that at which the judge is to arrive.[17] The reason here, of course, is that a "neutral" advocate would be subject to the same failings as a judge in seeking to arrive at truth through unilateral inquiry.

Of course, the parties to a legal dispute can speak for themselves, and some do so, appearing *in propria persona*. However, experience demonstrates that parties are often inept compared to practiced advocates. Typically a party will also have difficulty getting beyond his own subjective perceptions in trying to present his situation in terms that are comprehensible to the judge.

The Advocate's Imaginary World

The advocate's role requires maintaining multiple images. The advocate seeks to produce a resultant "truth" through her presentations to the court. In another more encompassing view, the advocate must visualize her presentation to the judge, anticipate the competing alternative version presented by the opposing party, and how the production as a whole will be received.

The term "production" implies that the advocate's endeavor is essentially theatrical, which indeed it is. The advocate produces a picture that, if artful, will to the judge as truth regarding the events in dispute. Like a theatrical producer, advocate views her production as it will appear to the audience, not simply A trial compresses some aspects of historical time, renders other events in tion, omits "irrelevant" detail, sharpens focus on crucial details, etc. Some of course is "real," notably documents, but only as to items whose authentic disputed. When a document is challenged as forged or postdated or the document is no longer unequivocally "real." So also, the parties are "real" but in their forensic Sunday best and not as they were in the underlying transac

An advocate by no means has a free hand in presenting these portrayals always some evidence that is irrefutable and some opposing evidence that plausible. It is a truism in advocacy that it is foolish to dispute every disputa many trials turn not on direct resolution of a crucial evidentiary issue but c verse inference drawn from a party's unwarranted disputation of some s issue. Another constraint is the counter-production by opposing counsel t to tear off costumes and wipe off grease paint, so to speak. Above all, there is tralizing effect of the judge's and jurers' skepticism. The advocate's producti appear to the decision makers as *cinéma vérité* or it is a failure.

Other constraints on the advocate consist of procedural and ethical r prohibit fabricated evidence and require disclosures such as identificatio tended witnesses.[18] The subject of "legal ethics" addresses the content, mear enforcement of these and other rules.[19] The advocate functions within the l straints imposed by these procedural and ethical rules and within the constraints of having to produce a scenario plausible to the judge. Within th straints, the duty of loyalty to clients and the interest in craft as a professior the advocate to maximum rhetorical effectiveness.

All this is familiar but profoundly unattractive. It is shocking that m great moment, including life and death in some criminal cases, are resolved ceeding that technically speaking is a theatrical enterprise. This fact is not re knowledged by the professionals. The judges are unhappy knowing that the l can get is verisimilitude. Advocates solemnly pronounce that trials are sea truth and justice, which is quite true, but are less forthcoming about the ar of their role in the process.

Many lay critics and some academicians condemn both the advocates and the artificers, without coming to terms with the fundamental diffic begets the role of advocate in the first place. An advocate who took on the ju rect truth-finding obligations would no longer be an advocate, and the parti have no advocates. We would be relegated to trusting divine intervention o tuting the advocate as "both prosecutor and judge," as the saying goes.

It may be observed that there is a similar dichotomy of roles in the vocations of politician in constitutional regimes and business manager in capitalist systems. In the domestic affairs of constitutional regimes, the governing party is supposed to make policy that is truly public, much as a judge is supposed to find the truth. However, constitutional systems involve an opposition party (sometimes more than one) committed to continually challenging whether the governing party's policies fulfill that standard. The "loyal opposition" is precommitted to oppose, quite like the precommitment of the advocate and on the same justification: the risk of error by those in authority. In the private sector of capitalist regimes, a similar function is performed through the force of competition. Advertising, for example, is advocacy by a business competing for the customers' decision.

The Legal Counselor's Imaginary World

A lawyer's responsibility goes beyond making an advocate's artful presentation if a dispute goes to trial. The lawyer must previously consider, as objectively as possible, the risk of losing in a trial. That is to say, an advocate is also a legal counselor.

A trial is a future contingent event and hence a gamble. Similarly contingent, and therefore something of a gamble, is any transaction with official authority that depends on interpretation of rules or determination of facts—for example, an encounter with tax authorities or the environmental regulators. The same kind of contingency is entailed in more or less contentious "private" transactions, for example between landlord and tenant, seller and buyer, borrower and lender. All such transactions potentially can be resolved by a trial before a judge, with corresponding contingencies. But short that, contentious transactions are resolved by bargaining—give and take between the parties, or a decision by one of them to lump it and retire. The bargaining postures are adopted in terms of the contours of legal rights—"bargaining in the shadow of the law."[20]

In the language of gambling, the lawyer as counselor must give advice to the client as to whether to raise, hold, or fold. The advice is in confidence and is supposed to be loyal but objective. Objectivity in an advocate's advice requires analysis informed by discerning appreciation of the client's interests, not improperly colored by the lawyer's own interests. The obligation to give candid advice is reinforced by the advocate's personal interest in avoiding an avoidable defeat, which translates into future financial returns, reputation, and, not the least, a personal sense of craftsmanship in navigating troubled social waters. A legal counselor is obliged to assess the client's interest as the client interprets that interest, not as the lawyer would interpret it.[21] However, a client can be startled to receive in private a dour and pessimistic estimate of a cause that his lawyer had boldly championed in court and to the opposing party.

There are of course cases in which a legal counselor need not weigh the contingency in adjudication. A conspicuous example is a death penalty case, where the accused has no practical choice except to take the risk of a trial. However, most ca going to trial do so because the opposing advocates have made substantially differ estimates of their risks of loss.[22] Hence, the aphorism that a trial represents a fail of settlement. A more formal statement is that a trial often constitutes a failure one or both advocates to make an adequately objective estimate of the risk of loss.

The Transaction Lawyer's Imaginary World

Most services provided by lawyers involve legal documentation, not trials or adv concerning litigation. "Transaction practice," as it is generally referred to, consists drafting contracts, mortgages, wills and trusts, corporate prospectuses regulatc compliance statements, and myriad other documents.

Functionally, transactional practice is like the theatrical production of an adv cate, except that it is at an earlier stage in a chain of events. Without documentatic parties to a transaction—a sale, a loan, and so on—rely, first of all, for compliance each other's good faith and on private sanctions such as bad-mouthing and refus to deal in the future. If the matter comes to litigation, the parties are governed by t law's general "default rules." However, modern regimes recognize that these defa rules can be superseded by provisions in contracts and other documents. For exa ple, the default rule governing family inheritance is that decedents' property goes their spouse or children, but law permits a will that directs property to charities other relatives. And so on for the myriad contracts that govern ordinary transactic in modern life. Transaction work thus establishes different legal frameworks for t parties' situation and for their bargining possibilities. In drafting a legal docume the transaction lawyer tries to envision all the contingencies that could disrupt t transaction—fire, flood, bankruptcy, death, etc. In addressing these contingenci lawyers devise language favorable to clients but likely also to be acceptable to otl parties and not so one-sided as to be unenforceable in court.[23] In effect, the ha and mind of the lawyer envelop the transaction in a different local reality.

Secrecy

Much of the lawyer's work in all these functions—advocacy, counseling, drafting– secret from everyone but his client. The courtroom advocate creates impressions f consumption by the judge, reserving the rest of what the advocate knows. The le counselor gives confidential advice to the client concerning the risks and alternati in litigation and negotiation. The transaction lawyer discloses only the document self and not the scenarios to which the language of the document might apply. Th secrets are protected from the court's inquiry by the attorney-client privilege a from others by the lawyer's duty to maintain secrecy of the client's confidences.[24]

Marvin Frankel brilliantly expounded how the advocates' productions can a pear misleading to a judge, but without further discussing the ethics of the situati

"back stage."[25] Professor Monroe Freedman has vigorously defended the role of advocate[26] but has not much explored similar problems that arise in legal counseling. Dean Anthony Kronman has articulated the angst of many lawyers who evidently wish they were engaged in what they (or at least Dean Kronman) would consider a more noble enterprise, but without plumbing the enterprise in which lawyers actually are engaged.[27] Retired corporation lawyers, such as Sol Linowitz, know what is involved in being legal counselor for a corporate client but typically address legal process from a judicial viewpoint, or even an Olympian one.[28]

The hard facts are that a lawyer's functions include being a partisan rhetorician and keeping secrets to the advantage of favored parties (clients) and to the disadvantage of others who could benefit from the information. Each of these functions is morally disreputable according to central themes in modern ethical and religious traditions.

Agency Further Considered

Moral philosophy has generally aimed at universal application, that is, formulations of what a person—in principle, any person—ought to do in one or another circumstance. One notable exception is the Judaic tradition, which prescribed highly specific rules for a specific people.[29] Another exception to this universal orientation is recognition of situational moral dilemmas such as circumstances where a parent sees that one of her children is drowning but where attempted rescue would risk loss of the parent's life and as well thereby loss to the rest of the family.

One fact of special relevance in modern moral philosophy is that most agency relationships are between unequals. If the client-lawyer relationship, if the client could provide himself with advice and assistance equal to that available from a lawyer, the lawyer would be unnecessary. The lawyer's training and experience thus effectuate the purposes of the "community" formed by client and lawyer better than those purposes can be effectuated by the client acting for himself. At the same time, under principles of agency law and the rules of professional ethics, the client has final authority of objectives of the representation—for example, whether to settle in litigation or to walk away from a proposed transaction.[30] It is therefore inappropriate to talk of equality or "democracy" among the participants in the relationship, instead of recognizing that the participants make different contributions.

The agency relationship also involves expense by or on behalf of the client. There is much caviling about whether lawyers' fees are too high, and whether lawyer overbilling or outright fraud are rampant. However, there would still be costs even if lawyers—or other politicians—were paid the same as public school teachers and if all such agents were completely honest in their fee charges. Because expense is involved, access to lawyer services necessarily depends on resources available to pay. I do not see how this problem can be overcome. Even if legal services were rationed, administration of such a scheme would require differentiation between "meritorious" claims for assistance and other claims, and that task would encounter the d crepancy between reality and appearance described earlier. If public policy aimed perfect equality in providing legal assistance, it seems safe to predict the evolution bribery, black markets or auxiliary services, performing equivalent functions. Under any of these regimes, access to lawyers' assistance would be unequal. "Equal before the law" can be achieved only imperfectly. This hard fact not only pose dilemma for a society committed to democracy but it also enfeebles any discussi of lawyers' social responsibilities that assume true equality before the law, as disti from the adequacy of representation.

Each of these aspects of agency entails difficulties that seem to me insoluble : cording to general principles. How far should the lawyer's duty to client be cc strained by responsibilities to others—for example, the responsibility not to m lead?[32] What is the appropriate degree of paternalism by the lawyer, given that t client and lawyer are unequal?[33] How much is "enough" legal assistance, especia for a client who cannot pay the full cost? And at what point, and to what lawful pu poses, should a skillful practitioner refuse assistance to a client with abundant sources but a cause that appears to the lawyer, having an insider's knowledge, as t just or antisocial? (Tobacco companies and O. J. Simpson come to mind.) In r opinion, lawyers as citizens with special information on these issues should u ameliorative measures in the political forum—for example, funding for legal a However, as far as I can see, lawyers as such have no special capability to discern a propriate solutions to these distributional problems. I do not see how these qu tions can be answered in general terms, any more than general terms can respond similar questions on the public agenda involving health care, educational oppor nity, and housing standards.

More fundamental, the concept of agency contravenes a basic theme in so ethical traditions. It violates a Christian ideal of equality and equal access to Go grace and mercy[34] and a Greek ideal of democratic equality of citizens. It violates t Kantian Categorical Imperative: The categorical imperative . . . is: act upon [su jective grounds] that can also hold as a universal law.[35] Agency by definition enta commitments to some indentifiable principal, with at least partial subordination the interests of others. In my view, the Kantian universal presupposes a world dev of relationships involving parties who stand in various relationships with each oth parent and child and "others," husband and wife and "others," partners, lawyer a client, fellow countrymen, etc.

Partisanship Further Considered: "Who Counts"

The correlate of agency is partisanship. One who undertakes to be another's ag cannot be impartial as regard third parties. This in turn poses the question of "W counts?" and for what.

At the extremes, nearly all agree that everyone counts—everyone is entitled

compassionate treatment—in answering the question of whether genocide is evil. The difficult questions begin short of that extreme—for example, whether a particular war is "just"[36] or whether abortion is always wrong.[37] Similar questions arise in legal ethics because invoking legal sanctions has similarities to going to war or otherwise causing harm to innocents. Litigation can impose an unjust result through decision by an authority from whom there is no recourse, whereby an advocate for the winning party becomes the instrument of injustice. In legal ethics, the client is the one "who counts" more than others.

Prevailing moral philosophy has great difficulty with the idea that an actor can properly give preference to one individual as compared with others, or to one group compared with another. I have seen no satisfactory resolution of this problem in universal terms. Professor Michael Walzer, for example, proposes a peculiar concept of equal treatment: "The principle of equal consideration would . . . apply only within [legally separated] groups. Equality is always relative; it requires us to compare the treatment of this individual to some set of others, not to all others." I cannot distinguish between that formulation and segregation, which also distinguished between groups separated by law.

A recent attempt to address the problem of "who counts" is a thoughtful analysis by Onora O'Neill, *Towards Justice and Virtue.* In her pivotal section, "Constructing the Scope of Ethical Concern, Dr. O'Neill concludes: "[The] underlying idea is that for *practical* purposes it is not necessary to have a comprehensive theory of ['who counts']. Agents do not need a comprehensive account of ethical standing that covers all possible cases; but they do need *procedures* that can be deployed in circumstances they actually face." The qualifying term "practical" in this passage seems to translate into much-despised applied ethics. The interlinked reference to "procedures" might seem promising and would be welcome to lawyers, who are proceduralists. However, when Dr. O'Neill explains the procedures, they hinge on preexisting assumptions that in some unexplained way have been fashioned by the actors themselves: "[The actors] will need to construct rather than to presuppose an account of ["who counts."] . . . The presuppositions of activity commonly include rather specific assumptions about others who are taken to be agents and subject. . . ."[38] O'Neill does not tell us what an actor is "to construct," or out of what materials. This seems to me a concession that problems of ethics are necessarily situational and cannot be based on impartiality. It would follow that the only way someone can decide "who counts" is in terms of the actor's situation, such as being a lawyer and therefore governed by norms of legal ethics.

Secrecy Further Considered

The rules of truthfulness governing lawyers are designed to permit lawyers to keep secrets, but also to prevent lawyers from lying to a judge or to an opponent. Under current ethical rules, however, withholding relevant information is not "lying" unless

being fully forthcoming is required in specified situations. These situations are c limited. One is where disclosure of confidential information will further the cli interests. (Partisanship again.) A second is in response to a direct question tha court is authorized to ask. However, the rules and conventions sharply limit perm able questions. General rules of law governing all individuals, including lawyers, hibit materially misleading statements. Where a question has arisen concernin lawyer's own legal probity in a matter undertaken for a client, lawyers may dis confidences to protect themselves. Attorneys are not required to risk going to jai assisting clients who turn out to be crooks. But apart from these circumsta lawyers must avoid disclosing confidential information. As a result they s through clenched teeth.

At the same time, there are also practical constraints on a lawyer's freedo conserve the truth. These arise primarily from the necessities of productive neg tion, an activity in which most lawyers engage. Productive negotiation requi combination of openness about matters to be conceded and secrecy about c reserve position, and a game of hide and seek within those limits. Positively misl ing statements are destructive because they frustrate achieving a positive resu "getting to 'yes'" in the jargon of negotiation. Care in expression and wariness i tention are therefore required in playing the game.

Being less than fully forthcoming with the truth violates commonly pronou standards of proper behavior, especially when employed to advantage a client's i est over the interest of another, perhaps with resulting injustice.[39] It is therefore possible to reconcile an ethical demand for "the whole truth" with what lawyers dc everyone beyond the age of four realizes the uses of imperfect truth and often re to them. Public opinion generally acknowledges the need to be less than fully fo coming in various circumstances, despite the pronounced standards to the contra

Concluding Reflections

The practice of law thus considered is incompatible with traditional virtues of tonomy, impartiality, and openness. It is, on the contrary, a Machiavellian cal like politics, management, and other relationships in ordinary life. Machiavelli's proposition was that in affairs of state it was necessary "to be a great feigner and sembler."[41] In such matters "force alone will [not] ever be found to suffice, whil will often be the case that cunning alone serves the purpose."[42] So also in the pra of law, with the client standing in the place of the state.

Machiavelli still has a bad name, although his reputation has improved thro the respectful attention he received from Sir Isaiah Berlin.[43] Yet Machiavelli had found insights, particularly in the claims that institutional structures are extrer vulnerable and that dissimulation is a useful alternative to physical force. Client also vulnerable or consider themselves so; otherwise, they would not be see lawyers' assistance.

It might be useful, therefore, to begin analysis of legal ethics—and political and business ethics and ethics in ordinary life as well—with several Machiavellian premises. That is:

- lawyers, politicians, and business leaders cannot be impartial because they are agents, as are most ordinary people in many situations;
- an agent's responsibility to "relevant others" requires providing protection of those others in preference to those outside the pale;
- being not fully forthcoming with truth is a cheap and generally peaceful means of providing effective protection.

From this perspective, the serious ethical questions do not involve the justification for partisanship and secrecy, but rather the terms of situational norms that limit partisanship and confidentiality. Legal ethics, on this view, involves important moral, political and legal problems, but ones that are not much illuminated by traditional moral philosophy.

There is a more fundamental difficulty in trying to make use of traditional moral philosophy in matters of legal ethics. This is the problem of gradients, i.e., the specification of morally acceptable positions within extreme limits. For example, agents generally are not permitted to use lethal force on behalf of their constituents, but it is recognized that this limitation does not apply to soldiers in war or to policemen under some circumstances. A lawyer is not permitted to lie to a court, but in some situations can present evidence that he would conclude was false if it were his role to determine that issue. The partisanship involved in agency is prohibited on the part of such functionaries as judges, teachers, and auctioneers, but not on the part of legislative representatives or salesmen. All regimes impose limits on secrecy in domestic affairs but fewer ones in foreign affairs.

The concepts of agency, of partisanship, and of confidentiality thus all are conditional upon gradients. Moral philosophy has had difficulty with degrees since Aristotle sought to explicate a "mean" of virtue located intermediate on a continuum between vices on either end, for example a mean of "truthfulness" between "boastfulness" and "understatement."[44]

One interpretation for this difficulty is that specification of gradients *is*—is equivalent to—specification of situations or local conditions. That is, inelligibly addressing whether boastfulness or understatement or fulsome truth is appropriate requires such a specification. Yet to specify "the" situation or "a" situation is also to exclude all other situation and, thereby, to preclude universal statements.

The approach taken here follows that of Sir Isaiah Berlin, whose thought is aptly summarized by John Gray: "The implication of Berlin's thought for philosophical method is that the conception of the prescriptive authority of philosophy, and its pretensions to govern practice, which pervades the work of Aristotle, of Plato, of Hobbes, of Spinoza, of Kant, or J. S. Mill and (in a distinct but no less manifest way)

of at least the earlier Rawls, say, cannot be accepted: philosophy's pretension: be far humbler."[45]

Notes

I thank Professor Susan Koniak and Howard Lesnick for their helpful comments, and M Applebaum for research assistance.

1. I use the term "moral" philosophy because that is the conventional descrip philosophical discussion of normative issues. In my opinion, the term "ethical" phil might be most appropriate because that term denotes intersubjective deliberation : trasted with wholly subjective reflection, for which the term "moral" might be more ap ate. See G. Hazard, "Law, Morals and Ethics," *So. Illinois U.L.J.* 447 (1995).

2. A rather difficult kind of criticism is in R. Posner, "The Problematics of Mo Legal Theory," 111 *Harv. L. Rev.* 1638 (1998).

3. A detailed comparison of rules of professional ethics in various countries is E frey, ed., *Law Without Frontiers: A Comparative Survey of the Rules of Professional Ethics able to Cross-Border Practice of Law* (Amsterdam: Klumers, 1995).

4. Aristotle, *Nichomachean Ethics, Book Two* (Martin Ostwald, trans.; Indiar Bobbs-Merrill, 1962), 9.

5. See Isaiah Berlin, *Vico and Herder: Two Studies in the History of Ideas* (Ne Viking Press, 1976); *Concepts and Categories: Philosophical Essays* (London: Hogarth 1978); and *The Crooked Timber of Humanity: Chapters in the History of Ideas* (Ne Knopf, 1991). See also John Gray, *Isaiah Berlin* (Princeton, N.J.: Princeton University 1996).

6. See Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge: Harvai versity Press, 1985)

7. Hilary Putnam, *Renewing Philosophy* (Cambridge: Harvard University Press, 190–91.

8. William James, "The Principles of Psychology," in Bruce Wilshire, ed., *William The Essential Writings*, 44 (Albany: State University of New York Press, 1984).

9. The classic statement of judicial authority is in *Marbury v. Madison*, 1 Cran 177, 5 U.S. 137 (1803): "It is emphatically the province and duty of the judicial departr say what the law is." An observation by Justice Robert Jackson applies to judges general are not final because we are infallible, but we are infallible because we are final." *Brown* 344 U.S. 443, 540 (1953).

10. See, e.g., 28 U.S.C. Sec. 455; and American Bar Association, Model Code of J Ethics. I bypass consideration of the salient function of the jury in deciding issues of fa ticularly in the American legal system. In the framework of this analysis, in a trial l imaginary world the jury has the same significance as a judge.

11. The distinction between religious-based authority and rational-bureaucra thority is that drawn by Max Weber, who identified a third basis of authority—the matic. See Weber, *The Theory of Social and Economic Organization* (trans. A. M. Hen and Talcott Parsons) (New York: Oxford University Press, 1947). The commonly em distinction between the "legal" and "political," for example in the American conception aration of powers, roughly corresponds to Weber's distinction between bureaucratic tional and charismatic processes.

12. Aristotle, *The Politics, Book 7*, 1326:15 (Jonathan Barnes revision of B. Jowett, Cambridge: Cambridge University Press, 1988).

13. Compare Deuteronomy 14:2: "For thou *art* a holy people . . . and the Lord hath chosen thee to be a peculiar people unto himself, and above all the nations that *are* upon the earth."

14. See G. Hazard, "Discovery and the Role of the Judge in Civil Law Jurisdictions," 73 *Notre Dame L. Rev.* 1017 (1998).

15. *Dialogues of Plato* (B. Jowett, trans., New York: Appleton, 1898).

16. Aristotle, *The Art of Rhetoric* 76–77 (H.C. Lawson-Tancred trans. London: Penguin, 1991).

17. Some academicians seem unable to countenance such a role, or its epistemological and social foundations. See William H. Simon, "Ethical Discretion in Lawyering," 101 *Harv. L. Rev.* 1083 (1988).

18. See ABA, Model Rules of Professional Conduct, Rules 3.3 and 3.4.

19. E.g., American Law Institute, Restatement of the Law Governing Lawyers, Proposed Final Draft No. 1 (1996), Proposed Final Draft No. 2 (1998); G. Hazard and W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (2d ed. Englewood Cliffs, N.J.: Prentice Hall Law & Business, 1990); C. Wolfram, *Modern Legal Ethics* (St. Paul, MN: West Publishing Co., 1986).

20. See R. Mnookin and L. Kornhauser, "Bargaining in the Shadow of the Law," 88 *Yale L. J.* 950 (1979).

21. Restatement of the Law Governing Lawyers, Proposed Final Draft No. 1 (1996) §28(1) See also §§31–33.

22. See F. James, G. Hazard, and J. Leubsdorf, *Civil Procedure* §6.3 (4th ed., Boston: Little, Brown, 1992).

23. See Restatement Second of Contracts Sec. 208 (unconscionable contract or term).

24. See, e.g., Restatement of the Law Governing Lawyers Proposed Final Draft, No.1, §118; see ABA, Model Rules of Professional Conduct, Rule 1.6.

25. See M. Frankel, "The Search for Truth: An Umperial View," 123 *U. Pa. L. Rev.* 1031 (1975).

26. See M. Freedman, *Understanding Lawyers' Ethics* 156 (New York: Matthew Bender, 1998).

27. Anthony Kronman, *The Lost Lawyer* (New Haven: Yale University Press, 1997).

28. Sol M. Linowitz with Martin Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (New York: C. Scribner's Sons, 1994).

29. See n. 12 above

30. See ABA, Model Rules of Professional Conduct, Rule 1.2(a).

31. See Paul Brand, *The Origins of the English Legal Professional* (Cambridge, Mass.: Blackwell Publishers, 1992).

32. For some "local" rules on this subject, see ABA, Model Rules of Professional Responsibility, Rules 1.6, 3.1, 3.3, 3.4, and 4.1.

33. Local rules addressing this problem include Rules 1.13(b) and 1.14.

34. Matthew 25:40: "Inasmuch as ye have done *it* unto one of the least of these my brethren, ye have done *it* unto me."

35. Immanuel Kant, *The Metaphysics of Morals* 17 (Mary Gregor, trans., Cambridge: Cambridge University Press, 1996).

36. See Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977).

37. See, e.g., Cynthia Gorney, *Articles of Faith: A Frontline History of the Abortion Wars*, (New York: Simon and Schuster, 1998).

38. Onora O'Neill, *Towards Justice and Virtue: A Construction Account of Practical Reasoning* (Cambridge: Cambridge University Press, 1996), 99; Cf. G. Hazard, "Dimensions of Ethical Responsibility: Relevant Others," 54 *U. Pitt. L. Rev.* 965 (1993).

39. See Sissela Bok, *Lying: Moral Choice in Public and Private Life* (New York: Vintage Books, 1979); and Sissela Bok, *Secrets: On theEthics of Concealment and Revelation* (New York: Vintage Books, 1983).

40. Compare Janny Scott, "Bright, Shining or Dark: American Way of Lying," *NY. Times*, Aug. 16, 1998, p. 3: "It is okay to lie to hide something that will be used unfairly against you or others, or to conceal information that an inquisitor has no right to have (the classic Nazis-at-the-door-while-the-Jews-are-in-the-attic exception, stretched in contemporary life to justify paying the baby sitter off the books because the employer cannot afford child care otherwise)." The foregoing "cases" are among those in which people consult lawyers.

41. Niccolo Machiavelli, *The Prince*, Book 18 (Luigi Ricci, trans., New York: Modern Library, 1950).

42. Niccolo Machiavelli, *The Discourses*, Chap. 13 (Luigi Ricci, trans., New York: Modern Library, 1950).

43. Isaiah Berlin, "The Originality of Machiavelli," in *Against the Current: Essays in the History of Ideas* (New York: Oxford University Press, 1979).

44. See Aristotle, *Nichomachean Ethics*, Book, 2 viii (J. A. K. Thomson, trans., London: Penguin, 1955).

45. John Gray, *Isaiah Berlin* 7 (Princeton, N.J.: Princeton University Press, 1996).

6

The Ethics of Wrongful Obedience

DAVID J. LUBAN

A century ago the legal realists taught us that the real law is the law in action, not just the law in books. They taught us to think things, not words, and placed their faith in the power of the still-youthful social sciences to think legal things accurately and rigorously. In legal ethics, I think most scholars would agree on the single biggest discrepancy between the law in books—the profession's ethics codes—and the law in action. The ethics codes are almost entirely *individualist* in their focus. They treat lawyers (clients, too, for that matter) largely as self-contained decision makers flying solo. In fact, however, lawyers increasingly work in and for organizations. While most lawyers continue to practice in small firms, and sole practitioners still form the largest single demographic slice of the profession, the trend is toward organizational practice. The largest law firms and corporate legal departments have more than a thousand lawyers, and the biggest firms in the country three decades ago would not make this year's top hundred.

The importance of these trends for legal ethics can hardly be exaggerated. Psychologists, organization theorists, and economists all know that the dynamics of individual decision making change dramatically when the individual works in an organizational setting. Loyalties become tangled, and personal responsibility gets diffused. Bucks are passed, and guilty knowledge bypassed. Chains of command not only tie people's hands, they fetter their minds and consciences as well. Reinhold Niebuhr titled one of his books *Moral Man, Immoral Society,* and for students of ethics no topic is more important than understanding whatever truth this title contains.

My own students, I might add, think about it constantly without any prompting. No dilemma causes them more anxiety than the prospect of being pressured by their boss to do something unethical. Not only do they worry about losing their jobs

if they defy the boss to do the right thing, they also fear that the pressures of the situation might undermine their ability to know what the right thing is.

An Example: The Berkey-Kodak Case

One of the best-known and most painful examples of this phenomenon was the Berkey-Kodak antitrust litigation in 1977, a bitterly contested private antitrust action brought by Berkey Photo against the giant of the industry. In the heat of adversarial combat, Mahlon Perkins, an admired senior litigator for the large New York law firm representing Kodak, snapped. For no apparent reason, he lied to his opponent to conceal documents from discovery, then perjured himself before a federal judge to cover up the lie. Eventually he owned up, resigned from his firm, and served a month in prison. Perhaps this sounds like an instance of chickens coming home to roost for a Rambo litigator. But by all accounts, Perkins was an upright and courtly man, the diametrical opposite of a Rambo litigator.[1]

Joseph Fortenberry, the associate working for him, knew that Perkins was perjuring himself and whispered a warning to him; but when Perkins ignored the warning, Fortenberry did nothing further to correct his mistatements. "What happened" recalls another associate, "was that he saw Perkins lie and really couldn't believe it. And he just had no idea what to do. I mean, he . . . kept thinking there must be a reason. Besides, what do you do? The guy was his boss and a great guy!"[2]

Notice the range of explanations here. *First,* the appeal to hierarchy: the guy was his boss. *Second,* to personal loyalty: the guy was a great guy. *Third,* to helplessness: Fortenberry had no idea what to do. *Fourth,* Fortenberry couldn't believe it. He kept thinking there must be a reason. The last is an explanation of a different sort, suggesting that Fortenberry's own ethical judgment was undermined by the situation he found himself in.

As a matter of fact, the same may be said of Perkins. He wasn't the lead partner in the litigation; he belonged to a team headed by a newcomer to the firm, an intense, driven, focused, and controlling lawyer.[3] In a situation of supreme stress, Perkins's judgment simply failed him.

In Berkey-Kodak, neither Perkins nor Fortenberry received an explicit order to break the rules, but sometimes lawyers do. (And in Berkey-Kodak, Perkins's behavior, ignoring Fortenberry's whispered warnings, amounts to a tacit order to Fortenberry to say nothing.) What guidance do the ethics rules give when this happens? ABA Model Rule 5.2(a) denies the defense of superior orders to a subordinate lawyer ordered to behave unethically, but Rule 5.2(b) states that a subordinate may defer to "a supervisory lawyer's reasonable resolution of an arguable question of professional duty." The problem is that the pressures on subordinate lawyers may lead them to misjudge when a question of professional duty is arguable and when the supervisor's resolution of it is reasonable. Remember Fortenberry, who "kept thinking there must be a reason" when he heard Perkins perjure himself before a federal judge. This

was not even close to an arguable question, and there's nothing reasonable about perjury—but the very fact that it was Fortenberry's respected supervisor who committed it undermined his own confidence that he understood what was reasonable and what was not. When that happens, Rule 5.2(b) will seem more salient to an associate than the bright-line prohibition on wrongful obedience that the first half of the rule articulates.[4]

The Milgram Obedience Experiments

I want to see what we can learn about wrongful obedience from the most celebrated effort to study it empirically, Stanley Milgram's experiments conducted at Yale thirty-five years ago. Even though these experiments are very well known, it is useful to review what Milgram did and what he discovered.[5]

Imagine, then, that you answer Milgram's newspaper advertisement, offering twenty dollars if you volunteer for a one-hour psychology experiment.[6] When you enter the room, you meet the experimenter, dressed in a gray lab coat, and a second volunteer, a pleasant, bespectacled middle-aged man. What you don't know is that the second volunteer is in reality a confederate of the experimenter.

The experimenter explains that the two volunteers will be participating in a study of the effect of punishment on memory and learning. One of you, the learner, will memorize word-pairs; the other, the teacher, will punish the learner with steadily increasing electrical shocks each time he makes a mistake. A volunteer, rather than the experimenter, must administer the shocks because one aim of the experiment is to investigate punishments administered by very different kinds of people. The experimenter leads you to the shock-generator, a formidable-looking machine with thirty switches, marked from 15 volts to 450. Above the voltages, labels are printed. These range from "Slight Shock" (15–60 volts) through "Danger: Severe Shock" (375–420 volts); they culminate in an ominous-looking red label reading "XXX" above 435 and 450 volts. Both volunteers experience a 45-volt shock. Then they draw lots to determine their role. The drawing is rigged so that you become the teacher. The learner mentions that he has a mild heart problem, and the experimenter replies rather nonresponsively that the shocks will cause no permanent tissue damage. The learner is strapped into the hot seat, and the experiment gets under way.

The learner begins making mistakes, and as the shocks escalate he grunts in pain. Eventually he complains about the pain, and at 150 volts announces in some agitation that he wishes to stop the experiment. You look inquiringly at the man in the gray coat, but he says only, "The experiment requires that you continue." As you turn up the juice, the learner begins screaming. Finally, he shouts out that he will answer no more questions. Unflapped, the experimenter instructs you to treat silences as wrong answers. You ask him who will take responsibility if the learner is injured, and he states that he will. You continue.

As the experiment proceeds, the agitated learner announces that his heart is starting to bother him. Again, you protest, and again the man in the lab coat replies,

"The experiment requires that you continue." At 330 volts, the screams stop. learner falls ominously silent, and remains silent until the bitter end.

But it never actually gets to the bitter end, does it? You may be excused for tl ing so. In a follow-up study, groups of people heard the Milgram experimen scribed without being told the results. They were asked to guess how many p would comply all the way to 450 volts, and to predict whether they thems would. People typically guessed that at most one teacher out of a thousand w comply—and no one believed that they themselves would.[7]

In reality, 63 percent of subjects complied all the way to 450 volts.[8] More this is a robust result: it holds in groups of women as well as men, and experime obtained comparable results in Holland, Spain, Italy, Australia, South Africa, many, and Jordan; indeed, the Jordanian experimenters replicated the 65 percer sult not only among adults but among seven-year-olds. Originally, Milgram ha tended to run his experiments in Germany, to try to understand how so r Germans could participate in the Holocaust; his American experiments were m for the purpose of perfecting his procedures. After the American dry run, how Milgram remarked: "I found so much obedience, I hardly saw the need of takin experiment to Germany."[9]

In my view, we should regard the radical underestimates of subjects' willin to inflict excruciating shocks on an innocent person as a finding just as impo and interesting as the 65 percent compliance rate itself. The Milgram experin demonstrate not only that in the right circumstances we are quite prone to des tive obedience, but also that we don't believe this about ourselves, or about neighbors—nor do we condone it.[10] Milgram demonstrates that each of us oug believe three things about ourselves: that we disapprove of destructive obedi that we think we would never engage in it, *and, more likely than not, that w wrong to think we would never engage in it.*

Milgram was flabbergasted by his findings. He and other researchers ran dc of variations on the experiment, which I won't describe, although I'll mention : of them shortly. His battery of experiments, which lasted for years and ultimatel volved more than 1,000 subjects, stands even today as the most imaginative, a tious, and controversial research effort ever undertaken by social psychologists.

The Milgram experiments place moral norms in conflict. One is what I wil the *performance principle*: the norm of doing your job properly, which in hierarc work-settings includes the norm of following instructions. The other is the *no-i principle:* the prohibition on torturing, harming, and killing innocent people. I: abstract, we might think, only a sadist or a fascist would subordinate the no-l principle to the performance principle. But the Milgram experiments seem to : that what we think in the abstract is dead wrong. Two out of three people you pa the street would electrocute you if a laboratory technician ordered them to.

The question is why. At this point, I'm going to run through several exp: tions of the Milgram results. None of them fully satisfies me. After exploring weaknesses, I turn to the explanation that seems to me most fruitful.

The Agentic Personality; The Classical Liberal Personality

Each of the explanations I will discuss focuses on a different aspect of human personality, and I will label them accordingly. There is, first, Milgram's own explanation. He describes the mentality of compliant subjects as an *agentic state*—a state in which we view ourselves as mere agents or instruments of the man giving the orders. The terminology is entirely familiar to lawyers, of course, because it is agency principles that govern the relationship between lawyer and client.

The problem with this explanation is that it merely relabels the question rather than answering it. *Why* do we turn off our consciences and "go agentic" when an authority figure starts giving us orders? Saying "because we enter an agentic state" is no answer; it's reminiscent of Molière's physician, who explains that morphine makes us sleepy because it possesses a "dormative virtue."

Admittedly, Milgram's subjects usually offered the agentic explanation in their debriefing. But as we all know, "I was just following orders" is often an insincere rationalization. Remember that in the follow-up studies, no one who heard the Milgram experiment described stated that they would comply, and that is another way of saying that none of them accept "just following orders" as a valid reason for complying. Even if the subjects offered the agentic explanation sincerely, we should never accept it at face value, because we human beings are not very gifted at explaining our own behavior.

Indeed, one of Milgram's experiments dramatizes this fact. Many of Milgram's subjects insisted that they went along with the experiment only because the learner had consented. Their response is, of course, quite different from the agentic explanation. Here, subjects claim to be impressed by the learner's consent, not the experimenter's orders. Their consent-centered explanation of why they complied is a hallmark of classical liberalism, so we might as well call them "Classical Liberal Personalities"—if, that is, their understanding of why they complied is correct. To test this classical liberal explanation, Milgram ran a variation in which the learner expressly reserved the right to back out of the experiment whenever he wanted. He did this out loud, in the presence of the teacher and the experimenter. But even so, 40 percent of the subjects followed the experimenter's instructions to the bitter end despite the learner's protests; and three-fourths of the subjects proceeded long past the point where the learner withdrew his consent. Apparently, whether the learner consented or not is actually not especially relevant to whether subjects are willing to administer high-level shocks to him regardless of his subsequent protests. We simply can't take subjects' own explanations for their obedience at face value.

The Authoritarian Personality

If the *Agentic Personality* doesn't explain Milgram's results, how about the *Authoritarian Personality*? A group of researchers in the early 1950s devised a famous questionnaire to measure the cluster of personality traits that they believed characteri supporters of fascist regimes—traits that include an emotional need to submit authority, but also an exaggerated and punitive interest in other people's sexual and a propensity to superstition and irrationalism. They called this measure *F-scale*—'F' for fascist.

Interestingly, Milgram's compliant subjects had higher F-scores than his defi subjects.[11] Indeed, isn't it mere common sense that authoritarians are more obedi to authority?

Unfortunately, the answer is no. For one thing, subsequent research has larg discredited the authoritarian personality studies. The F-scale turns out to be a gc predictor of racism, but a bad predictor of everything else politically interest about authoritarianism (such as left-right political orientation).[12] For another, p ple who volunteer for social psychology experiments are generally low-F, wh makes Milgram's subjects at best atypical authoritarians.[13] For a third, high-F in viduals typically mistrust science, so it rather begs the question to assume that tl regard the experimenter as an authority to be deferred to. Finally, remember that F-scale measures other things besides emotional attachment to hierarchy. We mi as well call high-F something other than the Authoritarian Personality: we might it the Superstitious Personality, or even the Perverted Prude Personality. In that ca the explanation only raises new questions. Why should Perverted Prudes or believ in alien abduction be specially prone to obedience?

The Sadistic Personality

Some researchers, perhaps with the Perverted Prude in mind, argued that the tr explanation for Milgram's results is the *Sadistic Personality*: the experimenter's ders remove our inhibitions, and permit us to act on our repressed urge to hurt otl people for pleasure.

The problem is that there is no evidence that we *have* such an urge. None of M gram's compliant subjects seemed to take even the slightest pleasure in administeri punishment, and many of them seemed downright agonized. They protested, th bit their lips until they bled, they broke into sweat or hysterical giggles. One w into convulsions. Milgram writes, "I observed a mature and initially poised busine man enter the laboratory smiling and confident. Within twenty minutes he was duced to a twitching, stuttering wreck, who was rapidly approaching a point of ne ous collapse. . . . At one point he pushed his fist into his forehead and mutter 'Oh God, let's stop it.' And yet he continued to respond to every word of the expe menter, and obeyed to the end."[14] This hardly describes a sadist at work.

And, as it happens, the researchers who proposed the Sadistic Personality had ax to grind.[15] They claimed, based on Rorschach tests done on the Nuremberg fendants and Adolf Eichmann, that every last one of the top Nazis was a psychopa Like Professor Goldhagen today, they wanted to show that there was nothing or

nary about Hitler's executioners, nothing banal about Nazi evil. Their interest in Milgram seemed largely a competitive interest in shoring up their own theory of Nazism.

But their studies were flawed and their argument fallacious. Without interviews and other evidence of clinical pathology, Rorschach diagnoses are quack psychiatry; in any case, the researchers used a discredited method to analyze their Nazi Rorschachs. More basically, Rorschach diagnoses are based on deviations from statistical norms—and Milgram compliance *is* the statistical norm! To say on the basis of Rorschachs that two-thirds of adults are sadists is arithmetically impossible, like saying that all the children are above average.[16]

The Deferential Personality

A very different kind of explanation grows out of the cognitive psychology of the past three decades. Much of this research has revolved around the claim that we all rely on heuristics—rules of thumb—to make everyday judgments. Life is too short for us to be Cartesian rationalists, thinking everything through to the bottom, and natural selection is not kind to Cartesian rationalists. Instead, evolution statistically favors creatures who make snap judgments by applying largely reliable heuristics—even though, in atypical situations, the heuristic gets things badly wrong.

One of these is what might be called the *Trust Authority* heuristic. And this suggests that what drives Milgram's compliant subjects is not the Agentic Personality, nor the Authoritarian Personality, nor the Sadistic Personality, but the *Deferential Personality*. Indeed, some of Milgram's subjects said in their debriefings that they went along with the experimenter because they were sure he knew what he was doing. Remember the Berkey-Kodak associate, who "kept thinking there must be a reason" for Perkins to lie. Ordinarily, we do well to follow the Trust Authority heuristic, because authorities usually know better than lay people. At times, though, even the best heuristic fails—and Milgram devised one such situation.[17]

This is a sophisticated explanation, but I think that Milgram's own findings cast serious doubt on it. In one experiment, Milgram places the naive subject who draws the role of teacher with two experimenters instead of one. Before the session begins, one experimenter announces that a second volunteer has canceled his appointment. After some discussion of how they are going to meet their experimental quota, one of the experimenters decides that he himself will take the learner's place. Like the learner in the basic set-up, he soon begins complaining about the pain, and at 150 volts he demands to be released. Indeed, he follows the entire schedule of complaints, screams, and ominous silence.

Surely, if subjects were relying on the Trust Authority heuristic, the fact that one of the authorities was demanding that the experiment stop should have brought about diminished compliance. Indeed, in another version of the experiment, in which two experimenters disagree in the subject's presence about whether the subject should go on shocking the learner after the learner begins protesting, all of subjects broke off the experiment immediately. Here, however, the usual two-th of the subjects complied to 450 volts. Apparently, it isn't deference to the exp menters' superior knowledge that promotes obedience.

Another variant of Milgram's experiment reinforces this conclusion. In this sion, the experimenter gives his orders from another room, in a situation where clear that he cannot see what level of shock the teacher is actually administering. surprisingly, compliance drops drastically; and yet the experimenter's supe knowledge is no different than if he was standing directly behind the teacher. Ag it appears that whatever causes the teacher to obey, it is not the experimenter's ceived expertise.

The Situationist Alternative

Perhaps the most radical suggestion is that *nothing* in the subjects' personalities counts for their compliance. The so-called situationist view holds that situatic pressures, not personalities, account for human behavior. Indeed, situationists ar that attributing behavior to personality is one of the fundamental delusions to wh human beings are prey—it is, in their terminology, the "fundamental attribut error." Situationists point out that small manipulations of Milgram's experime set-up are able to evoke huge swings in compliance behavior. For example, in so experiments Milgram placed the teacher on a team with other "teachers," who w actually actors working for Milgram. When the fellow teachers defied the exp menter, compliance plunged to 10 percent; but when they uncomplainingly de ered the shocks, compliance shot up to 90 percent. Obviously, variation like arises from the situation, not from the subjects' personalities.[18] As a consequer situationists argue that the only reliable predictor of how any given person will have in a situation is the baseline rate for the entire population. The person's obse able character traits are by and large irrelevant.

Situationism offers an important reminder that human character and will not operate in a vacum. The Achilles' heel of situationism is explaining why any deviates from the majority behavior. If individual personality and idiosyncracy largely irrelevant to subjects' responses, we should find more-or-less uniform co pliance behavior. In the Milgram experiments, situationists must explain why o third of the subjects defy the experimenter. Remember that in the follow-up qu tionnaire studies, where subjects were asked whether they would comply in Milgram experiment, 100 percent said no. What, if not individual personality a idiosyncracy, causes a one-third/two-thirds split when the situation changes fr filling out a questionnaire to performing in the actual experiment?

The situationists' explanation is that even though people respond similarly similar situations, different individuals perceive situations differently from e other. Idiosyncracy operates at the level of perception and not the level of behavi

On this theory, the defiant minority simply don't perceive the experiment in the same way as the compliant majority.[19] Yet I find this explanation a little too convenient, particularly because there is no evidence to back it up—no independent study of how Milgram's subjects perceive the experiment, and no attempt to correlate perception with response. Just what do the defiant subjects perceive in the experiment that their compliant brethren perceive differently? Without an answer to this question, and evidence to support it, it seems to me that the situationist explanation of individual differences fails, and with it the situationist explanation of Milgram compliance.

A Proposal: The Corruption of Judgment

And yet I agree that the key to understanding Milgram compliance lies in features of the experimental situation. The feature I wish to focus on is the slippery-slope character of the electrical shocks. The teacher moves up the scale of shocks by 15-volt increments, and reaches the 450-volt level only at the thirtieth shock. Among other things, this means that the subjects never confront the question "Should I administer a 330-volt shock to the learner?" The question is "Should I administer a 330-volt shock to the learner *given that I've just administered a 315-volt shock?*" It seems clear that the latter question is much harder to answer. As Milgram himself points out, to conclude that administering the 330-volt shock would be wrong is to admit that the 315-volt shock was probably wrong, and perhaps *all* the shocks were wrong.[20]

Cognitive dissonance theory teaches that when our actions conflict with our self-concept, our beliefs and attitudes change until the conflict is removed.[21] We are all pro se defense lawyers in the court of conscience.[22] Cognitive dissonance theory suggests that when I have given the learner a series of electrical shocks, I simply won't view giving the next shock as a wrongful act, because I won't admit to myself that the previous shocks were wrong.

Let me examine this line of thought in more detail. Moral decision making requires more than adhering to sound principles, such as the no-harm principle. It also requires good judgment, by which I mean knowing which actions violate a moral principle and which do not. Every lawyer understands the difference between good principles and good judgment—it is the difference between knowing a rule of law and being able to apply it to particular cases. As Kant first pointed out, you can't teach good judgment through general rules, because we already need judgment to know how rules apply. Judgment is always and irredeemably particular.

Let's assume that most of Milgram's subjects do accept the no-harm principle, and agree in the abstract that it outweighs the performance principle—again, the questionnaire studies strongly suggest that this is so. *The subjects still need good judgment to know at what point the electrical shocks violate the no-harm principle.* Virtually no one thinks that the slight tingle of a 15-volt shock violates the no-harm principle: if it did, medical researchers would violate the no-harm principle every time

they take blood samples from volunteers. Unsurprisingly, only two of Milgr thousand subjects refused to give any shocks at all.

But how can 30 volts violate the no-harm principle if 15 volts didn't? if a 30-volt shock doesn't violate the no-harm principle, neither does a shock o volts.

Of course we know that slippery-slope arguments like this are unsound some point, the single grains of sand really do add up to a heap, and at some p shocking the learner really should shock the conscience as well. But it takes g judgment to know where that point lies. Unfortunately, cognitive dissonance ge ates enormous psychic pressure to deny that our previous obedience may have lated a fundamental moral principle. That denial requires us to gerrymander boundaries of the no-harm principle so that the shocks we've already delivered d violate it. However, once we've kneaded and pummelled the no-harm princip becomes virtually impossible to judge that the next shock, only imperceptibly n intense, crosses the border from the permissible to the forbidden. By luring us higher and higher level shocks, one micro-step at a time, the Milgram experim gradually and subtly disarm our ability to distinguish right from wrong. Milgr subjects never need to lose, even for a second, their faith in the no-harm princi Instead, they lose their capacity to recognize that administering an agonizing ele cal shock violates it.

What I am offering here is a *corruption of judgment* explanation of the Milg experiments. The road to hell turns out to be a slippery slope, and the travelers c really do have good intentions—they "merely" suffer from bad judgment.

The corruption-of-judgment theory fits in well with one of the other classic periments of social psychology, Freedman and Fraser's 1966 demonstration of so-called foot-in-the-door effect. In this experiment, a researcher posing as a vol teer asks homeowners for permission to erect a large, ugly "Drive Carefully!" in their front yards. The researcher shows the homeowners a photo of a pleas looking home completely obscured by the sign. Unsurprisingly, most homeow refuse the request—indeed, the only real surprise is that 17% agree to take the s (Who *are* these people?)

Within one subset of homeowners, however, 75 percent agree to take the s What makes these homeowners different? Just one thing: two weeks previously, t had agreed to place a small, inconspicuous "Be a Safe Driver" sticker in their v dows. Apparently, once the public service foot insinuated itself in the door, the en leg follows.[23] Perhaps what is surprising is only that such a small foot could pro an opening for such a large and unattractive leg. The slippery slope from so judgment to skewed judgment is a lot steeper than we may have suspected.

According to this explanation of the Milgram experiments, it is our own pr ous actions of shocking the learner that corrupt our moral judgment and lead u continue shocking him long past the limits of human decency. In a sense, then, "do it to ourselves"—Milgram compliance turns out to be the result of cognitive

sonance and our need for self-vindication, rather than obedience to authority. In that case, what role does the man giving the orders play in this explanation?

The answer, I believe, is twofold. First, his repeated instruction—"the experiment requires that you continue!"—prompts us to view the shocks as morally indistinguishable, to downplay the fact that the shocks are gradually escalating. After all, his demeanor never changes, and his instructions never vary. The authority of the superior lies in his power to shape our perceptions, by making us regard everything he asks us to do as business as usual. The experimenter's unflappable demeanor communicates a message: "This experiment is as worthwhile now as it was at the outset. Nothing has changed." Good judgment lies in drawing distinctions among near-indiscernables, whereas authoritative instructions reinforce the theme that indiscernables are identical. The experimenter undermines our judgment, rather than over-mastering our will. Second, his orders pressure us to make our decisions quickly, without taking adequate time to reflect. Together, these two effects of orders subtly erode the conditions for good judgment, and contribute to judgment's self-corruption.

The idea that obedience to evil may result from corrupted judgment rather than evil values or sadism is central to the most famous philosophical study of wrongful obedience in our time, Hannah Arendt's *Eichmann in Jerusalem*.[24] Adolf Eichmann, on Arendt's account, was neither a monster nor an ideologue, neither an antisemite nor a sadist. He was a careerist—an organization man through and through, who could never understand why doing a responsible job well might be regarded as a crime against humanity.

Arendt was struck by the many statements Eichmann made that showed that he never perceived anything at all extraordinary about mass murder. Eichmann would relate the "hard luck story" of his failure to win promotion in the S.S. to an Israeli policeman whose parents he knew had been murdered by the Nazis; or describe the "normal, human" conversation he had had with an inmate of Auschwitz, who was actually begging for his life.[25] He was utterly oblivious to the way that his listeners would regard these war stories. For Arendt, who understood that thinking is the inner dialogue by which we examine our situation from various perspectives, Eichmann's inability to think from another person's point of view meant that he could not think at all. Instead, he fell back on the slogans and party euphemisms that had structured his experience throughout his career. Eichmann insulated himself from reality with an impenetrable wall of routines, habits, and cliches.

The result was a man who was incapable of judging reality for what it was; he could experience the world only through the arid, Newspeak categories of a functionary. Eichmann's inability to think from another's point of view deprived him of the ability to think from his own point of view, perhaps even the capacity to *have* a point of view of his own. As in the Milgram experiments, Eichmann allowed his superiors to define the situation he was in; and that is why Eichmann, "an average, 'normal' person, neither feeble-minded nor indoctrinated nor cynical, could be perfectly incapable of telling right from wrong."[26]

The parallels between Arendt's account and the corruption-of-judgment theory offered here are straightforward. To begin with, consider the slippery slope that led Eichmann to the dock in Jerusalem. Eichmann "knew" that his conscience was clear about his casual decision to follow a friend's advice and join the Nazi Party, about which he knew very little at the time. As for his subsequent decision to transfer into the S.S., that was a simple mistake: he thought he was joining a different service with a similar name. He regarded his early work in Jewish affairs as something close to benevolent, as he expedited the deportation of Jews from Austria by making it easier for them to obtain their exit papers (in return for all their property). When the mission changed from expelling Jews to concentrating them in camps in the East, Eichmann persuaded himself that this was the best way to fulfill the Zionist ambition of "putting firm ground under the feet of the Jews."[27] As for the Final Solution, all the glitterati in the Nazi hierarchy embraced it enthusiastically; so after six weeks of bad conscience, Eichmann came to see things their way. In his own eyes, each step on Eichmann's road to damnation seemed innocent, sanctioned, almost inevitable. There was no sticking point, no clear moment of demarcation that his judgment, accustomed to functioning solely in terms of conformism and career advancement, could grab ahold of. The ordinary incentives of career-making colluded with his sense of dutifulness (the performance principle) to launch Eichmann on his slippery slope. His own thoughtlessness and *amour-propre* prevented him from seeing it for what it was; as a result, his judgment became entirely corrupt without Eichmann ever ceasing to believe in his own rectitude.

For Arendt, the case of Adolf Eichmann posed profound questions in moral psychology, questions she wrestled with for the rest of her life. What is thinking? What is judgment? How can thought, which is not the same as judgment, insulate us, at least in part, from bad judgment?[28] These are ultimate questions that I shall not even try to answer here. But the corruption-of-judgment account presented here can at least provide us with a point of connection between Arendt's philosophizing and the empirical phenomena revealed in social psychology experiments such as Milgram's.

To many readers, the idea of analogizing issues of legal and organizational ethics to the Eichmann case will be preposterous and even offensive. On the one side, the analogy demonizes the Joseph Fortenberrys of the American workplace; on the other, it trivializes the Holocaust. But this objection misses the point. Obviously, I am not suggesting that wrongfully obedient law firm associates are the moral equivalent of Eichmann, nor that genocide is just one more form of wrongful obedience in the workplace. Rather, the point for both Arendt and Milgram is that if an ordinary person's moral judgment can be corrupted to the point of failure even about something as momentous as mass murder—or shocking an innocent experimental volunteer to death!—it is entirely plausible to think that the same organizational and psychological forces can corrupt our judgment in lesser situations. The extreme situations illuminate their ordinary counterparts even if, in the most obvious ways, they are utterly unlike them.

Explaining Berkey-Kodak through Corruption-of-Judgment Theory

With these thoughts in mind, let me return to the Berkey-Kodak case and see what light the corruption-of-judgment theory may shed on it. The theory suggests that we should find the partner's and associate's misdeeds at the end of a slippery slope, beginning with lawful adversarial deception and culminating with lies, perjury, and wrongful obedience. Following this lead, one fact leaps out at us: *the misdeeds occurred during a high-stakes discovery process.*

Every litigator knows that discovery is one of the most contentious parts of civil litigation. Civil discovery is like a game of Battleship. One side calls out its shots—it files discovery requests—and the other side must announce when a shot scores a hit. It makes that announcement by turning over a document. There are two big differences. First, unlike Battleship, it isn't always clear when a shot has scored a hit. Lawyers get to argue about whether their document really falls within the scope of the request. They can argue that the request was too broad, or too narrow, or that the document is privileged, or is attorney work-product. Second, unlike Battleship, lawyers don't always get to peek at the opponent's card after the game. When the opponent concludes that a shot missed her battleship, she makes the decision ex parte—she doesn't have to announce it to her adversary, who may never learn that a smoking-gun document (the battleship) was withheld based on an eminently debatable legal judgment.[29]

Every litigation associate goes through a rite of passage: she finds a document that seemingly lies squarely within the scope of a legitimate discovery request, but her supervisor tells her to devise an argument for excluding it. As long as the argument isn't frivolous there is nothing improper about this, but it marks the first step onto the slippery slope. For better or for worse, a certain kind of innocence is lost. It is the moment when withholding information despite an adversary's legitimate request starts to feel like zealous advocacy rather than deception. It is the moment when the no-deception principle encoded in Model Rule 8.4(c)—"It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation."—gets gerrymandered away from its plain meaning. But, like any other piece of elastic, the no-deception principle loses its grip if it is stretched too often. Soon, if the lawyer isn't very careful, every damaging request seems too broad or too narrow; every smoking-gun document is either work-product or privileged; no adversary ever has a right to "our" documents. At that point the fatal question is not far away: *Is lying really so bad when it is the only way to protect "our" documents from an adversary who has no right to them?* If legitimate advocacy marks the beginning of this particular slippery slope, Berkey-Kodak lies at its end.

Are Compliant Subjects Morally Blameworthy?

The Milgram experiments lead quite naturally to the depressing reflection that human nature is much more readily disposed to wrongful obedience than we might

have expected or hoped. Milgram seems to have established that in situations whe obedience struggles with decency, decency typically loses. What does this conclusi imply about moral responsibility for wrongful obedience? Let us consider two pos ble lines of thought, which, for reasons that will become clear, I shall call the *Inc pating View* and the *Exculpating View.*

The Inculpating View holds that no matter how widespread wrongful obedien is, and no matter how deep its roots within human nature, wickedness remai wickedness; the fact that wickedness is the rule rather than the exception excuses one. Suppose that experimenters were to demonstrate that two out of three peo will walk off with someone else's hundred-dollar bill if they are sure they can g away with it. The experiment suggests that greed has roots deep within hum nature, but that creates no excuse for theft. The temptation to obey is like greed any other temptation. It is perfectly natural to give in to it—that's why they call temptation!—but being perfectly natural excuses nothing.[30]

It might be objected that the analogy between Milgram obedience and greed i bad one. No matter what his rationalizations, the thief knows that theft is wror or so we may suppose. He simply allowed his baser drives to override his mo judgment, and that is why we don't allow his greed to excuse him. If our earli corruption-of-judgment explanation of Milgram obedience is correct, however, t drive to obey operates at a deeper level, undermining our very capacity to distingui right from wrong.

But this objection overlooks the fact that we generally do *not* excuse wrongf behavior because it resulted from bad judgment—if anything, the fact that t wrongful choice was the product of judgment rather than passion or pathology co demns it even more. So the corruption-of-judgment explanation supports rath than undermines the Inculpating View.

Or does it? Try a thought experiment. Suppose a group of high school seniors given a test of judgment, such as the familiar multiple-choice analogies test. As suppose that the test's difficulty is calibrated so that every student in a control gro passes it. This time, however, the test is administered under extraordinary conc tions: throughout the test, a large-screen television in the testing room broadcast video of a good-looking couple making enthusiastic, noisy, and improbably athle love. Under these conditions, we will suppose, two-thirds of the students fail the te

Clearly, we should conclude that passing the test under such distracting conc tions is really hard. The numbers prove it.[31] We would be foolish to blame the st dents for failing; and we would be cruel to punish those who failed, for example refusing to admit them to college because of their bad scores. Surely we would blan the situation, which obviously undermined their capacity to judge.

The analogy to Milgram is straightforward. When people had the Milgram e periments described to them, they all passed the "test" of moral judgment: witho exception, they predicted that they would break off the experiment well before t 450-volt maximum (and it should be clear that their prediction is in reality a mo

judgment that complying to 450 volts would be wrong). But in the actual experiment, two out of three failed their test. Pursuing the parallel, we would be foolish to blame them for failing, and cruel for punishing them. The situation excuses their compliance. This is the *Exculpating View.*

In short, the Inculpating View holds people responsible for their wrongful obedience, regardless of how common wrongful obedience is, or how deeply rooted it may be in human nature. The Exculpating View excuses wrongful obedience whenever it is the statistical norm, because that fact shows how unreasonably difficult it must be to disobey under such circumstances. One view accuses, the other excuses.

How are we to decide between the Inculpating and the Exculpating Views? I propose approaching the problem indirectly, by looking at parallel puzzles in the treatment of psychologically based defenses in the criminal law. Admittedly, criminal responsibility raises different issues from moral responsibility, and the psychological defenses the law recognizes do not include the deep-seated propensity to obey. Despite these obstacles, there are enough suggestive parallels that examining the criminal law issues will allow us to triangulate toward our own question.

Consider the "heat of passion" or "extreme emotional disturbance" defense in homicide cases, which reduces murder to manslaughter.[32] In its formulation in the Model Penal Code, the defense is available whenever a "homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."[33] The canonical situation is a husband murdering his wife and her lover when he finds them in bed.

Surprisingly, however, this cliched bit of melodrama is *not* the typical situation in which the defense actually arises. Victoria Nourse recently examined every reported heat-of-passion decision in U.S. courts between 1980 and 1995, and discovered a disturbing pattern. The paradigm case for heat of passion turns out to be men angry at women for exiting a relationship: boyfriends upset that their girlfriends have left them; long-separated husbands whose wives finally file for divorce; long-divorced husbands who learn that their ex-wives are remarrying; and men served with protective orders forbidding them from approaching wives or girlfriends they have battered. In other words, the typical heat-of-passion "provocation" turns out not to be infidelity, but a woman's attempt to lead her own life free from her killer's dominion; and the killer's "passion" seems not to be sexual jealousy so much as the overwhelming desire to control and own a woman.[34]

The Model Penal Code aimed to reform the criminal law by taking a scientific approach to human psychology. It treats passion and irrationality as demonstrable facts of human existence that must be acknowledged rather than denounced. In this respect, it holds what Dan Kahan and Martha Nussbaum label the "mechanistic conception" of emotion—he idea "that emotions . . . are energies that impel the person to action, without embodying ways of thinking about or perceiving objects or situations in the world."[35] From a clinical point of view, it hardly matters what circumstances provoke an emotional disturbance. All that matters is whether the emotional disturbance undermines the defendant's self-control. The MPC embodies t idea that psychological drives are causes, not reasons, for human behavior, and tha is senseless to moralize about nonrational causes. For that reason, juries in MPC j risdictions are asked to determine whether, *from the killer's "subjective" point of vie* a woman's declaration of independence is a reasonable explanation of murderc anger.[36] Sadly enough, from the killer's point of view, it often is.

Nourse is critical of the Model Penal Code's approach, and I am as well. F findings about the circumstances under which the heat-of-passion defense gets i voked provide a virtual reductio ad absurdum of the mechanistic treatment provocation. Mitigations reflect judicial and legislative compassion for wrongdo who have committed crimes under unusually trying circumstances. Does a man w flies into a murderous rage because his wife dates someone else three years after th separated really deserve our compassion?[37] Surely not; and surely it *is* appropriate moralize about whether his murderous rage was justified.

In line with this thought, Nourse proposes a different approach to extreme em tional disturbance, based on the concept of a *warranted excuse.*[38] Begin with t philosophically attractive idea that emotions can be appropriate or inappropriate that they embody (or at least correspond with) evaluative judgments of objects a situations that can be true or false, warranted or not warranted.[39] If a man flies in a murderous rage because his wife has been raped, his emotion reflects a warrant evaluative judgment about the rape—that rape is wicked and horrible. If the enrag man kills his wife's rapist, his extreme emotional disturbance provides a warrant excuse that rightly mitigates the murder to a manslaughter.[40]

If, on the other hand, the killer has become enraged because his wife is leavi him, his emotion corresponds with the evaluative judgment that she is not entitl to leave him—perhaps even that wives are never entitled to leave their husbanc This evaluative judgment is absurd and repulsive. Even assuming that he was in tl grip of extreme emotional disturbance when he killed her, the heat-of-passion e cuse should be unavailable to him, because the emotion is unjustified. In line wi this reasoning, Nourse proposes a legal test to distinguish warranted from unwa ranted extreme-emotional-disturbance excuses for homicide. If the killer's em tional disturbance is provoked by an act, like rape, which the law condemns, the e cuse is warranted; if it is provoked by an act that the law protects, like leaving relationship, the excuse is unwarranted.

There is one way in which the "warranted excuse" terminology can be misleac ing. It is important to realize that what makes the excuse unwarranted is not just th the actor's emotion corresponds with a *false* evaluative judgment. The excuse is u warranted because the actor's emotion corresponds with an *evil* evaluative judg ment—one that reflects badly on the actor's character. The excuse fails not becau its underlying evaluative judgment is epistemologically unwarranted; the excuse fai because its underlying evaluation is morally detestable.

Admittedly, it runs deeply against the modern temper to moralize about psych

logical forces over which we arguably have no control. That is what the warranted-excuse approach does, inasmuch as it relies on moral judgments to distinguish causal explanations for behavior that mitigate liability from causal explanations that do not.

Yet assigning responsibility in a world of causal explanations is what compatibilism (the approach to the free-will problem that insists that moral responsibility is *compatible* with determinism) is all about—and the criminal law is compatibilist through and through. Criminal lawyers are rightly agnostic about the possibility that all behavior can be causally explained, but they will insist that even so the law must ascribe responsibility to some people but not others for their actions. Given that we inevitably make such judgments, it seems plausible to make them on moral grounds—in effect, blaming agents for their susceptibility to morally obnoxious causes.

Viewed abstractly, then, the strategy for separating warranted from unwarranted heat-of-passion excuses amounts to this. First, we make explicit the underlying judgment that the emotion reflects. Second, we ask whether the judgment is warranted. Third, if the judgment underlying the emotion is unwarranted, we ask whether in addition it is morally condemnable. If so, the excuse is unwarranted.

How can we apply these ideas to Milgram obedience? Notice first that the propensity to obey is not an emotion. It is more like a hankering, like wanting to smoke a cigarette or scratch an itch. But even though the urge to obey is not an emotion, we can treat it along the same lines as the heat-of-passion defense: first, by making explicit whatever underlying judgments it corresponds with, second, by asking if they are justified, and third, if they are unjustified, by asking whether they are in addition morally condemnable.

What underlying judgments correspond with Milgram obedience? That depends on what the explanation of Milgram obedience is. Here, I will assume that the corruption-of-judgment explanation I defended earlier is the right explanation. Subjects obey, according to the corruption-of-judgment account, because the experiment manipulates them into misjudging the point at which an electric shock violates the no-harm principle. The experiment begins innocuously, and each incremental step implicates the teacher a bit further in the project of shocking the learner. The experimenter's repeated instruction—"The experiment requires that you continue"—reinforces the idea that every shock level is morally indistinguishable from those that went before. As a result, breaking off the experiment for moral reasons generates cognitive dissonance, because it suggests that the teacher has willingly participated in wrongdoing. The teacher cannot eliminate the dissonance by undoing what he's already done. Instead, he eliminates the dissonance by gerrymandering the scope of the no-harm principle so that participating in the experiment doesn't appear to violate it. As one psychologist puts it, "Dissonance-reducing behavior is ego-defensive behavior; by reducing dissonance, we maintain a positive image of ourselves—an image that depicts us as good. . . ."[41] In other words, our

judgment gets corrupted because only by corrupting our judgment can we contir to think well of ourselves. Conscience must be seduced into flattering our self-ima

On this analysis, the propensity to obey corresponds with the following line (unconscious) reasoning: "If the next shock is wrong, the one I just administe was wrong as well. If so, I would have to believe that I had done something mor wrong; I would have to think badly of myself. That's unacceptable. So the next sh can't be wrong."

That this line of reasoning is unsound goes without saying. It takes one's o inevitable moral uprightness as a given, and our inevitable moral uprightnes never a given. But the reasoning is more than merely unsound. It reflects badly our character. It reveals us as so childishly resistant to moral self-criticism that will distort our sense of right and wrong to avoid admitting that we have dc wrong. We are willing to electrocute the learner if the alternative is feeling a little b about ourselves. *Amour-propre über alles!*

The Milgram experiments demonstrate that two-thirds of us are fatally suscep ble to this kind of unconscious reasoning, from which it follows that avoiding it m be rather difficult. On the Exculpating View, the difficulty of avoiding it mitiga our moral culpability. But the argument I have been elaborating leads to the oppos conclusion. Compliance originates in corruption of judgment, and corruption judgment in this case corresponds with the line of reasoning that I have summariz as *amour-propre über alles!*—a line of reasoning that is not only unsound but mor repugnant. Our susceptibility to self-corrupted judgment reflects badly on us, a no mitigation is warranted. In this case, at any rate, the Inculpating View see closer to the truth.

It is important to understand what I am *not* arguing. I am not arguing tl whenever a bad choice arises from fallacious unconscious reasoning that corru our judgment we bear full responsibility for making the bad choice. We bear full sponsibility only when the unconscious reasoning is not only fallacious but mor reprehensible. Sometimes, fallacious unconscious reasoning casts no discredit on and in those cases the difficulty of avoiding it *does* mitigate our blame.

For example, cognitive psychologists have discovered that when we face ri decisions we unconsciously employ quick-and-dirty heuristics that in trick cases c lead us to faulty probability-judgments. Presumably, natural selection bred th heuristics into us because they make up in ease and speed what they sacrifice in re ability. They are useful rules of thumb, and Mother Nature is a rule-utilitarian. T principle is the same as in optical illusions: our brain learns quick-and-dirty opti heuristics like "small-is-far-and-big-is-near," which can be exploited by illusionists fool the eye. The rule "small-is-far-and-big-is-near" is fallacious; but it does not flect badly on us that we unconsciously follow it. Even if following it leads us t fatal mistake, we aren't to blame. In the same way, we aren't to blame for mistal arising from our quick-and-dirty cognitive heuristics, because it doesn't reflect ba on us that we employ them. Finite creatures like us must and should employ them

Milgram compliance is different, because the unconscious reasoning compliant teachers follow *does* reflect badly on them. What follows from these observations is that neither the Inculpating View nor the Exculpating View is entirely right, because each holds sway in some cases but not others. Suppose psychologists discover that under some experimental condition *C* most people suffer a failure of judgment. The Inculpating View says that the large number of people suffering the failure doesn't excuse the failure, while the Exculpating View says that it does. What we have discovered instead is that when susceptibility to *C* reflects badly on our character, the Inculpating View is true; when susceptibility to *C* does not reflect badly on our character, the Exculpating View is true. In Milgram, the Inculpating View is true; compliant subjects are to blame for their wrongful obedience, even though it resulted from bad judgment, and their judgment was corrupted by dynamics they were unaware of. That is because their susceptibility to corruption of judgment reflects badly on them.

Warranted Excuses and Free Will

Those who hold the Exculpating View are likely to find this analysis question-begging. If it is extraordinarily difficult to avoid fallacious unconscious reasoning based on excessive self-regard, as the two-thirds Milgram compliance rate suggests, giving in to it should not reflect badly on us. That, recall, was the argument behind the Exculpating View, and the analysis offered here seems to assume at the outset that it fails. Hence the concern that the analysis begs the question.

The point of the objection is that we should be held responsible only for choices that are ours to make, and if we cannot help reasoning as we do—it is, remember, *unconscious* reasoning—it follows that the choice is not really ours. Let us use the term "moral self" to describe those aspects of a person that engage in moral choice. Unconscious reasoning that we can't easily avoid seems to come from outside the moral self, and for that reason it does not reflect badly on the moral self.

Take an extreme illustration. Suppose that a Milgram subject believes he is morally infallible, but he believes it only because a brain tumor has given him delusions of grandeur. And suppose that because of this belief he becomes a Milgram complier in just the way that the corruption-of-judgment theory suggests. He is, in other words, a typical Milgram complier, with the one difference that excessive self-regard has become part of his make-up only because of the misfortune of the brain tumor. Surely, we should hold him blameless, because his judgment has been corrupted by something foreign to his moral self.

If that is right, however, we must consider the possibility that even in less extreme cases—everyday cases where we can't point to an obvious cause like a brain tumor—susceptibility to excessive self-regard also derives from causal factors foreign to the moral self (brain chemistry, psychological laws, upbringing). According to psychologist Melvin Lerner, "as any reasonable psychologist will tell you, all behavior is 'caused' by a combination of antecedent events and the genetic endowment of the individual."[43]

Clearly, we are here treading in the vicinity of the general question whetl moral responsibility and determinism are compatible—an aspect of the Problem Free Will, which one writer has aptly described as the most difficult problem in p losophy.[44] I have no reason to believe myself equipped to solve that problem. A d tinguished philosopher once warned that "it is impossible to say anything signific about this ancient problem that has not been said before."[45] He wrote these words 1964; obviously they remain true now. Instead, I will simply lay out, with a mi mum of argument, the views about free will and compatibilism that underlie the gument of this chapter. More importantly, though, I will show how these views spond to the objection I have just rehearsed.

Melvin Lerner's deterministic line of argument suggests a blanket disclaimer responsibility for all bad acts, and—as legal theorist Michael Moore rightly argues this implication amounts to a reductio ad absurdum of the theory that caused acti is blameless action.[46] Not that everyone would regard the implication as a reduct Lerner believes "that (a) the way people act is determined by their past experier and their biological inheritance, and (b) this perspective neutralizes the condemni or blaming reaction to what people do."[47]

Yet Lerner finds that he himself blames members of his family for actions which he disapproves. His explanation: "I want to, must, believe that people have ' fective' control over important things that happen, and I will hang on to this beli even when it requires that I resort to rather primitive, magical thinking. . . ."[48] few moments' reflection will reveal that to abandon this "primitive, magical thir ing" is to abandon all the reactive attitudes such as gratitude, resentment, forgi ness, and indignation—that is, to abandon the cement of the social universe.[49] Tl is one reason Moore calls the argument a reductio ad absurdum.[50] Before accepti its drastic conclusion, we should explore the possibility that praising and blaming not require primitive, magical thinking, even in a deterministic universe.

Moore's preferred alternative is to insist that we are morally responsible for c choices, whether or not determinism is true. To avoid the counter-intuitive arg ment that his position blames people for acting even though they could not do ot erwise, he adopts G. E. Moore's analysis of the phrase ". . . could have done oth wise": it means "could have if the actor had chosen to do otherwise."[51] According this analysis, even an actor whose behavior is determined could have done otherwi as long as the causal laws that link choosing with doing remain valid. For then, t actor could have done otherwise if he had chosen to.

I cannot accept this alternative, however, because it falls prey to the well-knov objection that "he could have done otherwise if he had chosen to do otherwise" c be true even of someone who could not have chosen to do otherwise. As Susan W. illustrates the objection, "the fact that a person attacked on the street would ha screamed if she had chosen cannot possibly support a positive evaluation of her r sponsibility in the case if she was too paralyzed by fear to consider, much less choo whether to scream."[52] Indeed, "she could have screamed if she had chosen to" may

true (in a hypothetical sort of way) even if the victim had fainted—hardly a condition under which it is reasonable to insist that she could have screamed!

Wolf suggests a better characterization of the ability to do something, namely that one possesses the necessary skills, talents, and knowledge to do it, and nothing interferes with their exercise.[53] And indeed, this may come close to another of Michael Moore's ideas, namely that one can do something if one has the capability and opportunity to do it.[54] If this characterization of freedom is right, atom-by-atom physical determinism seems pretty much beside the point.[55]

A worry nevertheless arises about whether Wolf's alternative will help us understand the Milgram experiment or similar cases where psychological forces distort our judgment. Moore rightly maintains that "[t]he freedom essential to responsibility is the freedom to reason practically without the kind of disturbances true [psychological] compulsions represent"[56]; and Wolf likewise insists that "agents *not be psychologically determined* to make the particular choices or perform the particular actions they do.[57] But what if we aren't free in that way? In that case, even Wolf's definition of ability will lead to the conclusion that Milgram's compliers were unable to act differently. After all, in social psychology the determinist argument is not that agents are unfree because the motions of every particle in the Universe are determined by the laws of physics. The argument is that psychological forces distort the judgment even of sane, healthy people.

However, the numbers in the Milgram experiments suggest that such distortion does not rise to the level of determination. If every last one of Milgram's thousand subjects had complied with the experimenter, we would undoubtedly conclude that some powerful psychological force, as irresistible as the brain tumor in our earlier example, compels our obedient behavior and excuses otherwise-wrongful compliance. Our only remaining puzzles would be isolating and identifying the force, and explaining why naive observers don't predict the result. Furthermore, if only one or two of the thousand subjects complied, we would likewise suspect that pathology had something to do with it, precisely because the experimenter's orders prove so easy for normal people to resist.

In the actual experiment, the numbers fall in between. The two-thirds compliance rate provides strong evidence that some previously-unsuspected psychological force distorts the judgment of otherwise-normal people. But, because a third of the subjects did not comply, the evidence hardly supports the hypothesis of an irresistible compulsion.

The corruption-of-judgment theory I have defended here grounds the urge to comply in cognitive dissonance, a dynamic that all people share. But it links the subjects' susceptibility to the urge to excessive self-regard, which two-thirds of us (apparently) have despite our conscious beliefs to the contrary, and the rest do not. This difference, no doubt, results from differences in how we are put together and brought up.

What makes the warranted-excuse theory distinctive is its insistence that such

differences are not morally neutral brute facts about us that excuse bad judgm
When distorted moral judgment arises from bad values like excessive self-regar
seems wrongheaded to release the actor from blame for his actions. That, at any r
is the idea underlying the warranted-excuse strategy defended here: because susc
tibility to corruption of judgment reflects badly on the agent, corruption of ju
ment provides no excuse for wrongdoing. A person's character flaw, or so I am
suming, provides a basis for criticism, not a basis for excuse.

Notice that on this approach, we blame people only for their chosen actions,
for their characters; the warranted-excuses approach should not be confused w
the theory that actions are wrong only because they manifest bad character. Mich
Moore criticizes this "character theory" because it implies that people of bad char
ter deserve to be punished even if they do nothing blameworthy.[58] It is importan
understand why his objection does not apply to the warranted-excuses approach.
our approach, the ground for criticizing Milgram compliers is not that they have l
characters. It is that they knowingly administered lethal electrical shocks to an in
cent person pleading with them to stop. The character-trait that renders them s
ceptible to authoritarian pressure is a moral fault, but that fact functions only to
them of an excuse, not to explain why shocking the learner is wrong.

The warranted-excuses approach does share features with the character the
First, as Moore observes, it recognizes two very different sorts of moral judgme
we make about persons—judgments that they are blameworthy because of th
wrongful actions, and judgments that their characters are bad.[59] Second, it acce
Moore's point that the latter judgments are "a kind of aesthetic morality"[60] whic
effect judges people by how well-formed their souls are. But, unlike Moore, it rej
any implication that "aesthetic morality" is illegitimate. What should we judge p
ple (as distinguished from their actions) by except the content of their characters?

Moore confuses matters when he marks the distinction between the two sort
moral judgments by describing them as judgments holding people responsible
their chosen actions and judgments holding them responsible "for being the sor
people that they are."[61] To be sure, this makes character-based moral judgm
sound irrational, because holding people responsible for being who they are sou
irrational. But that is only because Moore has inadvertently collapsed two very
ferent meanings of the word "responsibility"—responsibility as authorship, and
sponsibility as blameworthiness (or, for that matter, praiseworthiness). He is ri
that a person is not the author of her character, but that does not mean she can't
morally judged according to her character. She is praised or blamed for her charac
not because she created it, but because in an important sense she *is* her characte
there is no moral self beneath or beyond it. The distinction between judgments
deeds and judgments of character does not rest on extravagant Romantic ideas ab
self-creating selves.

Both kinds of moral judgments are legitimate, and the warranted-excuse
proach utilizes both. It assigns blame by judging actions, and accepts or rejects

cuses by judging character. This procedure is fair, because it grounds blameworthiness solely in what we do, and withholds deterministic excuses only when the bad acts result from judgment corrupted by bad character. Deterministic excuses remain available whenever our judgment is corrupted by forces beyond our moral selves—forces outside of us in the way that bad character in not outside of us. But doubts surely remain, unless there is something we can do to guard against corrupted judgment and wrongful obedience.

There is no reason to believe that corruption of judgment is inevitable in organizations or in the adversary system. But neither do I have a fail-safe remedy to protect lawyers or anyone else from the optical illusions of the spirit that authority and cognitive dissonance engender. Perhaps the best protection is understanding the illusions themselves, their pervasiveness, the insidious way they work on us.[62] Understanding these illusions warns us against them, and forewarned truly is forearmed, at least to some extent. One of Milgram's compliant subjects wrote him a year after the experiment, "What appalled me was that I could possess this capacity for obedience and compliance to a central idea, . . . even at the expense of another value, i.e. don't hurt someone else who is helpless and not hurting you. As my wife said, 'You can call yourself Eichmann.'"[63] It's hard to believe that this man will obey orders unreflectively in the future.

The point is that to understand all is *not* to forgive all. But if I am right, to understand all may well put us on guard against doing the unforgivable.

Notes

I presented an early version of these ideas as the Keck Award Lecture to the Fellows of the American Bar Foundation, and a later version became my Condon-Faulkner Lecture at the University of Washington School of Law. Later versions were presented at the University of Maryland, the Georgetown Philosophy Department, the Industrial College of the Armed Forces, the Program in Ethics and the Professions at Harvard University, and the Wharton School. I wish to thank the many listeners for their probing questions and perceptive comments. Thanks go also to Laura Dickinson, Deborah Rhode, and Wibren van der Burg for helpful comments on the penultimate draft. I owe a special debt of gratitude to Alan Strudler and David Wasserman, who have sparred with me for years about these issues.

1. For an extended account, see James B. Stewart, *The Partners: Inside America's Most Powerful Law Firms* (New York: Simon & Schuster, 1983), 327–65.

2. Steven Brill, "When a Lawyer Lies," *Esquire* 23–24 (Dec. 19, 1979).

3. Stewart, *The Partners*, 338.

4. See Carol M. Rice, "The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers," 32 *Wake Forest L. Rev.* 887 (1997).

5. I draw all my descriptions of the Milgram experiments and their variations from Stanley Milgram, *Obedience to Authority: An Experimental View* (New York: Harper Torchbooks, 1974).

6. Milgram actually offered $4, but this was in 1960 dollars.

7. Arthur G. Miller, *The Obedience Experiments: A Case Study of Controversy in Social Science* (New York: Praeger, 1986), 13, 21.

8. The fact that those who hear the experiments described vastly underestimate com ance may result in part from the "false consensus effect," the well-confirmed tendency to ex gerate the extent to which others share our beliefs. Lee Ross and Richard E. Nisbett, *The Per and the Situation: Perspectives of Social Psychology* (Philadelphia: Temple University Pr 1991), 83–85. That is, once a subject in the follow-up surveys had concluded that *she* wo defy the experimenter in Milgram's set-up, she is also likely to conclude that most pe would. A sophisticated subject aware of the false consensus effect should compensate for i upping her initial estimate of how many people would comply, say from one percent to percent. Yet even this 500 percent compensation would drastically underestimate what M gram actually found. Something more than false consensus is evidently at work here. Mo over, the follow-up subjects' belief that they would defy the Milgram experimenter is itself unwarranted prediction, since we know that in the basic experiment two-thirds of th would comply to the 450-volt maximum. That is, the very premise for their false consensu their prediction of their own behavior—is itself most likely false.

9. Quoted in Robert B. Cialdini, *Influence: Science and Practice* (3d ed. 1993), 176 n In 1970, David Mantell repeated some of the Milgram experiments in Munich, obtaining 85 percent compliance rate in the basic experiment. David Mantell, "The Potential for V lence in Germany," 27 *J. Social Issues* 101 (1971). So perhaps destructive obedience is a G man pathology after all!—except that a similar 85 percent compliance rate appeared in American replication as well (17 compliant subjects out of 20—David Rosenhan, "Some C gins of Concern for Others," in *Trends and Issues in Developmental Psychology* (P. Muss J. Langer and M. Covington eds. 1969), 143). Interestingly, Mantell introduced still anot variation, in which the subject would see a prior "teacher"—a confederate of the exp menter—refuse to proceed with the experiment and indignantly confront the experimen At that point, the experimenter revealed that he was actually an unsupervised undergra ate, and not a member of the institute where the experiment was conducted. In this versi more than half the subjects nevertheless complied, even after having observed the meloc matic scenario just described; and in subsequent interviews many of them criticized the p vious teacher who had broken off the series of shocks. In his American replication, Ros han also obtained a compliance rate over 50 percent when it was revealed the experimer was an unsupervised undergraduate.

10. In another experiment, subjects had the Milgram set-up described to them, and w shown the photograph of a college student who had supposedly participated in the exp ment as a "teacher." They were asked to rate the student in the photograph (weak-stro warm-cold, likable-not likable), based on appearance. Unsurprisingly, the ratings varied dr tically depending on what level of shock the student had supposedly proceeded to—the hig the shock, the weaker, colder, and less likable the subject. Miller, *The Obedience Experime* 28–29. The natural explanation of the "likability" finding is that subjects found the teac unattractive to the degree that they found her behavior unattractive—from which it follc that they disapproved of her compliance.

11. Alan C. Elms and Stanley Milgram, "Personality Characteristics Associated W Obedience and Defiance Toward Authoritative Command," 1 *J. Experimental Res. in Perso ity* 282 (1966).

12. John J. Ray, "Why the F Scale Predicts Racism: A Critical Review," 9 *Political I chology* 671 (1988).

13. Indeed, it is unclear whether the compliant Milgram subjects were high-F compa with the population at large, or only compared with the defiant subjects. The latter alterna is fully compatible with the compliant subjects being normal, or even low-F, compared w the population at large.

14. Stanley Milgram, "Behavioral Study of Obedience," 67 *J. Abnormal & Social Psych.* 371, 375-77 (1963).

15. Florence Miale and Michael Selzer, *The Nuremberg Mind: The Psychology of the Nazi Leaders* (New York: Quadrangle, 1975); Michael Selzer, "The Murderous Mind," *N. Y. Times Magazine*, Nov. 27, 1977, 35–40.

16. See, e.g., Stephen W. Hurt et al., "The Rorschach", in *Integrative Assessment of Adult Personality* (Larry E. Beutler and Michael R. Berren, eds., New York: Guilford Press, 1995), 202; Zillmer et al., in *Integrative Assessment of Adult Personality*, 73–76, 94; 1 John E. Exner, Jr., *The Rorschach: A Comprehensive System—Basic Foundations* (New York: Wiley, 1993), 330.

17. Alan Strudler and Danielle Warren, "Authority, Wrongdoing, and Heuristics," forthcoming in David Messick, John Darley, and Tom Tyler (eds.), *Social Influence in Organizations.*

18. A clear and forceful statement of situationism may be found in Ross and Nisbett, *The Person and the Situation.*

19. Ibid., 11–13.

20. Milgram, *Obedience to Authority*, 149.

21. This formulation of dissonance theory—a refinement of Lionel Festinger's original hypothesis of cognitive dissonance—comes from Elliot Aronson, *The Social Animal* (7th ed., New York: W. H. Freeman, 1995), 230–33.

22. I take the lawyer metaphor from Roderick M. Kramer & David M. Messick, "Ethical Cognition and the Framing of Organizational Dilemmas: Decision Makers as Intuitive Lawyers," in *Codes of Conduct: Behavioral Research Into Business Ethics* (David M. Messick and Ann E. Tenbrunsel, eds., New York: Russell Sage, 1996), 59.

23. Jonathan L. Freedman and Scott C. Fraser, "Compliance Without Pressure: The Foot-in-the-Door Technique," 4 *J. Personality & Social Psych.* 195 (1966).

24. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, rev. ed. (New York: Viking, 1963).

25. Ibid., 49–51.

26. Ibid., 26.

27. Ibid., 76.

28. See Arendt's paper "Thinking and Moral Considerations: A Lecture," 38 *Social Research* 417 (1971).

29. On the game-playing aspects of discovery, see William J. Talbott and Alvin I. Goldman, "Legal Discovery and Social Epistemology," 4 *Legal Theory* 93, 109-22 (1998).

30. On this point, see Ferdinand Schoeman, "Statistical Norms and Moral Responsibility," in *Responsibility, Character, and the Emotions* (Ferdinand Schoeman, ed., New York: Cambridge University Press, 1987), 296, 305.

31. "[T]he mere fact that most people fail in a given environment suggests that succeeding in that environment is difficult." Schoeman, 304. Schoeman takes this idea from Fritz Heider, *The Psychology of Interpersonal Relations* (New York: Wiley, 1958), 89. Heider was one of the founders of attribution theory, the psychological study of how we make judgments attributing causal responsibility for the actions of others as well as ourselves.

Doing the right thing in the Milgram set-up is emotionally as well as cognitively difficult. In an Austrian replication of the Milgram experiment, the pulse rates of defiant subjects went *up* at the moment they broke off the experiment, signaling that defiance generates physiological stress. Thomas Blass, "Understanding Behavior in the Milgram Obedience Experiment: The Role of Personality, Situations, and Their Interactions," 60 *Journal of Personality and Social Psychology* 404 (1991).

32. In the ensuing discussion, I closely follow the brilliant treatment of the emotio disturbance defense in Victoria Nourse, "Passion's Progress: Modern Law Reform and Provocation Defense," 106 *Yale Law Journal* 1331 (1997).

33. Model Penal Code, §210.3(1)(b).

34. Nourse, "Passion's Progress," 1342–68.

35. Dan M. Kahan and Martha C. Nussbaum, "Two Conceptions of Emotion in Cri nal Law," 96 *Columbia Law Review* 269, 278 (1996).

36. Even though the MPC requires a reasonable explanation or excuse for the emotio disturbance, it insists that "[t]he reasonableness of such explanation or excuse shall be de mined from the viewpoint of a person in the actor's situation under the circumstances as believes them to be"—a subjective, rather than an objective, test of reasonableness. Mo Penal Code, §210.3(1)(b).

37. Nourse, "Passion's Progress," 1360, discussing *State v. Rivera*, 612 A.2d 749 (Co 1992) (common-law husband kills his wife's lover three years after he and the wife separate

38. In the present essay I follow Nourse's examples and terminology. But the same proach was proposed several years earlier in Andrew von Hirsch & Nils Jareborg, "Provocat and Culpability," in Schoeman, *Responsibility, Character, and the Emotions*, 241–55.

39. Kahan and Nussbaum refer to this as the "evaluative conception" of emotion.

40. To avoid confusion, notice that this does not say that killing the rapist is justifi Justified emotions can lead to unjustifiable actions. That is why the appeal to heat of passio only a partial excuse, reducing murder to manslaughter, and not a full excuse or a justificati

41. Aronson, *The Social Animal*, 185.

42. On this point, see Christopher Cherniak, *Minimal Rationality* (Cambridge, Ma MIT Press, 1992).

43. Melvin J. Lerner, *The Belief in a Just World: A Fundamental Delusion* (New Yc Plenum Press, 1980), 120.

44. Susan Wolf, *Freedom Within Reason* (New York: Oxford University Press, 1990), vi

45. Roderick M. Chisholm, "Human Freedom and the Self," reprinted in Gary Wats ed., *Free Will* (Oxford: Oxford University Press, 1982), 24.

46. Michael Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxfc Oxford University Press, 1997), 504–05

47. Lerner, *The Belief in a Just World*, 121.

48. Ibid., 122.

49. See Peter Strawson, "Freedom and Resentment," 48 *Proceedings of the Bri Academy* 125 (1962), reprinted in Watson, *Free Will*, 59–80.

50. Moore, *Placing Blame*, 542–43.

51. Moore, *Placing Blame*, 540–41; again at 553. The analysis comes from G. E. Moc *Ethics* (Cambridge: Cambridge University Press, 1912), 84–95.

52. Wolf, *Freedom Within Reason*, 99. This objection originally comes from Chisho "Human Freedom and the Self," in Watson, *Free Will*, 26–27.

53. Wolf, *Freedom Within Reason*, 101.

54. Moore, *Placing Blame*, 541.

55. Wolf skillfully argues this point in *Freedom Within Reason*, 103–16.

56. Moore, *Placing Blame*, 525.

57. Wolf, *Freedom Within Reason*, 103.

58. Moore, *Placing Blame*, 584–87.

59. Ibid., 571.

60. Ibid.

61. Ibid.

62. This is Robert Cialdini's general strategy for immunizing us, to the extent possible, against those who use built-in psychological mechanisms, such as consistency-seeking or reciprocation of favors, to manipulate us. See Generally Cialdini, *Influence: Science and Practice.*

63. Milgram, *Obedience to Authority,* 54.

PART III

Adversarial Premises and Pathologies