2-16-2005

Professionalism as Interpretation

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Printed in U.S.A.
Vol. 99, No. 3

PROFESSIONALISM AS INTERPRETATION

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I. INTRODUCTION AND OVERVIEW OF THE ARGUMENT

It is a truism that lawyers were the but-for cause of many of the corporate scandals that came to light in the summer of 2002. Without the participation of lawyers and other professionals, the fraudulent transactions that had distorted the financial statements of Enron, Global Crossing, WorldCom, and other public corporations could not have closed in their original form. But factual causation is one thing; responsibility is another. There has been no shortage of public condemnation of the role of lawyers in facilitating corporate wrongdoing. When the last scandal of this magnitude—the savings and loan crisis of the 1980s—became widely known, a federal judge famously asked "Where . . . were the . . . attorneys"?[1] Judge Sporkin's *cri de cœur* has become a convenient shorthand used by scholars of the legal profession who believe, as I do, that lawyers have failed to take seriously their responsibility as professionals while representing wealthy

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[1] Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990); *see also* Accountability Issues: Lessons Learned from Enron's Fall: Hearing Before the Senate Comm. on the Judiciary, 107th Cong. 37–38, 47 (2002) (statement of Susan P. Koniak, ironically echoing Judge Sporkin's question).

corporate clients. Lawyers have not yet been subjected to the kind of Congressional grilling that officers like Kenneth Lay and Jeffrey Skilling endured.[2] And certainly no law firm has suffered the fate of Enron's auditor, Arthur Andersen, which was convicted of obstruction of justice for attempting to thwart an SEC investigation and subsequently went out of business.[3] Nevertheless, it is appropriate to ask the hard questions about the role of lawyers in the most recent wave of corporate scandals, as well as in other cases in which legal advice was sought by clients who appeared in hindsight to have been interested only in evading the law.

This Article is not a polemic against the rotten state of lawyers' ethics. It is probably true to some extent that "[p]erverse incentives, not declines in ethics, cause scandals."[4] When it comes to the role of lawyers, however, it is impossible to talk about incentives—perverse or otherwise—without having a very clear jurisprudential understanding of how lawyers ought to interpret and apply complex and ambiguous legal norms to their clients' transactions. In particular, we ought to investigate the responsibility of lawyers, acting in their capacity as representatives of clients, vis-à-vis the maintenance of a stable framework of legal norms. Do lawyers bear any responsibility for the system, or may they take a merely instrumental stance toward the law, treating it as something to be evaded or nullified through careful planning? If the technical requirements of law can be evaded to the client's benefit and the detriment of others, is there anything in the lawyer's role that prohibits her from assisting the client?

In this Article, I wish to defend what I call the interpretive attitude of professionalism. Professionalism is a stance toward the law which accepts that a lawyer is not simply an agent of her client (although the lawyer-client relationship is obviously governed by the law of agency). Rather, in carrying out her client's lawful instructions, a lawyer has an obligation to apply the law to her client's situation with due regard to the *meaning* of legal norms, not merely their formal expression.[5] A professional lawyer must re-

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[2] Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1237 (2003) ("[T]he lawyers have, however, largely escaped responsibility for their role in this nation's latest spate of corporate fraud . . . .").

[3] *See* BARBARA LEY TOFFLER & JENNIFER REINGOLD, FINAL ACCOUNTING: AMBITION, GREED, AND THE FALL OF ARTHUR ANDERSEN 221–22 (2003).

[4] John C. Coffee, Jr., *What Caused Enron? A Capsule Social and Economic History of the 1990s*, 89 CORNELL L. REV. 269, 278 (2004); *see also* William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1329–32 (2002) (arguing that the most plausible story of Enron's fall requires understanding the workplace "tournament" culture, which created a bias toward winning and an inability to perceive reality accurately); Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968 (2002) (discussing cognitive psychological research on the production of firm cultures that tend to lead managers to block out distracting concerns, like ethical issues).

[5] Compare the principle of dynamic statutory interpretation, which requires an interpreter to construe a text "in light of [its] present societal, political, and legal context." William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987). It is also similar to the principle

spect the achievement represented by law: the final settlement of contested issues (both factual and normative) with a view toward enabling coordinated action in our highly complex, pluralistic society. The attitude of professionalism has both negative and positive aspects. In the negative aspect, this obligation of respect means that a lawyer must treat legal norms as precluding the moral and other reasons that would otherwise justify or require a different action in the circumstances.[6] Conversely, the positive aspect is the demand that a lawyer should take a certain attitude toward the law, manifesting her recognition that the law is legitimate—that is, worthy of being taken seriously, interpreted in good faith with due regard to its meaning, and not simply seen as an obstacle standing in the way of the client's goals.[7]

Law is an achievement, but not one that will persist without custodians and defenders. It is the job of lawyers to maintain the institution in good working order, instead of subverting it.[8] As Jeremy Waldron puts it, any attempt to circumvent the law should be accompanied by feelings of distaste and dishonor,[9] not pride in defeating something that is regarded as an adversary. In addition, this obligation of custodianship demands that lawyers provide a public, reasoned justification for an interpretation of legal texts—

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of purposivism, familiar in legal ethics from the work of William Simon and David Wilkins. *See* William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 62–90; David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 505–15 (1990). Differences between these approaches will be apparent in the application of the attitude of professionalism to cases.

[6] For a more elaborate defense of this position, see W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363 (2004).

[7] *See* STEVEN J. BURTON, JUDGING IN GOOD FAITH 17, 35–37, *passim* (1992); Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralist Society*, 63 GEO. WASH. L. REV. 984 (1995). As Robert Gordon argues:

> [T]here is a difference between trying to game and manipulate a system as a resistance movement or alienated outsider would, and to engage in a committed and good faith struggle within the system to influence it to fulfill what a good faith interpreter would construe as its best values and purposes.

Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1200 (2003).

[8] The obligation on the part of lawyers to maintain the institution of law can be understood as an instance of the Rawlsian natural duty to support just institutions. *See* JOHN RAWLS, A THEORY OF JUSTICE 114–17, 333–37 (1971). For a defense of the Rawlsian position, see Jeremy Waldron, *Special Ties and Natural Duties*, 22 PHIL. & PUB. AFF. 3 (1993). In much of his work on legal ethics, Robert Gordon argues for a position very similar to the Rawlsian natural duty to support the basically just legal system of our country:

> Lawyers have, I think, fallen into the habit of thinking that maintaining the integrity of the legal framework is always someone else's problem . . . . But, of course, the order of rules and norms, policies and procedures, and institutional actors and roles that make up the legal system . . . [are] only as effective as voluntary compliance can make it; for if people routinely start running red lights when they think no cop is watching (or hire lawyers to keep a lookout for the cops, and to exhaust the resources of traffic courts arguing the lights were green), the regime will collapse.

Robert W. Gordon, *A Collective Failure of Nerve: The Bar's Response to Kaye Scholer*, 23 LAW & SOC. INQUIRY 315, 321 (1998).

[9] JEREMY WALDRON, LAW AND DISAGREEMENT 101 (1999).

one which is plausible in light of the interpretive understandings of a professional community.

Professionalism stands in opposition to the view of many lawyers that excellence in lawyering means engaging in "creative and aggressive" structuring of transactions for the benefit of clients, even though the transactions are designed to evade regulatory requirements enacted to protect investors. The quoted language, "creative and aggressive," which is often used by lawyers as a term of approbation, comes from the report issued by Enron's long-time outside counsel, Vinson & Elkins, in response to the concerns raised by Enron finance executive Sherron Watkins.[10] The firm, investigating transactions its own lawyers had worked on, despite the glaring conflicts of interest,[11] determined that the only problem with the structure and accounting treatment of the transactions was potentially one of public relations. The subtext of this response was that creativity and aggressiveness is a positive value in sophisticated business counsel. Interestingly, Watkins's letter itself used the word "aggressive" to describe the company's accounting, but she used the term with a decidedly more negative connotation—suggesting that Enron had obscured the economic substance of transactions to the point that the accounting treatment was no longer reliable.[12]

It is relatively easy to say, in the abstract, that lawyers should not be "too aggressive" or should exercise judgment with due regard to the meaning of legal norms. I hope to show that these general standards of professionalism have content when applied to actual transactions that fall within the zone of professional judgment. In many of the Enron transactions, an attitude of professionalism would have required the lawyers to refuse to issue opinion letters where the transactions violated substantively meaningful legal and accounting standards, even though the transactions arguably complied with formal legal rules—albeit "aggressively."[13] In other words, a

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[10] *See* LOREN FOX, ENRON: THE RISE AND FALL 259 (2003). Sherron Watkins was a vice president for corporate development in the finance department of Enron at the time she wrote a letter to Kenneth Lay warning that the company might "implode in a wave of accounting scandals." *See id.* at 247–48. The complete Watkins letter is included as an appendix to her book. *See* Letter from Sherron Watkins, Enron Employee, to Kenneth Lay, Chairman and C.E.O., Enron, *reprinted in* MIMI SWARTZ & SHERRON WATKINS, POWER FAILURE: THE INSIDE STORY OF THE COLLAPSE OF ENRON 361–62 (2003) (regarding Enron Accounting Practices).

[11] WILLIAM POWERS, JR., ENRON CORP., REPORT OF INVESTIGATION BY THE SPECIAL INVESTIGATIVE COMMITTEE OF THE BOARD OF DIRECTORS OF ENRON CORP. 176–77 (2002) [hereinafter POWERS REPORT] ("The result of the V&E review was largely predetermined by the scope and nature of the investigation and the process employed. . . . The scope and process of the investigation appear to have been structured with less skepticism than was needed to see through these particularly complex transactions."); Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 BUS. LAW. 143 (2002).

[12] *See* POWERS REPORT, *supra* note 11, at 4–5 (stating committee's conclusion that certain related-party transactions lacked economic substance and were entered into solely for the purpose of manipulating Enron's financial statements).

[13] *See* William W. Bratton, *Enron, Sarbanes-Oxley and Accounting: Rules Versus Principles Versus Rents*, 48 VILL. L. REV. 1023, 1044 (2003) (distinguishing regulatory arbitrage from strategic non-

lawyer would be required to prevent the kind of abuse that is colorfully illustrated by a former Enron employee:

> Say you have a dog, but you need to create a duck on the financial statements. Fortunately, there are specific accounting rules for what constitutes a duck: yellow feet, white covering, orange beak. So you take the dog and paint its feet yellow and its fur white and you paste an orange plastic beak on its nose, and then you say to your accountants, "This is a duck! Don't you agree that it's a duck?" And the accountants say, "Yes, according to the rules, this is a duck." Everybody knows that it is a dog, not a duck, but that does not matter, because you have met the rules for calling it a duck.[14]

It is not surprising that the rules of financial accounting would have criteria for duck-ness, but a point often escapes non-lawyers about the nature of rule-based reasoning: no matter how clear a rule appears to be, it will always be ambiguous enough to be manipulated. That is, unless the rule is interpreted in light of non-textually bound interpretive conventions and practices, applied through the informed judgment of a decisionmaker rather than through the text itself.[15] Professionalism, in a nutshell, instructs lawyers not to participate in the hocus-pocus of turning dogs into ducks, and is therefore a principle for regulating the exercise of interpretive judgment.

Similarly, when several internal government memos came to light which seemed to provide a blueprint for evading domestic and international legal prohibitions on torture, two prominent commentators referred to them as "standard lawyerly fare, routine stuff."[16] This characterization, however, begs the question of what attitude lawyers ought to take toward the law. One of the memos counseled the government that mistreatment of prisoners amounts to torture only under extremely unusual circumstances, and that the abuse of prisoners may be justified by criminal law doctrines such as self-defense and necessity.[17] This advice is far from "routine stuff," be-

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compliance, and defining the latter as "action under an interpretation of the law in conflict with the stated interpretation of the regulator").

[14] BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON 142–43 (2003) (quoting an unidentified former Enron employee).

[15] *See* LEO KATZ, ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW ix–x (1996) (arguing that legal practice is pervaded by opportunities for "avoision," or clever transactional structuring that straddles the line between legitimate penalty avoidance and illegitimate evasion); Steven L. Schwarcz, *Enron and the Use and Abuse of Special Purpose Entities in Corporate Structures*, 70 U. CIN. L. REV. 1309, 1317 (2002) (claiming that due to the complexity of structured-finance transactions, "Enron's investors . . . must, to some extent, rely on the business judgment of Enron's management").

[16] *See* Eric Posner & Adrian Vermeule, *A "Torture" Memo and Its Tortuous Critics*, WALL ST. J., July 6, 2004, at A22.

[17] *See* Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *available at* The George Washington University National Security Documents On-Line Archive, http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/index.htm (last visited Dec. 6, 2004) [hereinafter Aug. 1 OLC Memo].

cause it relied on a highly artificial—one might say "creative and aggressive"—reading of the governing law. It is difficult to resist the temptation to pun and call the reasoning "tortured," because it so clearly reveals the author's determination to come up with any argument, however plausible, that the law against torture does not apply to detainees at Guantánamo Bay. The overwhelming reaction by experts in criminal, international, constitutional, and military law has been that the legal analysis in the government memos was so distorted that the lawyers' advice was incompetent.[18] Given that the memos were prepared by agencies, such as the Office of Legal Counsel, that traditionally employ some of the ablest lawyers in government, it is unlikely that the authors lacked technical legal skills. The explanation for the deficiencies in reasoning is more likely that the authors did not want to regard the law as constraining their client's ends, so they approached the law in an excessively adversarial stance, in effect adopting the attitude that they would make the law say what they wanted it to say. Like the metaphorical process of turning dogs into ducks, this is an example of how lawyers can violate the obligation of professionalism when interpreting the law and counseling clients.

This Article belongs to a subgenre of legal ethics scholarship that examines the lawyer's responsibility as a law-interpreter and private law-giver when representing clients in transactional and counseling matters.[19] To the extent a lawyer is justified in taking an adversarial stance toward the law in litigation, that justification depends on procedural checks to safeguard against exploitation or misapplication of law. [20] A considerable degree of

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[18] *See, e.g.*, Kathleen Clark & Julie Mertus, *Torturing the Law*, WASH. POST, June 20, 2004, at B3 (criticizing "stunning legal contortions" in memos); Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, June 25, 2004, at A14 (quoting Harold Koh calling the memos "embarrassing" and Cass Sunstein's opinion that the legal analysis was "very low level, . . . very weak, embarrassingly weak, just short of reckless"); Ruth Wedgewood & R. James Woolsey, *Law and Torture*, WALL ST. J., June 28, 2004, at A10 (concluding that memos "bend and twist to avoid any legal restrictions" on torture and ignore or misapply governing law). For an example of what can only be either blatant incompetence or highly tendentious advocacy, consider that the torture memos' discussion of executive power in wartime never even mentions, let along provides a persuasive distinction of, the steel seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which is the leading Supreme Court decision on separation of powers in this context.

[19] For other examples, see Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 OSGOODE HALL L.J. 353 (1986); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995).

[20] The Model Code, which was frequently criticized for assimilating all lawyering activities to adversarial litigation, actually recognizes quite plainly the importance of context. "Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser." MODEL CODE OF PROF'L RESPONSIBILITY EC 7-3 (1981). Taking a narrow, technical, or instrumental attitude toward the law is appropriate only (if at all) in adversarial litigation, and only where the lawyer has a good faith belief that her interpretation of the law is supported by existing norms or by a reasonable argument for extension, modification, or reversal of existing law. *Id.* at EC 7-4. In adversarial litigation, this highly partisan stance toward the law may be justified by the effect on the tribunal of opposing partisan presentations: "[T]he advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impar-

impartiality in the proceedings as a whole is insured by three factors: the opposing lawyer's brief, the judge's experience (and the diligence of law clerks), and the requirement that lawyers disclose adverse authority and not make material misstatements of law.[21] When the lawyer represents a client outside the litigation context, however, these procedural constraints on partisanship are absent. In counseling and transactional representation, the only constraint on the assistance the lawyer may provide to the client is provided by the law itself, as interpreted by the lawyer on whose client the law is expected to act as a constraint.[22] Thus, a lawyer may be tempted to apply the law as the client wishes it to be, as distinct from as it actually is. As I will argue, this problem cannot be avoided by clarifying the law, because part of the nature of language is its inability to capture the full range of meaning that a text must bear. In other words, there is no such thing as a self-interpreting legal text that regulates the actions of lawyers or clients apart from the exercise of interpretive judgment by a community of professionals. As a consequence, the law cannot operate as a device to settle normative conflict and coordinate activity without a commitment on the part of law-interpreters to respect the substantive meaning standing behind the formal expression of legal norms.[23]

Part II of this Article begins the argument for professionalism by critically examining the prevailing wisdom of many scholars and practicing lawyers, which can be labeled legal realism, law-as-price, or the Holmesian bad man view of law. The position I criticize essentially permits the lawyer to assist the client in planning around the law without regard to the possibility that a legal restriction ought to be interpreted as a legitimate restriction on the client's activities. By "legitimate" I mean that the law has normative significance *as such* in the client's practical deliberations (conducted through the means of a lawyer, naturally, if the law is too complex to be understood without legal training and experience). The view I criticize

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tial judgments." *Id.* at EC 7-19. The attorney as adviser, however, is bound to render a professional opinion as to the applicability of law, interpreted from the point of view of an impartial tribunal. *Id.* at EC 7-5. The modern law governing lawyers preserves these distinctions. *Compare* MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002) [hereinafter MODEL RULES] (stating that an attorney as adviser must use independent professional judgment and render candid advice), *with id.* R. 3.1 (stating that a lawyer representing client in litigated matter may assert any nonfrivolous legal argument).

[21] For the duty of candor to the tribunal, see MODEL RULES, *supra* note 20, R. 3.3(a)(1) (stating that a lawyer may not make material misstatements of fact or law to the tribunal), and *id.* R. 3.3(a)(2) (stating that a lawyer may not fail to disclose to the tribunal controlling adverse legal authority).

[22] Pepper, *supra* note 19, at 1549, 1566–67.

[23] Although superficially this requirement may seem objectionable, because it requires the lawyer to imagine herself in the position of a judge, the law governing lawyers actually does require lawyers to adopt this interpretive stance when advising clients. *See* MODEL RULES, *supra* note 20, R. 2.1. This rule requires lawyers to exercise "independent professional judgment" and render "candid advice," which means that the lawyer must provide advice from a standpoint that is independent of the client's interests. As the comments to the rule recognize, this advice may be unpleasant for the client to hear, but lawyers are nevertheless professionally obligated to deliver bad news in the appropriate circumstances. *See id.* R. 2.1 cmt. 1.

would regard the law as functioning in practical reasoning as only one cost among many, and not as the expression of a view that individuals should, or should not do something. The jurisprudential problem with that position is that it undermines the social function of law, which is to establish settlement and coordination in a broad sense.

The terms settlement and coordination are familiar in the legal theory literature,[24] but I use them slightly idiosyncratically to mean a more robust or substantively meaningful resolution of a normative conflict. Suppose there is disagreement about an important public policy issue, such as whether a certain type of corporate transaction must be fully disclosed in a company's financial statements or, even, whether some humiliating and degrading interrogation techniques should be allowed when questioning suspected terrorists. If this disagreement cannot be settled by deliberation and debate, people turn to the law for resolution, in order to enable them to cooperate on common projects without becoming mired in the same normative dispute. It is critical to this settlement process that the law be interpreted as having a substantive meaning that depends in part on legal texts, but which is not exhausted by texts. If the form alone of an enacted law determined its meaning for the purposes of constraining lawyers' interpretive activities, then it would be practically impossible to achieve settlement, because given sufficient cleverness and resources, lawyers can almost always structure their clients' activities around purely formal rules. Using the law to achieve settlement, and therefore the possibility of mutually beneficial social interactions, requires that lawyers approach the law with the intent to recover the meaning of the law, rather than simply to manipulate formal features of legal texts. Thus, Part II will continue by considering a simple example of how different interpretive stances or attitudes can yield different meanings for legal texts.

The straightforward statute in Part II will serve as an analogy for the exponentially more complex schemes of regulation applicable to the practical contexts we will consider in Part III, namely the problem of identifying tax shelters, the abuse of legal and accounting rules by Enron, and the attempt by the Bush administration to avoid legal restrictions on torture. This Part also takes up in more detail the arguments against textualist theories of

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[24] *See infra* note 53 and accompanying text. The term "coordination problem" has a technical, narrower use in game theory. Coordination games are those in which the interests of the players do not conflict (in contrast to prisoners' dilemma games), but where the games have more than one Nash equilibrium. The parties are jointly better off adopting one of the equilibrium strategies, but in the absence of a means to communicate their strategy, the parties may not reach the beneficial equilibrium result. *See* DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 36–42 (1994). I use the term coordination problem in a different sense, but one which is common in jurisprudence. "[A] coordination problem is any cost that results from moral disagreement or from uncertainty about how others will resolve questions about what they are morally permitted, required, or forbidden to do." Larry Alexander, *"With Me, It's All Er Nuthin'": Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 534 (1999). The cost associated with moral disagreement is simply the inability of disputants to move beyond argument and reason-giving, into action that is socially permitted.

interpretation. Although I argue against textualism, it is important to emphasize that this Article is located firmly within the positivist tradition, in particular the incorporationist strand associated with Professor H.L.A. Hart. The interpretive attitude that professionalism requires lawyers to take toward the law is not a demand of ethics considered apart from the law. Rather, it is part of the law in the sense that lawyers and judges employ it to determine what the law actually is, as opposed to what it should be. In jurisprudential terms, the rule of recognition of the American legal system incorporates non-textual sources, including interpretive principles that differentiate between legitimate and abusive applications of rules. The instrumental stance toward law is actually ruled out by the interpretive practices of courts and lawyers, but in addition, one could make a normative argument based on the settlement and coordination function of law. The settlement achieved by law is not merely a form of words that establishes some minimal logical constraint on the range of possible meanings that can be ascribed to the utterance. Rather, it is a substantive response to a normative conflict, which functions in practical reasoning by displacing the reasons that would otherwise count in favor of a contrary action. Thus, to the extent individuals and lawyers share the need to resolve conflict and work together on common projects, they have a sufficient *moral* reason to respect the meaning of legal norms.

Part III concludes with the application of this theory of legal ethics to the cases of tax shelters, special-purpose entity transactions in Enron, and the Justice Department's memos on the domestic and international law of torture. In each of these cases, the governing legal texts are consistent with a formal interpretation, in which the client is permitted to do something, and a substantive interpretation, in which the client's acts would be prohibited. Although lawyers in all three cases have attempted to justify the formally plausible result, their interpretations would not be accepted in a community of lawyers and judges who are motivated to ascertain the actual meaning of the governing legal standards. Indeed, the only reason the lawyers in all of these cases may have been comfortable arguing for the formally plausible interpretation is that they expected some degree of secrecy, either through the audit lottery (in the case of tax shelters), the cover provided by byzantine transactions and obfuscated disclosures (the Enron manipulations), or geographic isolation and covert activities (the interrogations at Guantánamo Bay and Abu Ghraib). The correlation between a lack of transparency and aggressively instrumental interpretations of law suggests that the public justifiability of a legal interpretation is a significant component of its legitimacy. The veil of secrecy having been stripped from these interpretations, we can criticize the lawyers not in first-order moral terms, but for having misapplied and distorted the law governing their clients' conduct.

II. PROFESSIONALISM VS. THE HOLMESIAN BAD MAN STANCE

The principal target of my argument is the position that lawyers are permitted to take a "Holmesian bad man" interpretive attitude toward legal norms, regarding them as obstacles to be planned around, or even costs to be incurred in the course of pursuing the projects of one's clients.[25] Oliver Wendell Holmes defined the content of the law in terms of a prediction about how legal officials might decide particular cases, which he illustrated through the metaphor of a "bad man" who is interested only in avoiding legal penalties that might attach to his conduct. The problem with the perspective of the bad man is not that it is descriptively inaccurate—surely many people, including lawyers, do care about the law only insofar as it might impose sanctions on them—but that it is jurisprudentially unsatisfying. The bad man's perspective is only one of many standpoints that one may adopt toward the law,[26] and it is far from self-evident that it is the best perspective to employ when describing the relationship between lawyers and the law. The choice of an interpretive standpoint is a normative one, and there must be an argument for why one *ought* to adopt the perspective of the bad man if that perspective is to do any justifying work in jurisprudence. As Ronald Dworkin rightly observes, a participant in a social practice does not regard the practice and its constitutive rules as simply given, but assumes it serves some interest or purpose.[27] The focus of a theory of lawyering must therefore be on the purpose of the legal system and, correspondingly, the value of having officially licensed and regulated lawyers who represent clients in matters requiring legal advice, judgment, and skill.[28] The argument must be "normative all the way down," with a theory

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[25] *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459–62 (1897).

[26] *See* William Twining, *The Bad Man Revisited*, 58 CORNELL L. REV. 275 (1973).

[27] RONALD DWORKIN, LAW'S EMPIRE 47 (1986). Dworkin uses the term "*the* interpretive attitude" to describe the standpoint of participants in a practice who seek to impose some meaning on the practice, and to see it in its best light. *Id.* at 46–48. In this Article I will make a more general reference to plural interpretive attitudes, which need not be identical with Dworkin's constructive interpretation theory of law. I believe Dworkin is right in taking seriously the perspective of participants in a social practice, or those who take what Hart calls an internal point of view toward the rules of a practice. *See* H.L.A. HART, THE CONCEPT OF LAW 56, 88–91 (2d ed. 1994). Dworkin's use of the singular term "interpretive attitude" is too strong, however, because people governed by the rules of certain complex social practices may be able to adopt one of several reasonable stances toward the rules—e.g., attitudes of resistance, cautious acquiescence, enthusiastic embrace, and so on. The attitude one takes toward the rules is a significant jurisprudential question, and because I disagree with some aspects of Dworkin's theory of law, it is important to note this terminological distinction.

[28] *Cf.* Joseph Raz, *The Problem About the Nature of Law*, *in* ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 179, 184–87, 192–93 (1994) (arguing against taking a narrow "lawyer's perspective," which eliminates consideration of the lawyer's relationship with other institutions such as courts, legislatures, administrative agencies, and various intermediate associations); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003) (recommending that theories of interpretation take into account the institutional competence of the interpreter).

of democracy justifying a theory of the function of law, which in turn justifies a conception of the lawyer's role.

Lawyers facing serious criticism from regulators or academics for their roles in client malfeasance usually defend themselves and their extremely narrow interpretive attitude by appealing to the lawyer-client relationship and their duties as fiduciaries of clients. Their duties, say lawyers, are limited to protecting client interests by providing competent representation and keeping secrets, and most certainly do not include serving as a gatekeeper or quasi-regulator of their clients' transactions.[29] This defense misses the point, however, that the lawyer-client relationship is itself created by the legal system and imposes duties on lawyers to the extent (and only to the extent) those duties are justified by the social function of the law. Lawyers are not judges, who are institutionally charged with the task of remaining impartial, but they are also not clients, who may be permitted to approach the law from a partisan and self-interested perspective. The role of lawyer is something of an amalgam of the judges' and clients' roles, serving as a bridge between the biased position of the client and the ideally neutral position of the judge.[30]

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[29] *See, e.g.*, Am. Bar Ass'n, *Statement of Policy Adopted by the American Bar Association Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to the Compliance by Clients with Laws Administered by the Securities and Exchange Commission*, 31 BUS. LAW. 543 (1975); James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court,"* 48 BUFF. L. REV. 349 (2000); Evan A. Davis, *The Meaning of Professional Independence*, 103 COLUM. L. REV. 1281 (2003); Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097 (2003); Lawrence J. Fox, *The Fallout from Enron: Media Frenzy and Misguided Notions of Public Relations Are No Reason to Abandon Our Commitment to Our Clients*, 2003 U. ILL. L. REV. 1243, 1243–59. For example, the joint submission of numerous large law firms argued as follows:

> An attorney to an issuer . . . is ethically bound to act as a legal counselor to, and at times an advocate for, that issuer, is not independent or required to be, and only in very limited circumstances provides advice that may be relied on by the investing public.

Letter from 79 Law Firms to Jonathan G. Katz, Secretary, Securities and Exchange Commission 2 (Apr. 7. 2003), *available at* http://www.sec.gov/rules/proposed/s74502/79lawfirms1.htm. Harry Reasoner, the managing partner of Vinson & Elkins, one of Enron's principal outside law firms, defended his firm's conduct in similar terms, punting responsibility for ensuring that transactions had economic substance to Enron's accountants. "There is a misunderstanding of what outside counsel's role is," he said. "We would have no role in determining whether, or what, accounting treatment was appropriate." John Schwartz, *Enron's Many Strands: The Lawyers: Troubling Questions Ahead for Enron's Law Firm*, N.Y. TIMES, Mar. 12, 2002, at C1. For a thorough analysis of the tension between competing conceptions of the lawyers role which came to a head over the *National Student Marketing* case, see Simon Lorne, *The Corporate and Securities Adviser, The Public Interest, and Professional Ethics*, 76 MICH. L. REV. 423 (1978).

[30] Robert W. Gordon, *The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870–1910*, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51 (Gerard W. Gawalt ed., 1984). This hybrid role has long been accepted as a description of the duties of a prosecutor. *See, e.g.*, H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695 (2000).

Lawyers are fiduciaries, but not only caretakers of their clients' interests—they are also custodians of the law in an important sense.[31] Thus, they have a responsibility to build the interests of third parties into their interpretation of law, even when working on behalf of private clients. This is not to say that lawyers have a responsibility toward something amorphous like "the public interest"—indeed, disagreement about the nature of the public interest is precisely what makes law necessary in the first place.[32] Rather, the lawyer's responsibility is toward the law, and to what it represents as a mechanism to coordinate social activity through private ordering (as opposed to active intervention by state officials), despite deep and persistent normative disagreement. Although lawyers usually become almost apoplectic at the suggestion that they have any responsibility toward the legal system or the law as such, it is impossible to justify allowing lawyers to approach the law like Holmes's bad men under an institution-sensitive theory of law and lawyering.

A. Rational Instrumentalism?

Contemporary defenders of the Holmesian bad man interpretive attitude often identify with the law and economics movement.[33] Of course, an

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[31] German law recognizes a similar duty on the part of a lawyer to serve as a custodian of the law—*ein Pfleger des Rechts*. The foundation of the German judicial system is an obligation on the part of all actors within the system, including lawyers, to take care of the law. Thus, a lawyer is referred to as *ein unabhängiges Organ der Rechtspflege*—an independent institution in the administration of justice. *See* Bundesrechtsanwaltsordnung, v. 5.8.2004 (BGBl. I S.565) (as last amended by art. 4 (18) of Zuletzt geändert durch Gesetz zur Modernisierung des Kostenrechts (Kostenrechtsmodernisierungsgesetz), v. 5.5.2004 (BGBl. I S.718)). Thanks to Dennis Tuchler for pointing out this parallel and to Jens Damman for the citation to the German lawyer-licensing statute.

[32] *See* Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1294 (1987) (arguing that "an agency attorney acts unethically when she substitutes her individual moral judgment for that of a political process which is generally accepted as legitimate").

[33] *See, e.g.*, the well-known argument of Judge Easterbrook and Professor Fischel:

> [M]anagers do not have an ethical duty to obey economic regulatory laws just because the laws exist. They must determine the importance of those laws. The penalties Congress names for disobedience are a measure of how much it wants firms to sacrifice in order to adhere to the rules; the idea of optimal sanctions is based on the supposition that managers not only may but also should violate the rules when it is profitable to do so.

Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177 n.57 (1982); *see also* Stephen McG. Bundy & Einer Elhauge, *Knowledge About Legal Sanctions*, 92 MICH. L. REV. 261 (1993) (assuming that the law is relevant to actors only insofar as it imposes a cost on prohibited behavior). Cynthia Williams uses the term "law-as-price" conception to label this interpretive attitude. *See* Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1267 (1998). The law-as-price theory is somewhat different because it expands the Holmesian bad man predictive orientation toward law into a distinctive theory of entitlement. According to law-as-price, one has a *right* to violate the law which can be obtained simply by "purchasing" the associated penalty, or willingly incurring a risk of the penalty. *Id.* at 1268. This difference is immaterial for the purposes of this Article, because both the Holmesian bad man predictive account of law and the law-as-price theory of entitlement are predicated on the same jurisprudential error, which I will discuss in detail here.

affinity for law and economics does not make one pro-Enron; indeed, sophisticated neoclassical economic theory may even support something like the attitude of professionalism. As Kenneth Arrow points out, contracts, markets, and transactions depend on relationships of trust and confidence.[34] It is impossible to draft contracts with enough specificity to handle every situation that could conceivably arise in the course of a commercial relationship. Thus, the parties depend on one another not to behave opportunistically. "Every contract depends for its observance on a mass of unspecified conditions which suggest that performance will be carried out in good faith without insistence on sticking literally to its wording."[35] In relational contracting, the parties rely on the repeated nature of their interactions to safeguard against opportunistic behavior.[36] A similar dynamic limits dishonesty in small communities where the participants may encounter one another in a future commercial relationship and where information about misconduct can be inexpensively disseminated.[37] In one-shot interactions in larger and more impersonal communities, the parties must use a different mechanism to ensure against exploitation; in this case economic theory uses the concept of lawyers as reputational intermediaries to explain why a lawyer or law firm would avoid being too aggressive in structuring transactions.

The services of gatekeepers, such as transactional lawyers and auditing firms, signal to the market that the client's representations are fair and accurate.[38] Gatekeepers can perform this function because their principal stock in trade is a reputation for probity, built up over years of "vouching" for clients by representing them in transactions. A gatekeeper firm would squan-

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[34] Kenneth J. Arrow, *Social Responsibility and Economic Efficiency*, 21 PUB. POL'Y 303, 314 (1973).

[35] *Id.*; *see also* Pepper, *supra* note 19, at 1553–54 (noting that it would become vastly more expensive and cumbersome to regulate through law if lawyers took a Holmesian bad man stance toward the law).

[36] Stuart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

[37] *See, e.g.*, Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEG. STUD. 115 (1992); David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373 (1990).

[38] *See, e.g.*, John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293 (2003); John C. Coffee, Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid,"* 57 BUS. LAW. 1403 (2002); Coffee, *supra* note 4, at 279–97; Theodore Eisenberg & Jonathan R. Macey, *Was Arthur Andersen Different? An Empirical Examination of Major Accounting Firm Audits of Large Clients*, 1 J. EMPIRICAL LEGAL STUD. 263 (2004); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994); Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984); Reinier Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986); Reinier Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984).

der this reputation by vouching for a client whose representations were dishonest, so its association with a client is a credible signal of the client's honesty. Because gatekeepers have less to gain from dishonesty than clients do, they have a powerful incentive to monitor the client's conduct for dishonesty, to avoid losing valuable credibility. In effect the gatekeeper becomes a quasi-regulator, ensuring that deals are reached on the basis of accurate information.

Nevertheless, the relational-contracting and gatekeeper ideas still concede something significant to the Holmesian bad man model, namely their bleak vision of professionals as essentially self-interested, amorally pragmatic actors who take a purely instrumental approach to the law.[39] In the economic vision of professional ethics, there is only one reason to follow the law or to be honest in contractual relationships: fear of sanctions.[40] Sanctions may come in the form of official, state-imposed punishments or non-legal penalties such as the loss of business opportunities. Regardless of form, the avoidance of sanctions is the sole reason to refrain from exploiting other parties in a transaction or from treating legal rules as inconveniences to be planned around. As Holmes so memorably put it, this attitude toward the law "stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can."[41] His mocking tone shows his disdain for anyone who regards the law as legitimate, and therefore a reason for acting. Economic theory has no place for actors who are guided by legal norms because they regard them as having moral force in their own right.

But what would be the normative argument for taking a purely instrumental stance toward the law? It cannot be the observation that the world is full of Holmesian bad men, which would be a simplistic version of G.E. Moore's naturalistic fallacy.[42] The most promising argument in favor of in-

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[39] *See* Brian Leiter, *Holmes, Economics, and Classical Realism*, *in* THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR. 285 (Steven J. Burton ed., 2000).

[40] *Cf.* Holmes, *supra* note 25, at 462 ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else."). The instrumental attitude toward law may be characterized, in jurisprudential terms, as reducing conduct rules to decision rules. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984). Rules are analytically separable into two categories: conduct rules, which are addressed to individuals and which permit or forbid certain actions; and decision rules, which are addressed to officials and regulate the act of passing judgment. Although these categories are conceptually distinct, it is possible to run them together in practice, and conceive of conduct rules as being entirely a function of decision rules. *See id.* at 632. The Holmesian bad man attitude focuses interpretation solely on decision rules—i.e., when will a judge determine that I have violated the law? The attitude prescribed by professionalism focuses interpretation on conduct rules—i.e., what does the law require?

[41] Holmes, *supra* note 25, at 462.

[42] G.E. MOORE, PRINCIPIA ETHICA 13 (1903). The naturalistic fallacy in ethics is the reduction of propositions of ethics (e.g., "you ought to do X") to observations about what people actually do ("people do X") or what they believe with respect to what they should do ("people think it is good to do X"). The problem is that reduction to propositions about the natural world seems to squeeze the normativity out of

strumentalism relies on libertarian premises—the fundamental moral significance of human freedom, and the concomitant requirements that any restrictions on liberty imposed by the state be justified by reasons shared by the object of coercion, general, knowable in advance of acting, and no broader than necessary to accomplish their purpose. Indeed, a deep insight of modern legal ethics theory, characteristic of the work of William Simon and Robert Gordon, is the extent to which the prevailing attitudes of practicing lawyers toward the law reflect the assumption that the purpose of the legal system is to delineate a sphere of individual autonomy which is protected against interference by other individuals or the state.[43] But Simon and Gordon have not only recognized that this foundation is unsound—they, along with David Luban and others, have completely demolished it.[44] In brief, they argue the following. First, the autonomy of the client is not some kind of moral trump card over the lawyer's own moral agency, which would require reasoning about the permissibility of the client's ends quite apart from considerations of the client's autonomy. Second, citizens are not entitled to autonomy as such, but only to a just measure of autonomy that is compatible with the rights of others. Third, liberty is only one value among others that a decent legal system would seek to protect. Fourth, lawyers participate to such a great extent in interpreting and applying the law that legal restrictions on client autonomy can hardly be said to be impartial and general. And finally, even if autonomy were the most important thing, its exercise depends on a stable framework of legal norms and institutions, which is undercut by instrumentalist approaches to the law.

The other principal argument for taking an instrumental stance toward the law mistakenly overgeneralizes from the paradigm of adversarial litigation.[45] The most shopworn aphorism in legal ethics is that a lawyer's pri-

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ethical propositions, because ethical activities like valuing are different from observing, describing, and other scientific activities. Moore expressed this concern with his famous "open question" argument. If one says, "X is good because it produces happiness," it is always an open question why one ought to produce happiness. One major challenge in ethics is to avoid the naturalistic fallacy without an inflationary metaphysics that relies on entities like Moore's supersensory quality of goodness. *See generally* HILARY PUTNAM, ETHICS WITHOUT ONTOLOGY (2004).

[43] *See* WILLIAM SIMON, THE PRACTICE OF JUSTICE 30–37 (1998) (calling this the "Libertarian Premise"); Robert W. Gordon, *Why Lawyers Can't Just Be Hired Guns*, *in* ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 42, 47 (Deborah L. Rhode ed., 2000) (describing "libertarian-positivist view"). For the best known defense of the minimal state, grounded in the value of autonomy, see ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

[44] *See* DAVID LUBAN, LAWYERS AND JUSTICE 167–69 (1988); David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637.

[45] *See* BERNARD WOLFMAN ET AL., STANDARDS OF TAX PRACTICE § 201.2, at 43–44 (3d ed. 1995) (arguing that filing a tax return should not be analogized to an adversarial proceeding); William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243 (1998) (noting the litigation mindset that spilled over into the representation of Charles Keating in a regulatory matter, which caused the law firm to take an inappropriately adversarial stance toward government regulators).

mary duty is to "represent a client zealously within the bounds of the law."[46] Lawyers who seize on this maxim as a justification for interpreting the law as Holmesian bad men often elide the distinction between acting as an advocate in litigation and acting as a counselor or transactional engineer. Ask a securities lawyer why she opposes a requirement to report out evidence of client fraud, and she is likely to mention the principle of zealous representation, seemingly unaware that this phrase, as originally stated in the Model Code, applied only to representation in litigation. For good reason, however, a lawyer's attitude toward the law must vary according to the context in which she is representing a client.

A well prepared adversary and a fully informed tribunal are institutional features that counter excessive adversarial zeal in litigation and ensure that legal norms are applied in an impartial manner. In litigation, the judge serves as the custodian of the law, and as long as she is adequately informed and not misled, the parties' lawyers are justified in leaving to the judge the responsibility for taking care of the law. But transactional lawyering lacks the essential elements of litigation: an impartial referee, orderly procedures, rules for obtaining, introducing, and excluding evidence, and a competent opposing party. It is so different from adversarial litigation that one wonders why anyone has ever thought to analogize the role of lawyer from one context to the other.[47] Whatever psychological enthusiasm a lawyer might feel for her client's cause, the kind of zealous representation a lawyer may provide in counseling and transactional practice is circumscribed by a heightened obligation not to treat the law instrumentally. In effect, the legal system has delegated the judge's caretaker function to the lawyer in cases where the lawyer's interpretation of the law is not subject to review by an impartial referee.

The arguments in this Article are an attempt to provide a secure jurisprudential foundation for this "caretaker" theory of the authority of law and of legal interpretation—a model of lawyering which treats legal norms legitimately, as reasons in themselves that bear on a lawyer's practical deliberation.[48] In this view, legal rules are not only legitimate reasons for action but preclude recourse to ordinary first-order moral reasons, including the value of client autonomy. Legal norms preempt other reasoning because the law itself arises from recognition of deep and persistent disagreement, resulting from a plurality of worthwhile human goods, values and forms of life, empirical uncertainty, divergent evaluative standpoints, and what Hume called the circumstances of justice—moderate scarcity and limited benevolence.[49] Many goods, such as health care, education, and the protec-

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[46] MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980).

[47] *See* LUBAN, *supra* note 44, at 56–66.

[48] *See* Wendel, *supra* note 6, at 364. The summary here is extremely abbreviated, and many details of the position are explained in the prior Article.

[49] *See* WILLIAM A. GALSTON, LIBERAL PLURALISM 5–6, 28–35 (2002); AMY GUTMANN & DENNIS

tion of safety and property, can be realized only by cooperation with others, so every person has an interest in working together with other members of the society in order to satisfy her desires for these goods.[50] At the same time, people disagree with one another, either about the best way to obtain basic goods (means-ends rational disagreements), constraints that should be placed on others' efforts to satisfy their desires (disagreements about rights); or even fundamental disagreements about whether people should be permitted to live particular kinds of lives (substantive disagreements about goods).[51] These conditions mean that much normative disagreement is in good faith; people are not simply maneuvering in the public domain to grab the biggest piece of the pie for themselves (although of course this happens), but are often motivated by the belief that their proposed rules for social ordering are those most likely to maximize social well being.[52]

In many cases, parties to the normative disagreement share a desire for an at least provisional settlement of the issue, enabling coordinated activity notwithstanding the intractable dispute. "Settlement" here means not only termination of the dispute, but taking a position on the normative issue that

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THOMPSON, DEMOCRACY AND DISAGREEMENT 21–23 (1996); STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE 30–33 (1989); ALASDAIR MACINTYRE, AFTER VIRTUE 6–11 (2d ed. 1984); THOMAS NAGEL, *The Fragmentation of Value*, *in* MORTAL QUESTIONS 128–41 (1979); NICHOLAS RESCHER, PLURALISM: AGAINST THE DEMAND FOR CONSENSUS 76–78 (1993); WALDRON, *supra* note 9, at 175–79; Isaiah Berlin, *The Pursuit of the Ideal*, *in* THE CROOKED TIMBER OF HUMANITY 1 (1990); Morgan & Tuttle, *supra* note 7.

[50] JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 149, 154–56, 231–33, 248–51 (1980). I do not take a position as to whether the basic aspects of human well-being are those postulated by Finnis. *See id.* at 85–90. It would be possible to generate a somewhat different list by emphasizing basic human *capabilities*, as opposed to goods, for example. *See* MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE 39–42 (1999); *see also* Amartya Sen, *Equality of What?*, *in* CHOICE, WELFARE AND MEASUREMENT 353–69 (1982) (arguing that basic human capabilities, rather than basic social goods, ought to be used as the basis of the measurement of welfare). It is interesting that many of the goods described by Finnis overlap with the capabilities identified by Nussbaum—consider life, health, play, and practical reason, for instance. Rather than focusing on marginal differences among lists of basic values or capabilities, this account assumes that some set of goods is constitutive of human flourishing and that at least some of those goods can be realized only in an organized society. It is worth emphasizing, though, that I am not using "public goods" in the sense the term is used in economics—i.e., goods such as clean air or national defense from which it is impossible to exclude users—but in a broader sense, to stand for the various sorts of good things in social life that cannot be accomplished by individuals acting alone.

[51] I refer to this dual aspect of human nature, as sociability and disputatiousness, as the "Grotian problematic," following J.B. Schneewind's treatment of Hugo Grotius. *See* J.B. SCHNEEWIND, THE INVENTION OF AUTONOMY 70–73 & *passim* (1998).

[52] LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW 12 (2001) ("[T]he road to the nasty, brutish, and short lives of the Hobbesian state of nature does not require people motivated solely by selfishness and predatory opportunism . . . ."). Some political theorists specify as a constraint on permissible deliberation the requirement that participants in public debate "recogniz[e] that an opponent's position is based on moral principles about which people may reasonably disagree . . . ." GUTMANN & THOMPSON, *supra* note 49, at 82. One might also make an empirical claim that people do in fact disagree in good faith. My point is somewhat different. It is the conceptual claim that the reasons we have for disagreement are such that people *could* disagree in good faith, although it is also possible for people to be merely spiteful and avaricious.

is robust enough to serve as the basis for coordinated activity. If there were a normative disagreement about, say, whether certain methods of interrogation run afoul of laws prohibiting torture, government officials whose conduct is regulated need to ascertain not only the words of the relevant law, but their meaning. They care about more than what the words say; they want to know whether they will be allowed to use interrogation technique T on detainee D. The parties turn to an impartial, third-party procedural mechanism—the law—because they share the desire for peaceful cooperation and settlement, but cannot reach agreement through deliberation and debate alone.[53] Because the law permits them to do better at realizing their interest in cooperation than they would on their own, and because it is adopted through procedures that meet a threshold standard of fairness and respect for the parties to the normative disputes, the law has authority in the domain of the disagreement and precludes practical reasoning on the basis of the reasons that were relevant to the underlying controversy.[54] This is essentially the argument for the negative aspect of professionalism, which preempts recourse to reasons that would otherwise require a different action in the circumstances, where a legal norm is in force. The positive aspect of professionalism flows from the same conception of the authority of law, and requires lawyers to interpret legal norms in such a way that the law can continue to perform its coordination and settlement functions.

Before working through the defense of this position in detail, it may be helpful to take a preliminary look at some examples of how changes in an interpretive attitude in turn alter judicial decisions or the advice given to clients. As the examples should make clear, the approach to legal interpretation that flows from this conception of legal ethics is different from other methods of interpretation, particularly textualism.[55] Legal texts alone can-

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[53] *See* ALEXANDER & SHERWIN, *supra* note 52, at 11–15; HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1–4 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

[54] This conception of the authority of law is derived from Joseph Raz's normal justification thesis. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 53 (1986); Joseph Raz, *Introduction* to AUTHORITY 1, 12–13 (Joseph Raz ed., 1990). It is substantially influenced by Jeremy Waldron's use of the Razian normal justification thesis ("NJT"). *See* WALDRON, *supra* note 9, at 95–96. Both are discussed in considerably more detail in Wendel, *supra* note 6. I am making stronger claims for the force of the NJT than Raz would accept, but I believe they are consistent with Waldron's expansive use of Raz's conception of authority.

[55] For some of the most important contributions to this debate, see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992) [hereinafter Farber, *Inevitability*]; John Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L.

not achieve the settlement that is the function of law because they are never self-interpreting. Indeed, a pervasive textualist style of interpretation may be positively correlated with abusive interpretations of law that create costly externalities.[56] Texts instead must be interpreted in light of interpretive understandings of the relevant community of lawyers and judges. The most important features of professionalism as a style of interpretation are twofold: first, it avoids the policy preferences or first-order moral beliefs of interpreters; and second, it resists manipulation of the form of legal norms to defeat their substantive meaning. Professionalism, as defended here, does not instruct lawyers to act in the public interest, which may be internally incoherent and normatively contested. Rather, it instructs lawyers to be guided by what the public has come up with as its laws, through the process of legislation, administrative rulemaking, and adjudication. Professionalism is grounded in fidelity to a society's laws, but it is critical that law not be understood narrowly or formalistically. Rather, the law must be interpreted in a way that ensures it will continue to have the capacity to coordinate social action against a background of persistent first-order normative disagreement.

B. An Introductory Example: Text vs. Meaning

Professionalism makes reference to "substantive meanings" of legal norms, as opposed to their mere formal expression. One natural objection to this position is that legal norms do not have a substantive meaning apart from their textual form. The following brief example of an ethical dilemma in lawyering demonstrates that the meaning of even the simplest legal norms—in this case a simple statute—depends on interpretive understandings that are not captured in texts themselves. If a reader is persuaded in this case that non-textual conventions and practices of legal reasoning are actually relevant to determining the applicable law, then the only remaining step in the argument for professionalism is to establish the wrongfulness of ignoring them.

The Miserly Railroad. The Northern Atlantic Railroad asks its general counsel whether it must make an expensive modification to its locomotives. It is concerned that a new federal statute may mandate retrofitting the loco-

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REV. 685 (1999); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833 (1998).

[56] *See* Noël B. Cunningham & James R. Repetti, *Textualism and Tax Shelters*, 24 VA. TAX. REV. 1 (2004) (observing correlation between increased incidence of abusive tax shelters and belief in textualist styles of interpretation, prevalent among professional tax advisers).

motives with an automatic coupling device.[57] The relevant statutory language reads:

> On and after the first day of January, nineteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

The railroad's vice president of engineering tells the general counsel that for technical reasons, it is much more difficult to equip locomotives, as opposed to ordinary cars, with automatic coupling devices. She points out that the statute requires automatic couplers on "cars," which in the ordinary parlance of railroad workers would not be understood to include locomotives. (She actually overheard a snippet of dialogue in which one employee at a switching yard asked, "Are there any cars on that track?" and was told, "Nope, just a locomotive.") Moreover, the examples used to illustrate the definition of "car" in the Oxford English Dictionary all refer to conveyances that are pulled by a locomotive: passenger car, sleeping car, coal car, freight car, and so on. Her argument is supported by the statute's use of the verb "haul," of which "car" is an object—locomotives are not hauled; they do the hauling. The general counsel also remembers reading in law school a case involving the theft of an airplane, in which the Supreme Court noted that the operative term "vehicle" did not "evoke in the common mind" the image of an airplane.[58] What advice should the general counsel give to the railroad regarding compliance with the statute?

In this case, the content of the law on point is facially uncertain, if law is understood as a property of legal texts alone. The apparent uncertainty is the result of linguistic ambiguity or vagueness (does the term "car" encompass locomotives?). I suspect, however, that readers have already concluded that this case does not actually involve any serious uncertainty and that the railroad must equip the locomotives with automatic couplers.[59] What justifies this conclusion? The answer to any question of legal interpretation is ultimately provided by the conventions and practices of legal reasoning, which form the basis for the exercise of informed, sound "situation sense," prudence, practical reasoning, or *judgment*.[60]

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[57] This problem is based on *Johnson v. Southern Pacific Co.*, 196 U.S. 1 (1904), *rev'g* 117 F. 462 (8th Cir. 1902), two casebook classics illustrating issues in statutory interpretation, but I freely embellished many of the facts.

[58] McBoyle v. United States, 283 U.S. 25 (1931) (interpreting a statute criminalizing "transporting in interstate commerce a motor vehicle, knowing the same to have been stolen").

[59] *Cf.* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 1567 (1985) (arguing that doctrinal, factual, and linguistic factors may make a particular outcome easy for competent lawyers to predict).

[60] "Situation sense" is a term favored by Karl Llewellyn. *See* KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 60–61, 268–85 (1960). Anthony Kronman uses the Aristotelian

Legal reasoning begins with the text of statutes and the holdings of cases, but it does not end there. Indeed, a judge or lawyer might commit the vice of "hypertextualism" by pretending that the language of a statute, dictionary definitions, and rules of syntax are sufficiently determinate to produce an objective interpretation of a text.[61] Although the statute in the railroad case uses the word "car," the legislature may have intended to require coupling devices on locomotives as well (perhaps after hearing testimony about the frequency of locomotive-car coupling accidents), and only a myopic fixation on the literal language of the statute would cause an interpreter to miss this apparent meaning of the text. Moreover, statutory language, definitions of words, canons of construction, and so on, might create as much interpretive freedom as more expansive methods like purposivism or intentionalism, thereby permitting the interpreter to impose her own policy preferences on the text, under the guise of rendering an objective reading. Fortunately, in both of these styles of legal reasoning, there are second-level principles that have developed in any given domain of law that stabilize and regulate interpretation.[62]

The word "car" in isolation does inform whether the railroad is required to equip its locomotives with automatic couplers; if anything, it suggests a counterintuitive negative response. Starting with the text of the statute does tell us something; under this particular statute the railroad is not

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terms "prudence" (as a translation of *phronesis*) and "practical wisdom" to convey a similar notion. *See* ANTHONY T. KRONMAN, THE LOST LAWYER (1993); Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. (1985). Modern commentators on statutory interpretation favor the term "practical reason." *See, e.g.*, Eskridge & Frickey, *supra* note 55; Farber, *Inevitability*, *supra* note 55; *see also* BURTON, *supra* note 7, at 6 n.9 (citing sources). One might even use the term "pragmatism," as popularized by Richard Posner, among others. *See, e.g.*, Richard Posner, *Pragmatic Adjudication*, *in* THE REVIVAL OF PRAGMATISM 235 (Morris Dickstein ed., 1998). I will use the term judgment throughout the Article, but it should be understood that I am appealing to this vigorous tradition of legal theory, whatever label a particular writer chooses. And I intend as well to appeal (without elaboration, because of the constraints of space and relevance) to the work of critics within moral philosophy who seek to establish objective truths of ethics while making room for contextual judgment. *See, e.g.*, PUTNAM, *supra* note 42.

61 Pierce, *supra* note 55, at 750–52.

62 *See, e.g.*, MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW (1988); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Pepper, *supra* note 19, at 1585–87 (summarizing a series of factors and distinctions that define the bounds of the law). Owen Fiss refers to the norms of an interpretive community as "disciplining rules," *see* Fiss, *supra*, at 744–45, but this imprecise use of the term "rules" has created unnecessary confusion, as is evident in Fiss's debate with Stanley Fish. *See* Stanley Fish, *Fish vs. Fiss*, 36 STAN. L. REV. 1325 (1984). Fish makes an infinite regress argument, noting that if these interpretive norms were indeed rules, they would stand in need of interpretation, requiring further meta-disciplining-rules. *See id.* at 1326, 1334. Instead of rules, Fish believes an interpretive community is constituted by "interpretive assumptions and procedures [that] are so widely shared in a community that the rule appears to all in the same (interpreted) shape." *Id.* at 1327. Fiss's argument, read carefully, is that there are "interpretive assumptions and procedures" that are widely shared within a community. Apparently Fiss actually does not disagree with Fish at all, and Fish has simply seized on Fiss's use of the word "rule" to argue against a position that Fiss does not hold.

required to equip cars with air brakes, doors that can be opened from the inside, or some other useful safety feature. But the text still leaves interpretive puzzles. What about the absence of the term "locomotive"? Congress could easily have drafted the provision to read "any car or locomotive . . . not equipped with couplers coupling automatically by impact." Under the canon of construction known as *expressio unius est exclusio alterius*,[63] an interpreter should infer from the inclusion of the term "car" and the absence of the term "locomotive" that Congress intended the statute not to apply to locomotives. Of course, as Karl Llewellyn demonstrated in one of the best known critiques of formalism, every canon of statutory construction has an opposing canon, which should be used "when the context dictates."[64] In this case, if the context so dictates, one could argue that locomotives should be included from the opposing canon that the statute may comprehend cases beyond those specifically mentioned in the text, particularly if it is apparent that the statute has a purpose (such as protecting the safety of railroad workers) that would be advanced by requiring couplers on locomotives.[65] Similarly, the lawyer might argue either that statutes in derogation of the common law rule (which would not have required couplers on locomotives) should be strictly construed, or that remedial statutes (which would require the couplers) should be construed liberally to accomplish their purpose.[66] And these are only principles of interpretation based on the language of a statute.

There are also policy-based aids to construction, such as the rule of lenity, which provides that an ambiguous criminal statute should be read narrowly.[67] The case mentioned by the railroad's vice president, involving the theft of an airplane, can arguably be justified on this basis. Further-

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[63] 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.23, at 216–17 (5th ed. 1992). This was one of the arguments made by the court of appeals in this case. *See* Johnson v. S. Pac. Co., 117 F. 462, 466 (8th Cir. 1902) ("This striking omission to express any intention to prohibit the use of engines unequipped with automatic couplers raises the legal presumption that no such intention existed . . . .").

[64] Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950). A notorious example of a court disregarding the *expressio unius* canon is *Church of the Holy Trinity v. United States*, 143 U.S. 457, 458, 463 (1892), in which a statute making it a crime to assist "the importation or migration of any alien" contained exceptions for certain categories of workers, such as lecturers, actors, and domestic servants, but said nothing about "brain toilers" and "ministers of the gospel." The Court nevertheless held the statute inapplicable to an elite New York City church which had arranged for the entry of its new rector from England.

[65] In reversing the Eighth Circuit, the Supreme Court relied heavily on congressional intention and the purpose of the statute. *See* Johnson v. S. Pac. Co., 196 U.S. 1, 14–17 (1904).

[66] The court of appeals opinion discusses these opposing canons. *See Johnson*, 117 F. at 464–65 ("[C]ounsel for the plaintiff persuasively argues that this is a remedial statute . . . and should be liberally construed, to prevent the mischief and advance the remedy"); *id.* at 466 ("A statute which thus changes the common law must be strictly construed.").

[67] 3 SINGER, *supra* note 59, § 59.03, at 102–05. The court of appeals also relied on the rule of lenity. *Johnson*, 117 F. at 467.

more, we can ascribe a variety of hypothetical intentions to Congress (in the absence of clear legislative history).[68] Perhaps Congress wanted to improve safety for railroad workers, even though it would impose high costs on the railroads, in which case couplers should be required on locomotives. On the other hand, the statute may have represented a compromise between workplace-safety advocates and the railroad industry, in which case it fairly should be read as requiring couplers only on non-locomotive cars.[69]

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[68] Interpretation by ascription of intention is a disfavored methodology in modern jurisprudence, owing to powerful critiques by Dworkin and others. *See* DWORKIN, *supra* note 27, at 313–27; ANTONIN SCALIA, A MATTER OF INTERPRETATION 29–32 (1997); WALDRON, *supra* note 9, at 124–29; Easterbrook, *supra* note 55; Eskridge & Frickey, *supra* note 55, at 325–32; Stephen F. Williams, *Restoring Context, Distorting Text: Legislative History and the Problem of Age*, 66 GEO. WASH. L. REV. 1366 (1998). Briefly, the problems with imputing intentions to a multi-member representative body are that there is no speaker or actor to whom to ascribe an actual unitary intention, and that constructing a fictional unitary intention by combining the intentions of individual legislators is doomed to failure because of theoretical difficulties involved in identifying and cumulating the mental states of dozens, if not hundreds of legislators. Each legislator may have had a variety of mental states with respect to the proposed legislation—enthusiastic support, cautious assent, isolated qualms, serious reservations, or utter indifference. Legislators also may be moved by motives of rent-seeking, party loyalty, or logrolling, without regard to the content of the provision under consideration. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991). Specifically with respect to intention regarding interpretation, a legislator may hope that an interpreter would read the text in a particular way, even though she fully expected a different interpretation to gain acceptance. Even if we could identify the intentions of individuals, the actual text voted on by the majority may represent the intention of none of the individuals, because of the way preferences are registered in an assembly. Attempting to divine collective intention from legislative history is no less problematic, because of the malleability of legislative history and the multiplicity of interpretations that can be supported by the relevant history documents such as committee reports and remarks made on the floor by supporters and opponents of the bill. Interpreting statutes by selecting bits and pieces of legislative history has often been criticized as tantamount to "looking over a crowd and picking out your friends." Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983); *see also* Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). For an attempt to restore some jurisprudential significance to the lawmaker's intent, see ALEXANDER & SHERWIN, *supra* note 52, at 98–117.

[69] For a sophisticated discussion of the effect on interpretation of the lawmakers' and enforcement officials' understanding of the remedial purpose of a statute, see Pepper, *supra* note 19, at 1570–71. The scheme which limited couplers to non-locomotive cars might be an example of what Dworkin would call a "checkerboard" statute, which seems to resolve the dispute in an arbitrary or unprincipled way. *See* DWORKIN, *supra* note 27, at 178–84. Dworkin believes he is tapping into a generally shared intuition that checkerboard statutes are objectionable because we would prefer ex ante that our preferred legal norm be either adopted or rejected, but not compromised. "Even if I thought strict liability for accidents wrong in principle, I would prefer that manufacturers of both washing machines and automobiles be held to that standard than that only one of them be." *Id.* at 182. But leaving aside obvious checkerboards like a statute that made abortion legal on Mondays but illegal on Tuesdays, it is not clear that all legislative compromises like Dworkin's products liability statute are unprincipled. There may be good reasons for imposing strict liability on automobile manufacturers but not washing machine manufacturers. (Perhaps washing machines are easier for users to inspect for defects, or the expected cost of accidents is not as high, as compared with automobiles.) In the railroad case, if for some reason it is significantly more expensive to install couplers on locomotives, or if the operation of automatic couplers on locomotives creates some new danger that would not be present if they were used only on non-locomotive cars, the exclusion of locomotives from the coupler requirement would not be a checkerboard statute in Dworkin's sense.

As in most legal cases, it is possible to argue both positions in the railroad case. This is the point at which analysis of statutory interpretation often resorts to metaphors of weighing and balancing to capture the process of exercising judgment. The trouble with these tropes is that the process of comparison they suggest creates an illusion of precision which in turn encourages unrealistic expectations about the objectivity of judging. To put it another way, judgment sometimes functions as a black box in legal theory—one result or another mysteriously pops out of the decisionmaking machinery, but the process itself is opaque to third-party observation and criticism. Sophisticated legal theorists do not use judgment in this way, however. In every serious account of legal interpretation, the interpreter's judgment must be transparent—that is, available for public observation and criticism. Requiring the interpreter to justify her judgment to the public defends the judgment's objectivity against the critique that the interpreter is simply imposing her own policy preferences on the law.

For example, Ronald Dworkin is the most enthusiastic proponent of a thoroughgoing interpretive approach to law, and he is quite clear that his hypothetical interpreter, the superhuman judge Hercules, must exercise judgment with respect to an external standard. Hercules' standard is the best justification of a legal speech-act (a judicial decision or the enactment of a statute) where "best" is understood in terms of the coherence of the principles underlying the act (i.e., as reasons explaining and justifying the act) with a political community's ideals of integrity, fairness, and political due process.[70] Dworkin refers to this external constraint as integrity, and offers integrity as a criterion for others to judge whether Hercules has exercised his judgment correctly. Other theorists construct a framework of criteria, rebuttable presumptions, or a continuum of complementary interpretive methodologies.[71] However these external checks on interpretive discretion are constructed, they are essential to guard against both rampant subjectivity by the interpreter, and *ex post* evaluations of the propriety of an interpretation that would not have been as clear *ex ante*.[72]

To these models of judgment I would add a critical jurisprudential element: interpretation is not a function of a single judicial or lawyerly

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[70] DWORKIN, *supra* note 27, at 337–38, 345–46.

[71] *See* Eskridge, *supra* note 5, at 1496–97 (proposing continuum in which text controls where it provides determinate answers, but history, social and legal context, and evolutive context assume more importance as textualist interpretations become more contestable); Eskridge & Frickey, *supra* note 55, at 352–53 (proposing "funnel of abstraction" in which interpreter begins with statutory text and tests potential interpretations for historical accuracy and conformity to contemporary circumstances and values); Pepper, *supra* note 19, at 1607–09 (relying on moral perception and character to constrain the exercise of judgment).

[72] *Cf.* Schwarcz, *supra* note 15, at 1313 (suggesting that some of the decisions of accountants and lawyers in the Enron transactions may look bad ex post, but at the time were defensible exercises of discretionary judgment).

mind, acting alone.[73] Rather, it is a community-bound enterprise, in which the criteria for reasonable exercise of judgment are elaborated intersubjectively, among an interpretive community that is constituted by fidelity to law. These criteria are available to provide a justification of a decision.[74] As Anthony Kronman correctly points out, a person characterized by good judgment "is not someone who from time to time merely makes certain strikingly appropriate oracular pronouncements."[75] Rather, a person of good judgment can, if called upon to do so, provide a reasoned explanation of her decision.[76] This explanation is a public phenomenon, in the sense that the interpreter is appealing to shared community standards for evaluating the appropriateness of interpretation. In this way, the interpreter's discretion is constrained by public norms regulating the understanding of legal texts.[77] The meaning of these texts therefore becomes a property of the

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[73] Gerald Postema, *"Protestant" Interpretation and Social Practices*, 6 LAW & PHIL. 283 (1987).

[74] *See* BURTON, *supra* note 7, at 19–22 (arguing that the rule of law demands that judges be able to justify their decisions on the basis of reasons about what the law is, as opposed to what they think it should be); WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 205 (1973) (discussing Llewellyn's arguments in *The Common Law Tradition*).

[75] Anthony T. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 849 (1987).

[76] HART & SACKS, *supra* note 53, at 143. I do not take a position on whether professionals consciously rely on these criteria when exercising judgment. One influential account of professional judgment emphasizes the extent to which this knowledge is tacit, although it can be given structure through reflection. *See* DONALD A. SCHÖN, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION (1983). Others have pointed to research showing that if it is possible to specify criteria for the exercise of judgment, one generally does better by following a mechanical decision procedure than by committing the ultimate decision to the discretion of a professional. KATZ, *supra* note 15, at 14–16. What matters for the purposes of this argument is that legal judgments can be objective to the extent they are justified through publicly available reasons.

[77] This observation is not limited to legal rules, but can be generalized to all linguistic assertions, because language itself can never capture all of the shared understandings that are necessary to make communication intelligible. Even the seemingly clearest possible assertion, such as "*68 + 57 = 125*," can be understood only in light of intersubjective assumptions about the permissible use of language. SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982). In our community, the "+" sign is understood to denote addition, but there is no reason, internal to the utterance "*68 + 57 = 125*," that the "+" sign could not denote "quaddition," that is, the operation "add the two quantities if both are less than 57, otherwise return the value 5." This observation does not mean that "*68 + 57 = 125*" has no determinate meaning, only that its meaning is not a function solely of the symbols written on the page, nor of other facts such as past usage of the "+" symbol, dispositions to use it in a certain way, or intentions. The "quaddition" interpretation is ruled out only by interpretive understandings shared by the community of language-users who wish to communicate with each other, which understandings are internalized and followed unconsciously by members of the community. It is nevertheless the case that "*68 + 57 = 125*" is objectively true. But why cannot one argue that the community is actually engaging in "quinterpretation," which follows interpretive understandings that yield the true proposition, "*68 + 57 = 5*"? Kripke's insight is that the principle of interpretation itself cannot announce that it is not a principle of quinterpretation, and moreover there cannot be another meta-principle ruling out quinterpretation within the legal system because that meta-principle itself must be interpreted.

To avoid an infinite regress, it is necessary to take a normative stance on interpretation that is rooted in something external to the system of rules (or language, law, or anything else) that we are considering. This pattern of argument leads to the conclusion, in jurisprudence, that legal texts themselves cannot perfectly constrain interpretation in all cases. Nevertheless, the theory of law advanced here is still posi-

community, which confers the ultimate authority on legal norms, and the community's standards are legitimate to the extent they respect the purpose of law, which is to enable people to live peacefully together, flourish, and achieve their common ends.

A textualist might respond that I have assumed too hastily that judgment is necessary. Perhaps the plain language of the statute provides sufficient determinacy to accomplish the settlement of normative disputes that is the function of law. One might also make the argument from the authority of law by noting that legal norms are legitimate only to the extent they are enacted by fair procedures, and in the case of legislation, fair procedures involve a majority vote on a particular form of words embodied in the resolution under discussion.[78] But the argument from authority shows only that "the product of legislation" is entitled to respect, not that the product of legislation is simply a text, the interpretation of which is confined to the literal language of the enactment. Even Jeremy Waldron, who makes the argument from authority powerfully, concedes that "statutes need interpretation [and] the words of the enactment (and their 'plain meaning') are often insufficient to determine the statute's application."[79] For Waldron, the important thing is that the interpretive process *begin* with the sense that there is a single, definitive proposal under discussion, and that the meaning of the proposal should be recovered by beginning with the text of the enactment. Suppose in the railroad case that the legislature had responded to a series of lurid reports of accidents, and resulting public outcry. In the course of considering some response, it became apparent that workers were injured by attaching locomotives to cars as well as by hooking non-locomotive cars together. The course of discussion in the legislature reveals that all members of the assembly were concerned with this problem *in toto*, although the members disagreed on other points, such as whether to make new safety measures mandatory or voluntary.[80] In that instance, is there any doubt that the word "car" should be interpreted to include locomotives? This interpretation is not undermined by the reasons for treating the enactment as authoritative, because the legislative response was aimed at settling some disagreement other than a disagreement over whether the word "car" should

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tivistic, because the law is capable of identification without resort to moral argumentation. For this definition of positivism, see Jules Coleman, *Negative and Positive Positivism*, *in* MARKETS, MORALS AND THE LAW 3, 4–5, 16 (1998). Dworkin resists the argument that a positivist theory can rely on a norm that is accepted as part of a legal system because of "a sense of appropriateness developed in the profession." RONALD DWORKIN, *The Model of Rules I*, *in* TAKING RIGHTS SERIOUSLY 14, 24 (1977). But I follow Jules Coleman in believing that a rule of recognition may take account of interpretive conventions or practices. *See* Jules Coleman, *Authority and Reason*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 287 (Robert P. George ed., 1996); *see also* H.L.A. Hart, *Postscript*, *in* HART, *supra* note 27, at 237, 241–42.

78 WALDRON, *supra* note 9, at 25, 77–82.

79 *Id.* at 79.

80 *See* ALEXANDER & SHERWIN, *supra* note 52, at 114–15 (arguing that the lawmaker's purposes can provide context that makes interpretation determinate in some cases).

include locomotives. Thus, one should not assume that the functional argument for the authority of law necessarily entails a textualist interpretive methodology; in fact, it may support a broader purposivist approach to statutory meaning.[81]

These higher-order norms regulating the exercise of judgment are legitimate, and have authority to the exclusion of ordinary moral reasons, to the extent they enable the law to fulfill its function of optimizing people's ability to work together to achieve common projects.[82] The law would fail at this end if one of two conditions obtained: (1) it were impossible for a representative of a client to discern the content of the law, or (2) it were permissible for individual legal interpreters, such as lawyers, to manipulate the formal expression of legal norms to make them mean anything at all. Thus, returning to our examples, if it is apparent that the purpose of the statute in the railroad case is to prevent accidents caused by workers getting their hands caught in manual coupling mechanisms, there will be good grounds for interpreting the statute to require automatic couplers on locomotives. Naturally, a contrary purpose may be apparent—perhaps, as suggested previously, the statute was a compromise between advocates of a comprehensive reform of railroad safety regulations and those who preferred a more cautious, incremental approach. In that case, one might make a reasonable argument for not requiring the automatic couplers on locomotives. But the crucial term here is "reasonable." The demand is, in any event, for a reasoned elaboration of an interpretation of legal texts. Appealing only to formal features like the statutory text is not a reasoned elaboration, absent some argument why the form alone ought to have dispositive importance in the particular case.[83]

Finally, it is worth observing that judgment is also necessary in common-law reasoning because it is impossible fully to specify meta-rules that capture the complexity of legal interpretation. The decisionmaker must consider texts, principles, and facts, as well as subsidiary norms such as

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[81] *See* William N. Eskridge, Jr., *The Circumstances of Politics and the Application of Statutes*, 100 COLUM. L. REV. 558, 566 (2000) (reviewing WALDRON, *supra* note 9); Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 92 GEO. L.J. (forthcoming 2004) ("At the very least [legislative history] can help us to determine whether the difficulty in applying the statute results from an unfortunate choice of statutory language to effectuate a legislative goal that is very clear once one investigates the matter.").

[82] HART & SACKS, *supra* note 53, at 146–48.

[83] Kripke's interpretation of Wittgenstein makes a similar point in a different way, noting that for utterances to be said to conform to a rule, they must not only conform to assertability conditions, but also that there is some point, within the community of language-users, of making this type of utterance under these conditions. *See* KRIPKE, *supra* note 77, at 92; *see also* BARBARA HERMAN, THE PRACTICE OF MORAL JUDGMENT 83–84 (1993) (discussing rules of moral salience, which specify features of a situation that are relevant to the exercise of moral judgment, and noting that not just any rules count as rules of moral salience); Schauer, *supra* note 55, at 251 (asserting that members of linguistic communities not only share the ability to make sense of utterances, but do the same things with linguistic understandings).

rules of legal salience (which point to aspects of the facts that are germane to the decision), considerations of weight and priority among competing norms, and the possibility of justified departures from previously sanctioned interpretations. Consider a famous example of the interplay between facts and rules in case interpretation, from Karl Llewellyn's *Bramble Bush*:

> What are *the facts*? The plaintiff's name is Atkinson and the defendant's Walpole. The defendant, despite his name, is an Italian by extraction, but the plaintiff's ancestors came over with the Pilgrims. The defendant has a schnauzer-dog named Walter, red hair, and $30,000 worth of life insurance. . . . The defendant's auto was a Buick painted pale magenta. He is married. His wife was in the back seat, an irritable, somewhat faded blonde. She was attempting back-seat driving when the accident occurred. He had turned around to make objection. In the process the car swerved and hit the plaintiff. The sun was shining; there was a rather lovely dappled sky low to the West. The time was late October on a Tuesday. The road was smooth, concrete. It had been put in by the McCarthy Road Work Company.[84]

It does not take more than a couple of weeks of law school for a first-year student to learn to winnow out the relevant facts from an example like this. But what has the student learned? Surely not a system of rules that can be applied deductively (e.g., "if the dispute involves an auto accident, road conditions may be relevant but not the plaintiff's ethnic ancestry"), because any set of rules would quickly become too complex to learn and apply. For example, the identity of the construction company may or may not be legally salient, depending on whether the case involves allegations that the design of the road contributed to poor visibility. Life insurance may matter if this is a case in which the collateral source rule is an issue. Even the ethnic background of the plaintiff and defendant might conceivably matter if the auto accident had been only the precursor to a violent argument in which insults were exchanged, and out of which the plaintiff claims infliction of emotional distress.[85] Some knowledge of the law is necessary to know which facts are relevant, but the relevance-making relationship between law and facts is not constituted by rules.[86] Instead of rule-application,

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[84] KARL LLEWELLYN, THE BRAMBLE BUSH 48 (1951).

[85] *See, e.g.*, Taylor v. Metzger, 706 A.2d 685 (N.J. 1998) (recognizing cause of action for intentional infliction of emotional distress arising out of racial epithets uttered in an employment setting).

[86] *See* Michael S. Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280, 287–88 (1989) (arguing that moral knowledge of the domain of consequentialist calculation is needed before it is possible to proceed to consider consequences in moral reasoning); *cf.* HERMAN, *supra* note 83, at 75 ("An agent who came to the [Kantian Categorical Imperative] procedure with no knowledge of the moral characteristics of actions would be very unlikely to describe his action in a morally appropriate way."). Note that Moore does not subscribe to an intuitionist view, in which knowledge of the domain of consequentialist calculation is something mysterious and ineffable; rather, he reviews numerous rigorous standards (such as the act/omission and intended/foreseeable distinctions, the pre-existing peril doctrine, and Judith Jarvis Thomson's principle of redirecting harms) which justify the boundary between permissible and impermissible use of consequences in moral reasoning. Moore, *supra*, at 299–308. Moore boils these down to the standard threefold analysis of criminal law culpability, *id.* at 308–09, but the application of

this reasoning process involves the exercise of informed professional judgment, which can be justified on the basis of rules and standards, but which is always incompletely specified, or underdetermined by rules and standards. Lawyers acquire and internalize these higher-order norms through professional education, and follow them largely unconsciously within a given interpretive community.

C. Hard Cases and Right Answers

Building on this last point, and to anticipate a common objection to this line of reasoning, it is important to emphasize that I am not denying the existence of "hard cases," where the relevant legal texts and interpretive practices underdetermine the result.[87] In *The Legal Process*, Hart and Sacks confidently assert that "[u]nderlying every rule and standard . . . is at least a policy and in most cases a principle [which is] available to guide judgment in resolving uncertainties about the arrangement's meaning."[88] Although I share their belief that underlying purposes, policies, and principles are available to guide judgment, the passage quoted is made too strong by the singular nouns—*a* policy, *a* principle. Many legal rules and standards serve multiple, sometimes conflicting purposes. In addition, purpose is not the only key to a statute's meaning—the express language of the statute may be in conflict with its purpose, and there may be other indications, such as legislative history and context, that cut against the interpretation suggested by the apparent purpose (even if there is only one). For these reasons, there are a great many cases in which a competent judge or lawyer, reasoning in good faith, could reach result A or result B, and be deemed by a competent observer to have performed her job adequately.[89] An observer might disagree with B, and believe that A was the better result, but nevertheless concede that B was within the range of plausible, justifiable results.[90]

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these criteria still calls for the exercise of judgment, as opposed to deductive reasoning. The point is not that the student's judgment in my example, or the ascription of responsibility in Moore's, is incapable of being justified or theorized, but that the precise nature of reasoning process is often opaque to the person exercising judgment.

87 *See* ALEXANDER & SHERWIN, *supra* note 52, at 115–16; BURTON, *supra* note 7, at xii, 5–12, 47–48, 79–80. The term "hard cases" is associated with Dworkin's debate with Hart. *See* RONALD DWORKIN, *Hard Cases*, *in* DWORKIN, *supra* note 77, at 81.

88 HART & SACKS, *supra* note 53, at 148.

89 Kent Greenawalt, *Discretion and the Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359, 368–69 (1975).

90 I do not believe it is possible to define "plausible" legal arguments in mathematical term —e.g., whether a 10% chance, a 30% chance, and so on, is necessary before we can deem an interpretation of law plausible. These numbers create an illusion of precision by masking the uncertainty and guesswork that goes into coming up with the number. Instead, the plausibility standard should be understood in terms of an attitude or conviction on the part of the lawyer who offers the interpretation and may be fleshed out with reference to a kind of hypothetical reasonable observer. Plausibility certainly requires more than passing the proverbial straight-face test. One possible heuristic is that if a lawyer would be comfortable making the argument to the judge for whom she clerked, a professor she respects, or a col-

For example, consider a municipal ordinance that bans vehicles in excess of 6000 pounds from residential streets. The ordinance is intended to reduce wear and tear on municipal streets, as well as prevent accidents caused by heavy trucks driving in residential neighborhoods. Does the ordinance apply to monster sport-utility vehicles like the Ford Excursion and Cadillac Escalade?[91] Not only do large SUVs fall within the prohibition created by the literal language of the statute, but they pose many of the same dangers; they are within the "mischief" sought to be remedied by the statute, as British lawyers would say.[92] On the other hand, these ordinances were mostly enacted before the widespread craze for SUVs, particularly the subgenre of gigantic vehicles that weigh as much as commercial trucks. The drafters of the ordinances probably did not intend to target vehicles that are owned primarily for personal use. Moreover, the law is generally quite lenient on SUVs, granting their owners special tax breaks and their manu-

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league who is known for her good sense and judgment, the argument is plausible. If the lawyer could stand behind an interpretation, take pride in it, and offer it to a third party the lawyer respects for her sound judgment, then the interpretation is plausible.

I recognize that it can be difficult to give a rigorous logical account of the distinction between a plainly implausible legal argument (say, one with only a 1% chance of success) and a clearly plausible one (say, one with a 98% chance of success), just as it is difficult to differentiate formally between a heap of stones and a non-heap. *See* Sorites Paradox, *in* THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 864 (Robert Audi ed., 2d ed. 1999); Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509 (1994). But law does not lend itself to bivalent logic (i.e., heap vs. non-heap, or frivolous vs. non-frivolous) and always demands the exercise of judgment. Further support for this assertion must await the arguments in Part III. As a preliminary matter, even if we are uncertain whether we need three, four, five, or *n* stones to make a heap, it does not mean that there are no such things as heaps. Moore, *supra* note 86, at 332. By analogy, even if we may be unsure on the margins whether an argument is frivolous, we should not conclude that there is no such thing as a frivolous argument.

In some contexts the law governing lawyers does adopt pseudo-mathematical standards for plausibility or frivolousness. For example, Treasury Department Circular 230, regulating practice before the Internal Revenue Service, permits a lawyer to sign a tax return only where each position in the return has a "realistic possibility of being sustained on its merits." *See* 31 C.F.R. § 10.34(a) (2004). "Realistic possibility" is further defined as "approximately a one in three, or greater likelihood" of being sustained on the merits. *Id.* § 10.34(d)(1); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 352 (1985) (also adopting a "realistic possibility" standard); ABA SPECIAL TASK FORCE REPORT ON FORMAL OPINION 85-352, *reported in* 39 TAX LAW. 635, 638 (1986) (stating that a position with a 5% to 10% chance of success on the merits would not have a realistic possibility of success, while one with a one in three chance would). As suggested previously, I believe these numbers only obscure the issue by deflecting attention away from the lawyer's attitude toward the interpretation. "Realistic possibility" seems better defined in terms of something like "confident endorsement" or whether the lawyer would be comfortable putting her reputation for sound judgment on the line by standing behind the interpretation.

[91] *See* Andy Bowers, *California's SUV Ban*, SLATE, Aug. 4, 2004, *at* http://slate.msn.com/id/2104755.

[92] *See* Heydon's Case, 76 Eng. Rep. 637, 638 (Ex. 1584).

facturers exemptions from passenger car fuel economy standards.[93] Thus, one could plausibly argue that the most reasonable interpretation of the ordinance would not apply to SUVs.

What is critical in hard cases is that the judge argues for A or B on the basis of what might be called "internal" legal reasons, and do so in a way that is respectful of the social function of law.[94] In order to respect the law, these justifications must be based on reasons that could be advanced publicly in an adversarial process in which reasons are given in support of one's position.[95] It is not necessary that all interpreters agree on the result, as long as the result is justifiable in principle on the basis of internal legal reasons. Internal legal reasons are simply those grounds (texts, principles that are fairly deemed to underlie and justify legal rules, interpretive practices, hermeneutic methods, and so on) that are properly regarded in a professional community as appropriate reasons to offer in justification of a result. In the SUV case, the arguments back and forth were offered on the basis of reasons such as the underlying policies (reducing wear and tear on streets), traditional canons of statutory construction (the mischief rule), and interpretive practices that place a single text in a broader legal context (observing the solicitude for SUVs in environmental and tax law). Perhaps it is most natural to define internal legal reasons negatively, as excluding extraneous factors such as a bribe, gratitude for a party's support in a judicial election, information excluded by evidentiary rules, the flip of a coin, or what the judge ate for breakfast.[96] Providing a positive definition of internal legal reasons is a major task of analytic jurisprudence, and the next Part will consider how seemingly esoteric academic debates can actually have a great

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[93] *See* Union of Concerned Scientists, *Tax Incentives: SUV Loophole Widens, Clean Vehicle Credits Face Uncertain Future*, *at* http://www.ucsusa.org/clean_vehicles/cars_and_suvs/page.cfm?pageID=1280 (last visited Aug. 4, 2004).

[94] In fairness to Hart and Sacks, they recognize the problem of indeterminacy:

> It may even be said that more than one answer is permissible, in the sense that if one answer had been conscientiously reached and generally accepted a reviewing court might well think it ought not to be upset, even though its own answer would have been different as an original matter.

HART & SACKS, *supra* note 53, at 149. Fairly or not, however, *The Legal Process* has become known as the *locus classicus* of the attribution-of-purpose method of statutory interpretation, and Hart and Sacks are usually understood to have relied on an assumption that a statute, case, or legal doctrine has a single purpose standing behind it. *See, e.g.*, Eskridge & Frickey, *supra* note 55, at 333–37. I do want to make clear that I do not subscribe to the interpretation of Hart and Sacks that assumes a single purpose lying behind a regime of legal rules and standards.

[95] *See* MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR 49–53 (2004) (arguing that the rule of law does not require invariance, but does require public justification).

[96] The familiar reference to "what the judge had for breakfast" as a basis for judicial decisions is a caricature of American legal realism. Most realists believed that judicial decisions fell into predictable patterns, influenced by various social forces. Only a small faction of realists argued that the reasons for judicial decisions were completely idiosyncratic, a claim whose plausibility is undermined by the ability of lawyers to predict judicial decisions with a fair degree of reliability. *See generally* Brian Leiter, *American Legal Realism*, *in* THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY (Martin Golding ed., 2004).

deal of practical significance in shaping the way lawyers understand their role in relation to the law.

Before moving on to that discussion, however, it is necessary to consider a seeming inconsistency between the demands of professionalism in litigation versus transactional and counseling contexts. In an easy case, a lawyer is not justified in urging a court to adopt a spurious interpretation of law; neither is she permitted to structure a transaction in order to take advantage of an illegitimate construction of applicable legal rules. The law governing lawyers—both the state bar disciplinary rules and the law of civil procedure—prohibits advancing frivolous legal arguments.[97] In a hard case, however, it is an implication of professionalism that a lawyer may advocate for an interpretation in litigation that she would be prohibited from adopting as the basis for legal advice to a client or the structure of a transaction. There are such contextual distinctions in the law of lawyering, most notably in the Securities and Exchange Commission's regulations implementing the Sarbanes-Oxley Act. This Act requires lawyers in some cases to report information "up the ladder" within a corporation where they reasonably believe their client is committing certain wrongful acts, but do not require reporting up where the lawyer is representing the client in litigation over the wrongful act.[98] The distinction may nevertheless be incoherent if it amounts to a requirement that the lawyer assert, in litigation, an interpretation of the law that she would be prohibited from relying upon in transactional representation.[99]

It is important to note that my distinction between the transactional and litigation contexts is not an ontological or epistemological claim that the law is actually different in these contexts, or that it may be more easily recovered in one setting than the other. The applicable law and the process of interpretation are the same in both settings. The difference is, in hard cases, the responsibility to serve as a custodian of the law is primarily the judge's, with limited coordinate duties on lawyers to avoid advancing frivolous legal arguments, withholding adverse legal authority missed by the adversary, falsifying evidence, or permitting perjury to taint the record.[100] The lawyer is justified in advancing an aggressive or novel interpretation of law in litigation, as long as there is some good faith basis for the argument, because

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[97] *See* MODEL RULES, *supra* note 20, R. 3.1; FED. R. CIV. P. 11; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 (2000).

[98] *Compare* 17 C.F.R. § 205.3(b)(2)–(3) (2003) (duty to report where representing issuer in non-litigation context), *with* 17 C.F.R. § 205.3(b)(7)(ii) (no duty to report up where lawyer retained "[t]o assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer . . . in any investigation or judicial or administrative proceeding relating to such evidence of a material violation").

[99] Thanks to Dennis Tuchler and Emily Sherwin for raising this problem with me.

[100] For these litigation-related duties, see MODEL RULES, *supra* note 20, R. 3.1 (frivolous legal arguments), R. 3.3(a)(1), (3) (perjury), R. 3.3(a)(2) (adverse legal authority), R. 3.4(b) (falsifying evidence).

the judge is always in a position to reject it. Metaphorically, the lawyer in a litigated matter may aim somewhat less accurately at the law, and trust the procedures of adjudication to ensure the right result in the end. A judge, or a lawyer in a transactional matter must take more care and aim more precisely. The law is the same in both cases, but the responsibility for getting it right shifts among the various actors in the legal system, depending on the degree of procedural checking that is available.[101]

Transactional and planning situations are distinctive precisely because there is no impartial referee to resist the lawyer's client-centered construction of the law. The lawyer is the sole legal interpreter and is therefore, in effect, a law-giver from the client's point of view. As such, the lawyer has the power to shape the law for good or for ill. As Spider-Man observed, with great power comes great responsibility, for if the lawyer does not internalize the judicial virtues of impartiality and objectivity, the law will be distorted by partisan zeal where no neutral third party can check this tendency. In litigation, the lawyer's partisan stance and greater flexibility to advance aggressive or novel interpretations of legal rules makes the law itself more flexible and adaptable. If similar interpretive license were permitted in transactional work, however, the legal system would lose some of the virtues identified with the rule of law, such as stability, predictability, and certainty. Legal theory must always balance the need for growth and change with the values of stability and resistance to manipulation. The distinction between transactional and litigation-related representation is one way to strike this balance.

III. ARGUMENTS FOR PROFESSIONALISM

A. Identification and Interpretation of Legal Norms

I have been defending the view that the social function of law is the settlement of uncertainty and normative conflict, and this requires a system of legal norms that can be identified without reference to the truth of moral beliefs. This is an argument about the nature of *law*. Even if one accepts this account of the nature of law, however, there can be further controversy over *the law* in a given case.[102] The law on a particular issue must be suffi-

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[101] *Cf.* WOLFMAN ET AL., *supra* note 45, § 204.2.2, at 77 (noting that the ABA's opinion on tax advising seems to require a lawyer to weigh the relevant authorities just as a court would when considering the issue). The claim that a lawyer's "caretaker" responsibility varies by the degree of procedural checking is also supported by IRS regulations which permit lawyers to take more aggressive or adversarial positions in tax filings as long as they are adequately disclosed to the IRS. *See* Circular 230 Regulating Practice Before the Treasury, 31 C.F.R. § 10.34(a) (2002).

[102] Hart drew this distinction, which he accused Dworkin of blurring. *See* Hart, *supra* note 77, at 247–48. Waldron explicitly connects the problem of interpretation with the authority of law: "If enacted law is to settle at least some cases at the level of particularity at which they present themselves, a rule of recognition will need to provide a basis for specifying not only which proposal, but *which version* of a given proposal, has been enacted." WALDRON, *supra* note 9, at 39.

ciently determinate such that the matter may be resolved by reference to the law, rather than to any of the reasons that were at stake in the underlying normative disagreement. The question of the identity of the law, as opposed to the nature of law, is case-specific and interpretive. It can be stated concisely in one of the following ways: "What does it mean to say that a proposition of law is true?"[103] or "With respect to some action, is it legally permitted?"

The controversy about the law can also be understood in terms of criteria for the objectivity of legal decisions. If a judge decides that there is a constitutional right to same-sex marriage, or to obtain an abortion, or to use marijuana for the purpose of alleviating pain, the question naturally arises whether the decision is just the judge's subjective belief about what the law ought to be, or whether it is in fact an accurate report on what the law is, or at least a defensible judgment where the legal issue could have more than one plausible resolution.[104] Most attempts to understand the nature of objectivity in legal reasoning have addressed the predicament of a judge who must decide a case, or a critic of a judicial decision.[105] With respect to an interpretive question in law, if there is an objective or determinate right answer, a range of plausible right answers, or at least a wrong answer, then it is possible to criticize the judge for making a mistake. If there is no such thing as objectivity or determinacy in law, however, the law does not provide a standpoint for criticizing the judge.

Lawyers too, must worry about whether legal interpretation can be objective or determinate, because when they act in a representative capacity, they enable or limit their clients' enjoyment of legal entitlements.[106] If a client has a legal right to disinherit his son for opposing the war in Vietnam,[107] but his lawyer refuses to draft a will with this effect because of her moral disagreement with the client's desire, the lawyer has blocked the client's enjoyment of a right that the legal system would recognize if asserted—namely, the right to cut his son out of his inheritance. The client may be able to find another lawyer to draft the will, but regardless of

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103 *See* DENNIS PATTERSON, LAW & TRUTH 3 (1996).

104 *See* Fiss, *supra* note 62, at 742.

105 The most helpful discussions include KENT GREENAWALT, LAW AND OBJECTIVITY (1992); JOHN RAWLS, POLITICAL LIBERALISM 110–16 (1993); Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, *in* LAW AND INTERPRETATION 203 (Andrei Marmor ed., 1995); Andrei Marmor, *Three Concepts of Objectivity*, *in* POSITIVE LAW AND OBJECTIVE VALUES 112 (2001); Gerald J. Postema, *Objectivity Fit for Law*, *in* OBJECTIVITY IN LAW AND MORALS 99 (Brian Leiter ed., 2001).

106 EISENBERG, *supra* note 62, at 10 ("[I]n the vast majority of cases where law becomes important to private actors, as a practical matter the institution that determines the law is not the courts, but the legal profession . . . ."); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 23 cmt. c (2000) ("Lawyers who exercise their skill and knowledge so as to deprive others of their rights or to obstruct the legal system subvert the justifications of their calling.").

107 Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 7–8 (1975) (using this example to illustrate the tension between legal entitlements and ordinary moral reasons).

whether the client eventually gets his wish, one could ask whether the original lawyer acted wrongly vis-à-vis the client's legal entitlement. The first step in that analysis would be to ascertain the content of the law of wills. For example, in Louisiana a parent can disinherit a child for only one of ten enumerated "just causes," which must be set forth specifically in the will.[108] Unless the hypothetical occurred in Louisiana, however, the testator's freedom is virtually unrestricted, except by pretermitted heir statutes, which require that the will expressly state the intent to disinherit the son.[109] In a state with such a statute, the lawyer may believe her refusal to cooperate with the client to be morally justified, and she may further believe that her moral obligation not to assist the client outweighs her moral obligation to obey the law. But as long as she is a competent lawyer, she will not deny that the governing law would have permitted the client to disinherit his son.

This is obviously an exceptionally simple example,[110] but it illustrates what is at stake for lawyers in the attempt to characterize objectivity in legal interpretation: If the objectively correct interpretation of an applicable legal norm is that the client has a right to do X, then the lawyer in an existing lawyer-client relationship must justify her refusal to assist the client in doing X in moral terms. On the other hand, if one cannot say objectively that legal norms permit the client to do X, then the lawyer has no burden to justify her refusal morally—she can appeal instead to an interpretation of the law. Notice that the will example assumes the lawyer is motivated not to assist her client. The possibility that law is indeterminate creates a different, but equally serious ethical problem if the lawyer is motivated to do anything at all for her (presumably high-paying) client. If one cannot say objectively that the client is *not* legally entitled to do Y, and Y is a socially harmful thing to do, then the lawyer may assist her client doing Y to cause a

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[108] *See* Max Nathan, Jr., *An Assault on the Citadel: A Rejection of Forced Heirship*, 52 TUL. L. REV. 5, 12 (1977). None of the grounds stated would encompass Wasserstrom's hypothetical—they cover situations such as the child "rais[ing] his hand to strike a parent" or an adult child failing to communicate with a parent, without just cause, for two years. *See* LA. CIV. CODE ANN. art. 1621 (West 2001).

[109] *See* WILLIAM M. MCGOVERN, JR., WILLS, TRUSTS AND ESTATES § 3.6 (1988).

[110] Simple examples are sometimes useful to argue against the view that *all* legal texts present serious problems of indeterminacy. *See* BURTON, *supra* note 7, at 9–10 nn.20–21 (citing extensive collection of Critical Legal Studies sources urging that indeterminacy is a pervasive and unavoidable aspect of legal interpretation). Although it is possible to overgeneralize from easy cases, it is nevertheless worth noting that there are practically infinite examples that can be offered of uncontroversial interpretation of legal norms. *See, e.g.*, Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987). The strongest form of the indeterminacy claim—that "'doctrinal inconsistency necessarily undermines the force of any conventional legal argument'"—is fairly straightforwardly refuted by stating propositions such as, the "first paragraph of this essay does not slander Gore Vidal." *Id.* at 471–72 (citing Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 Yale L.J. 997 (1985)); *cf.* PUTNAM, *supra* note 42, at 116–19 (arguing against the view that interpretation is called for in every case).

significant amount of harm, and there is no legal standpoint from which we can criticize the lawyer for helping the client do Y.

In order to determine whether lawyers are subject to criticism from the point of view of the law, we must first determine what the law is with respect to the transaction in which the lawyer's services are being employed. Except in simple examples like the railroad case or the Louisiana will hypothetical, ascertaining the law in real world situations is not a matter of reading unambiguous statutory language and applying the rule it announces to a case within the core of the statute's plain meaning.[111] Finding the relevant rule is a much more complicated interpretive exercise in most cases, because of familiar problems with the use of verbally formulated rules to guide conduct. In Hart's well known formulation, legal rules have an "open texture."[112] That is, rules do not determine the scope of their own application, but there must always be something (another rule perhaps, or a conventional practice in the relevant community) that picks out the instances of some phenomenon falling under the rule.[113]

It is tempting to respond that a legal judgment is objectively true if it corresponds with something "out there," like "what the law really is" in a particular case. In general, correspondence theories of truth are widely believed to be fatally flawed, for a number of reasons, one of which is particularly relevant to the attempt to use correspondence as a criterion for legal objectivity.[114] Suppose we wish to know whether the sentence "the cat is on the mat" is true. The correspondence theory of truth says it is true if the sentence *p* ("the cat is on the mat") corresponds to a state of affairs in the world *W* (cat on mat), in some kind of appropriate correspondence-relationship *C*, whatever that may be. Schematically, we can represent this truth condition as *pCW*. Now, have we got it right? Does *p* correspond to

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[111] For the terminology of "core" meaning, see H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958). In Hart's words,

> [i]f we are to communicate with each other at all, and if, as in the most elementary form of law, we are to express our intentions that a certain type of behavior be regulated by rules, then the general words we use . . . must have some standard instance in which no doubts are felt about its application.

Id. at 607.

[112] HART, *supra* note 27, at 124–36.

[113] *Id.* at 126. Another way to make this point is to distinguish between two categories of rules: conduct rules, which are addressed to citizens and permit or forbid certain acts, and decision rules, which are addressed to officials and regulate what these officials do when they apply or interpret the law. *See* Dan-Cohen, *supra* note 40, at 627. As Dan-Cohen argues, "[t]he proper relationship between decision rules and their corresponding conduct rules is not a logical or analytic matter." *Id.* at 629. Rather, one must make a normative argument about the kinds of decision rules we want, in light of the relevant policies and values. The position advanced in the following textual discussion differs from Dan-Cohen's model of the relationship between decision rules and conduct rules in that it does not concede the existence, as a logical matter, of a rule that can be both a conduct rule and a decision rule. *Cf. id.* at 631.

[114] This discussion is drawn from SIMON BLACKBURN, SPREADING THE WORD: GROUNDINGS IN THE PHILOSOPHY OF LANGUAGE 224–29 (1984).

W in the right way? This is to ask the question whether *pCW* itself is true, which suggests there may be some property of the world *W'* to which *pCW* may or may not correspond. So *pCW* is true if *pCWCW'*. Then it is open for us to ask whether *pCWCW'* is true. We are thus faced with an infinite regress in which there is no foundational fact-and-correspondence relationship about which we cannot in principle ask whether it is true. Something else must serve as criteria of truth, such as coherence with other beliefs, or a normative community practice of manifesting agreement with the speaker who utters "there is a cat on the mat" under certain conditions.[115]

In legal reasoning, if there is any vagueness, open-texture, or uncertainty in the law, however, it is an open question whether the judgment corresponds to the law as it is. The sentence "the judgment corresponds to the law" is itself contestable, and the attempt to specify truth conditions for that sentence leads us down the same path of infinite regress. In other words, the correspondence relationship is impossible to pin down *using only the concept of correspondence*. We need something else to give genuine content to the notion of a truth-making relationship between an interpretation, on the one hand, and legal texts, practices, and conventions, on the other. Figuring out the nature of that "something else" has been a major preoccupation of analytic jurisprudence. It is certainly an issue that arises in connection with the argument for professionalism, because a lawyer who adheres to the Holmesian bad man position would deny the status of "law" to the considerations I claim should be relevant to legal interpretation by transactional lawyers.

In jurisprudential terms, the problem can be stated in terms of Hart's concept of a rule of recognition. In Hart's account, a legal system is "mature" rather than "primitive" to the extent it is characterized by a union of primary and secondary rules.[116] Primary rules impose obligations, create rights or permissions, and in other ways guide the day-to-day activities of citizens. Secondary rules, by contrast, are rules respecting what can be done with primary rules—they provide for orderly, formal change in primary rules, permit adjudication of disputes that arise under primary rules, and so on. The most important of these secondary rules, essential to the concept of a legal system, is a rule which provides binding criteria for legal officials who must identify primary rules in order to interpret and apply the law. This is the rule of recognition.[117] It specifies general characteristics of primary rules that identify some as law and the rest as non-law. In the simplest case, the rule of recognition might state that any act passed by both

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115 *See* ALEXANDER & SHERWIN, *supra* note 52, at 113–14.

116 HART, *supra* note 27, at 91–94. Hart's term "primitive" is perhaps unfortunate, but he uses it primarily as a thought experiment, not a characterization of any actual human society. A primitive legal system, as Hart uses the term, would be a small, closely knit community in which people knew each other and shared a thick set of values, so that they could effectively govern themselves by simple methods of social control. *Id.* at 92.

117 *Id.* at 94–95, 100.

houses of Congress and signed by the President is law in the United States. A more complex case might involve conditions for the valid interpretation of law. For example, in the railroad case discussed in Part II, the issue was whether the requirement of equipping "cars" with automatic couplers applied to locomotives. The text of the statute was clear, but there was controversy over whether the word car includes locomotives. The applicable rule of recognition included multiple, conflicting sub-rules governing the interpretation of statutes, such as "remedial statutes should be construed liberally" and *expressio unius est exclusio alterius*. In this case, the rule of recognition acknowledges both interpretive principles as validly part of the system of legal interpretation (as opposed to a mere policy argument about the kind of statute it would be desirable to have), but does not resolve the conflict between them.

The structure described by Hart gives rise to a paradox, however, because the rule of recognition cannot depend for its validity on any other rule; otherwise the infinite regress problem would recur.[118] His ingenious solution is to deny that there are legal rules or other norms that require officials to follow the rule of recognition. The rule of recognition, instead, comes into existence because it is practiced, in the sense that officials regard it as a standard for critically evaluating their own and others' conduct.[119] For this reason, moral and policy considerations can play a role in legal reasoning, as long as there is a conventional practice among legal officials of making decisions with reference to these criteria.[120] Moral and policy reasons in effect become incorporated into law, to the extent that legal officials, acting as interpreters of the law, take the attitude that they are relevant to working out the law as it is, as opposed to as it should be. For example, in common law adjudication moral reasons enter into the definition of concepts such as reasonableness in torts and unconscionability in contracts. An "exclusive" rule of recognition that screened out moral reasons from consideration by legal officials would be unable to account for this feature of the common law. The convergence by officials on a standard for identifying legal norms, and the internal attitude that officials take toward the rule as a reason for action, are the criteria for legality. A further rule whose credentials as a legal rule would themselves stand in need of certification by the rule of recognition is unnecessary.

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[118] Scott J. Shapiro, *On Hart's Way out*, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* 149, 150–53 (Jules Coleman ed., 2001).

[119] *Id.* at 154; HART, *supra* note 27, at 116–17; RONALD DWORKIN, *The Model of Rules II*, *in* DWORKIN, *supra* note 77, at 46, 49.

[120] This is known as "soft" or "inclusive" positivism. *See* W.J. WALUCHOW, INCLUSIVE LEGAL POSITIVISM (1994); Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, 4 LEGAL THEORY 381 (1998); E. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473 (1977). Hart accepted inclusive positivism in the posthumously published Postscript to *The Concept of Law*. *See* Hart, *supra* note 77, at 247–48.

Because it is a product of conventional behavior by officials and the attitude of acceptance of the rule as a guide to conduct, the rule of recognition need not be formally expressed as a rule, or written down in any authoritative legal document.[121] Thus, one might wonder whether legal judgments can be objective, if they have no foundation other than social practices. Specifically in regard to this Article, one might wonder whether the interpretive stance of professionalism is validated as a legal standard by the applicable rule of recognition, whether it is just my subjective policy preference or, as a third possibility, whether it is an objectively binding principle of legal interpretation that is not validated by the rule of recognition. It is important at this juncture not to overstate the requirements for a judgment to be objective. Even a strong conception of objectivity need not require something like Platonic forms or correspondence with the fabric of the universe to underwrite the truth of a proposition. Rather, objectivity in law need be only moderately domain-specific, meaning that the characteristics of an objective judgment in the natural sciences will differ in some respects from that which makes a judgment objective in art criticism, basketball officiating, or faculty hiring decisions.[122]

An objective judgment in any endeavor must have certain characteristics: (1) independence from the subjectivity of the judging subject, openness to the subject matter, and willingness to base judgments on the subject itself, not personal idiosyncrasies; (2) amenability to evaluation of the correctness of judgments, or standards for assessing judgments; and (3) invariance across judging subjects.[123] A decision to follow a norm that is capable of serving as a Hartian rule of recognition satisfies these criteria—in Hart's words, political officials "manifest their own acceptance" of the rule of recognition,[124] acknowledging that whether a norm counts as a rule of recognition is independent of the official's subjectivity. The official also acknowledges that the rule of recognition is a product of the shared acceptance of the norm, which indicates acceptance of standards for evaluating the correctness of this judgment. Finally, there must be a high degree of invariance in officials' acceptance of the norm, or there would be a general collapse in the efficacy of the legal system.[125] As Hart recognized, there may be some disagreement at the margins of a rule of recognition, but as long as there is a "normally concordant" practice of identifying law with reference to certain criteria, one exists.[126]

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121 HART, *supra* note 27, at 101–03.

122 *See* Postema, *supra* note 105, at 100.

123 *Id.* at 105–09; *see also* RAWLS, *supra* note 105, at 110–12; Fiss, *supra* note 62, at 744 (objectivity implies that an interpretation can be measured against a set of norms that transcend the judging subject).

124 HART, *supra* note 27, at 102.

125 *Id.* at 103–04.

126 *Id.* at 109–10.

For Hart, whether a rule of recognition exists is an empirical question.[127] The content of the rule of recognition is an empirical question as well.[128] One can ascertain the existence and content of a rule of recognition by reading cases, doing legal sociology, or employing some other method appropriate to discovering facts about a community's practices. One thing an observer might discover is that interpretive practices by judges, lawyers, legislators, and scholars frequently make reference to *principles* to justify a conclusion that X is a true proposition of law. In contrast with rules, which have a binary, all-or-nothing character,[129] principles are reasons in support of a judge's decision, but not conclusive reasons in the way that rules are. Two principles can conflict, and one can outweigh another, while both remain parts of the legal system; by contrast, when two rules conflict, one of the rules must persist while the other is abandoned.[130] Ronald Dworkin contends that Hart's rule of recognition has no place for principles, and thus fails to explain the reasoning behind judicial decisions which are based on principles as well as rules. For example, in *Henningsen v. Bloomfield Motors*,[131] the court's decision to impose liability for breach of warranty on a car manufacturer, notwithstanding lack of privity of contract and contractual disclaimers of the warranty, was justified on the basis of a balancing of competing reasons which existed outside any legal text such as a statute, rule, or judicial opinion.[132] These reasons included the importance of freedom of contract and voluntary assumption of duties, which tended to support the defendant, and the public's interest in being protected from dangerous products, which supported the plaintiff's position.

Principles in the Dworkinian sense are not the kind of extra-legal moral arguments that one might make to criticize the law for being wrongheaded; rather, they exist within the law and can serve as a link in the chain of an in-

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[127] *Id.* at 110. Dworkin criticizes Hart for arguing that social rules are constituted by behavior while admitting that rules can be uncertain at the margins. DWORKIN, *supra* note 119, at 54. The Hartian distinction between the core and penumbra of rules can explain this apparent anomaly, because the core of a rule of recognition will exist as long as it works most of the time, with only a few marginal uncertainties.

[128] HART, *supra* note 27, at 150 ("Which form of omnipotence . . . our Parliament enjoys is an empirical question concerning the form of rule which is accepted as the ultimate criterion in identifying the law.").

[129] DWORKIN, *supra* note 77, at 24.

[130] *Id.* at 26–27. In his response to Dworkin contained in the Postscript to *The Concept of Law*, Hart refers to this feature of principles as their "non-conclusive" character. Hart, *supra* note 77, at 261. He argues that Dworkin exaggerates this distinction between rules and principles, and that there are many instances in which two legal rules conflict and one is held to outweigh the other. Hart also points out that in cases where a principle conflicts with a rule and the principle prevails, the rule is not abandoned. *Id.* at 262.

[131] 161 A.2d 69 (N.J. 1960).

[132] Dworkin discusses *Henningsen* at DWORKIN, *supra* note 77, at 23–24.

ternal justificatory argument.[133] (In *Henningsen*, the Chrysler Corporation would presumably be horrified at the prospect that it could be forced to pay money to an injured person solely on the basis of some judge's beliefs about right and wrong. To legitimately expropriate money from Chrysler, perhaps forcibly, the decision must be based on the kind of reasons that ordinarily justify the use of coercive force.) Because they are part of the law, lawyers can no more ignore these principles than they can omit express statutory or common-law rules from their reasoning process.[134] Thus, my claim that lawyers appeal to extra-textual norms constraining their interpretive activities can be understood as an appeal to Dworkinian principles, which mandate an attitude of respect toward the law and legal interpretation. "[I]n 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."[135] This observation seems to reflect the presence of a special class of Dworkinian principles within the legal system, which are what I term attitudes or stances adopted by officials, and quasi-officials such as lawyers, toward the law. In jurisprudential terms, my argument is that a reasonable rule of recognition actually does, and must include not only considerations of pedigree (i.e., whether the legislature enacted a particular text or whether a judge decided a case) but also extra-textual interpretive norms that specify which of several textually supportable interpretations are consistent with the social function of the law.[136]

The opposing argument from the Holmesian bad man perspective is that a lawyer need not counsel and assist the client within the bounds of law as defined by good faith efforts and plausible interpretations—rather, the lawyer need only respect arguable or non-frivolous constructions of legal norms.[137] Which of these interpretive stances is the right one to take toward legal norms? One way to answer this question is to determine whether

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[133] *Id.* at 35, 44; DWORKIN, *supra* note 87, at 85, 115. Hart contended that judges exercise law-making power in cases that lay far out in the penumbra of rules. *See* HART, *supra* note 27, at 135, 145.

[134] Dworkin argues that principles do not have the same pedigree as judicial decisions and statutes—rather, they are a product of a "sense of appropriateness developed in the profession." DWORKIN, *supra* note 77, at 40. Hart responds that there is no reason why principles cannot be identified by pedigree criteria, "in that they have been consistently invoked by courts in ranges of different cases as providing reasons for decision." Hart, *supra* note 77, at 265.

[135] Gordon, *supra* note 43, at 48.

[136] I am grateful to Emily Sherwin for pressing me to clarify some ambiguities in this discussion.

[137] *See* Gordon, *supra* note 7, at 1194–97. David Luban argues that Holmes invented his image of the lawyer advising a "bad man" client in order to make a jurisprudential point about the separability of law and morality. *See* David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's The Path of the Law*, 72 N.Y.U. L. REV. 1547, 1562 (1997). Holmes can therefore be understood as making the same point as Dworkin—if a norm is not part of the legal system, a judicial decision based on that norm is not legitimate from the point of view of a client who is bound by it. Dworkin's response, of course, is very different from Holmes's, for instead of insisting on a bright-line separation of law and morality, Dworkin enthusiastically incorporates morality into law.

courts require clients to arrange their affairs to comply with the law interpreted in light of substantive principles, values, and social interests. In other words, we can make a descriptive argument for a particular rule of recognition that takes into account interpretive norms, stances, and attitudes. However, descriptive arguments cannot settle with finality the question of whether the attitude of professionalism is a part of our legal system.

One could read every case and conduct exhaustive empirical sociological research and never know the answer for sure. There are two reasons for this. The first is that the rule of recognition, like any legal rule, is characterized by its open texture.[138] There may be a situation in which there is factual uncertainty regarding the content of the rule of recognition, and in that situation some institution will be called upon to make an unconstrained choice about the specific contours of the ultimate rule for identifying law. There are no rules requiring one result or another—as Hart puts it, "at the fringe of these very fundamental things, we should welcome the rule-sceptic."[139] The second is the now-familiar infinite regress problem. No amount of rules and meta-rules can settle an interpretive question with finality. Hart grounded the rule of recognition in social practices to avoid the regress problem, and we might take the same way out with respect to professionalism. A more promising approach, therefore, would be to provide an extra-legal justification for professionalism—one based on the nature and function of law, and therefore the reasons for treating legal directives as authoritative. In other words, we would be giving a normative rather than a conceptual or descriptive argument for positivism.[140]

Philosophers of law ask the conceptual question "what distinguishes law from other means of social ordering?"[141] because law does a distinctive kind of work. My claim has been that the function of law is to secure the conditions necessary for cooperation and the realization of collective goods, notwithstanding deep and persistent disagreement over values, ends, conceptions of the good, and the application of moral principles to practical situations. In order to do this work, law must have certain characteristics.[142]

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[138] HART, *supra* note 27, at 151.

[139] *Id.* at 154. As Jules Coleman reconstructs Dworkin's argument against Hart's social rules thesis, "if there is substantial controversy [over the content of the rule of recognition], then there cannot be convergence of behavior sufficient to specify a social rule." Coleman, *supra* note 77, at 15.

[140] *See, e.g.*, ALEXANDER & SHERWIN, *supra* note 52, at 1; DWORKIN, *supra* note 119, at 50–52; Jeremy Waldron, *Normative (or Ethical) Positivism*, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW*, *supra* note 118, at 410.

[141] *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 11–15 (1980).

[142] *See* Joseph Raz, *Authority, Law, and Morality*, in ETHICS IN THE PUBLIC DOMAIN 210, 226–27 (1994). As Raz argues:

> [A]ssume that the maintenance of orderly social relations is itself morally valuable. Assume further that a legal system can be the law in force in a society only if it succeeds in maintaining orderly social relations. A necessary connection between law and morality would then have been established, without the legal validity of any rule being made, by the rule of recognition, to depend on the truth of any moral proposition.

It is tempting to say that the law must be uncontroversial,[143] but in anything outside the core of the application of legal norms, common experience shows that the law is anything but uncontroversial. In any event, the requirement that the law be uncontroversial is usually interpreted as a constraint on a legal system's rule of recognition. Namely, the rule of recognition must be capable of formulation without reference to the *content* of moral principles. Significantly, this constraint on the rule of recognition does not preclude the use in legal reasoning of moral principles that have become incorporated into legal norms.[144]

Preclusion of the content of moral norms is necessary to avoid slipping back into the disagreement that required authoritative settlement by law. But the preclusion of non-legal considerations that is the consequence of the negative aspect of professionalism requires a lawyer to exclude moral principles from her interpretive process only to the extent those principles are not recognized as part of law by the relevant interpretive community. In addition, the positive aspect of professionalism requires that the social function of law guide a lawyer's interpretive judgment. For this reason, interpretive communities have evolved, and ought to evolve, higher-order standards for differentiating artificial, abusive transactions that comply only formally with legal rules from those transactions that comply substantially with the law.

I suppose a lawyer could argue that she is unconcerned with the effective functioning of the law because it is a problem for legislators, rulemakers, or judges, but not for her or her client. This attitude, however, would be self-defeating and even irrational. Again picking up on an argument by Robert Gordon, the response to this lawyer is that she *must* be concerned about the effective functioning of the law, because without it, neither she nor her client could realize their own interests. The market economy presupposes a background of stable law, custom, and enforcement that enforces private ordering.[145] Even if a lawyer and client were concerned only with pursuing their own narrow interests, paradoxically it is only possible to

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Some philosophers believe that soft or inclusive positivism is vulnerable to Raz's authority argument, because the law could not perform its coordination function if those subject to its directives were called upon to evaluate the truth of moral propositions incorporated into law. *See, e.g.*, Kenneth Einar Himma, *Law's Claim of Legitimate Authority*, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW*, *supra* note 118, at 271, 274–75. As mentioned above, professionalism as a theory of legal ethics is a variety of soft positivism, because it permits reference to moral beliefs to the extent there is a conventional practice among legal officials of referring to these beliefs in legal reasoning. This position does not run afoul of Raz's authority argument because affected citizens are not required to ascertain whether a moral proposition is true, only whether officials have referred to it in the past when explaining and justifying a legal decision.

143 *See* Coleman, *supra* note 77, at 9–11 (explaining that this account of legal positivism is probably Dworkin's target in *The Model of Rules I*, DWORKIN, *supra* note 77, but that there is another characteristic of positivism, namely its conventionalism, that is plausible).

144 *Id.* at 15–16; *see also* Joseph Raz, *Incorporation by Law*, 10 LEGAL THEORY 1 (2004).

145 Gordon, *supra* note 43, at 49; Gordon, *supra* note 7, at 1198–99.

behave self-interestedly within a framework of other-regarding obligations. A lawyer might evade regulatory requirements by aggressive structuring of transactions in one case, but cause long-run damage by eroding the capability of the legal system to facilitate the functioning of financial markets. The lawyer cannot be indifferent to this long-term damage and still claim to be making an ethical argument about the obligations of her role, because it is in the nature of ethical arguments that they must be generalizable to relevantly similar situations.[146] It may be true that a lawyer could game the system once without causing catastrophic damage, but this is impermissible free-riding on the cooperation of others. Thus, any plausible ethical argument—i.e., one that is worthy of the respect of similarly situated others—must take account of the consequences of widespread manipulation of formal legal norms.

B. Professionalism in Practice

This Article has developed a jurisprudential argument for the position that lawyers ought to be guided by the informed judgment of a professional community of lawyers, judges, and other interpreters, who are committed to using the legal system to perform its social function of coordinating valuable social activity. Legal texts alone cannot accomplish this coordination, because it is always possible for clever lawyers to manipulate formal norms to accomplish results that are at odds with the evident purpose of the regime of legal norms. Thus, if the law respecting any area of economic activity is to possess sufficient stability to coordinate action, lawyers who counsel and advise clients, and structure transactions, must do so in a way that could be publicly justified to other members of the relevant community. Significantly, the law already works in the way I have been recommending.[147] Although there are numerous examples to offer, including the law of frivolous litigation[148] and the implicit norms of good faith dealing observed in various commercial communities,[149] I will concentrate on three examples—the economic substance doctrine in the law of taxation, the law governing the complex special-purpose entity (SPE) transactions that were used by Enron, and the legal advice provided by government lawyers on the application of domestic and international prohibitions on torture to the interrogation of detainees in the war on terrorism.

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[146] *See, e.g.*, T.M. SCANLON, WHAT WE OWE TO EACH OTHER 153 (1998).

[147] As Milton Regan observes,

> [m]uch of law practice consists of informal understandings about matters such as what arguments are considered within the bounds of good faith, acceptable levels of aggressiveness, the scope of disclosure requirements, how to interact with regulatory agencies, and what constitutes due diligence.

MILTON C. REGAN, JR., EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER 39 (2004).

[148] *See, e.g.*, William Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985).

[149] *See supra* note 29 and accompanying text.

1. Tax Shelters.—One of the recurring problems in the law of taxation is that the tax laws may be defeated through manipulation, that is, by structuring transactions in a way that creates artificial tax consequences.[150] The difficult analytical question is obviously how to define "manipulation" or "artificial," and this question only arises because it is possible for a transaction to comply with formal legal norms while somehow failing to satisfy the substantive standards or principles that those formal norms attempt to express. The difficulty is perhaps particularly acute in tax law, which supposedly does not concern itself with whether the taxpayer's intent in entering into a transaction was to avoid taxes,[151] but it must be faced in any complex regulatory arena in which a client may seek the assistance of a lawyer to avoid a legal prohibition or penalty through careful planning. The danger of manipulation results from the familiar dichotomy between form and substance, or rules and standards, in legal norms.[152] Briefly, the distinction depends on the conceptual possibility of divergence between the action mandated (or prohibited) by a rule and the action mandated (or prohibited) by the rule's background justification.[153] A legal norm in the form of a rule permitting only people age sixteen or older to obtain a driver's license is plainly justified by reasons of public safety, but the rule is both overinclusive and under-inclusive with respect to this background justification. The rule may prevent mature, careful fifteen-year-olds from driving (overinclusiveness) as well as permitting reckless, dangerous twenty-year-olds to obtain a license (underinclusiveness). One response to this problem is to permit a decisionmaker to rely directly on the background justification, by

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150 David P. Hariton, *Sorting out the Tangle of Economic Substance*, 52 TAX LAW. 235, 236 (1999) (noting that tax lawyers have tried to devise rules so that "business transactions do not permit some taxpayers to avoid tax at the expense of others in a way that was not intended by the political system"); Joseph Isenbergh, *Musings on Form and Substance in Taxation*, 49 U. CHI. L. REV. 859, 863 (1982); David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860, 860 (1999) ("[T]axpayers have been able to manipulate the rules endlessly to produce results clearly not intended by the drafters.").

151 Alan Gunn, *Tax Avoidance*, 76 MICH. L. REV. 733, 735 (1978).

152 *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Weisbach, *supra* note 150. Leo Katz denies that there is anything distinctively legal about this distinction and argues that loopholes in the law result from a similar form/substance dichotomy in morality, which is simply reflected in the structure of law. Leo Katz, *Form and Substance in Law and Morality*, 66 U. CHI. L. REV. 566, 567 (1999).

153 *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE 53–55 (1991). The terminology of background justification and the driver's license example, are from a contemporaneous article by Schauer. *See* Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 648–49 (1991); *see also* Schauer, *supra* note 55, at 236. Significantly, the phenomenon of divergence between the result mandated by a general rule and what would be required after full attention to all the relevant features of a situation is not limited to following legal rules. A similar dynamic exists in moral philosophy; indeed, a well known criticism of Kantian ethics is that the emphasis by Kant on moral rules distorts the nature of moral judgment by directing an agent to ignore morally relevant details of a problem. *See* HERMAN, *supra* note 83, at 74–75.

casting the norm in the form of a standard. In our example, the relevant norm expressed as a standard might be that only competent, mature drivers may obtain a license.

The distinction between rules and standards creates two sets of mirror-image risks facing the regulator. Expressing a norm in a standard-like way entails the loss of benefits associated with rules, such as ease of application, error reduction, constraint on the decisionmaker's discretion (and therefore power), and especially values of *ex ante* predictability and certainty of application.[154] By contrast, expressing the norm in a rule-like way entails the loss of the benefits associated with standards, such as sensitivity to the fit between the outcome of the legal decision and the background justification of the norm, and greater ex post contextualization and particularization of the result, resulting in a more just result as between the parties.

In tax law, rules are generally favored for the additional reason that many transactions are structured carefully in order to capture tax benefits, even if the tax treatment of the given transaction was never foreseen or intended.[155] In particular, a transaction with economic substance and a business purpose may be structured in a "funny" way in order to take advantage of a tax benefit that was not foreseen by Congress.[156] The transaction is not a sham, because it has economic substance and would have been undertaken anyway, for business reasons. But the form of the transaction is artificial, and highly tax-sensitive. Given the sensitivity of transactional structure to tax consequences, there seems to be a heightened need for predictability in tax law as opposed to, say, tort law, where many actors are less likely to be influenced by the precise form of legal norms. Still, there must be limits on the extent to which the formal (or rule-based) treatment of a transaction can diverge from the substantive (or standard-based) approach—too great a divergence and the system will be unfair as between similarly situated taxpayers.[157] There is accordingly great pressure to differentiate between real transactions, undertaken in the ordinary course of a taxpayer's business for legitimate business purposes, and the artificial transactions, with all their Rube Goldberg complexity, set up with no purpose other than to generate tax benefits. The result of this tension has been considerable confusion in

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[154] SCHAUER, *supra* note 153, at 135–66; *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[155] *See, e.g.*, Yosha v. Commissioner, 861 F.2d 494, 497 (7th Cir. 1988) (Posner, J.) ("There is no rule against taking advantage of opportunities created by Congress or the Treasury Department for beating taxes. . . . Many transactions are largely or even entirely motivated by the desire to obtain a tax advantage."); Hariton, *supra* note 150, at 237 (noting the general presumption that the taxpayer "should not be denied beneficial tax results which she stumbles upon, or even seeks out, in the course of her legitimate business dealings, even if those results are obviously unanticipated, unintended, or downright undesirable").

[156] Michael L. Schler, *Ten More Truths About Tax Shelters: The Problem, Possible Solutions, and a Reply to Professor Weisbach*, 55 TAX L. REV. 325, 337–40 (2002).

[157] Hariton, *supra* note 150, at 236.

the courts, which have applied a variety of substance-over-form doctrines in cases in which a textualist style of interpretation would effectively reward sophisticated evasion of the substantive meaning of the tax laws.[158]

One way to distinguish between real and artificial transactions and their tax consequences is to rely on the informed judgment of members of the relevant professional community. As Mark Gergen observes, "[g]ood tax lawyers know when they are pushing hard at the edge of the envelope."[159] After observing the difficulty in arriving at determinate standards of tax motive and economic substance, which would enable courts to deny a positive result to a taxpayer who had complied formally with the rules, he falls back on professional judgment to formulate a "disclaimer" that could be attached to any analysis of form and substance in tax law:

> A determination that an action is tax motivated or insubstantial is neither a necessary nor a sufficient condition for denying a positive tax result to which the actor claims he is entitled under tax law. There may be other grounds for rejecting the actor's position. These standards do not displace other forms of reasoning. Further, some tax motivated or insubstantial actions are respected. As for which are respected and which are not, that is difficult to say. Do not always expect to find a rule or principle to sort them out. In a novel case the best guide may well be professional common knowledge.[160]

Similarly, tax lawyer Peter Canellos claims that everyone in the relevant community knows the difference between creative tax planning and bogus tax shelters, even though shelters are designed to mimic real transactions.[161] In tax sheltering, "promoters attempt to apply a patina of substance to a transaction that is formal and unreal," while legitimate tax practitioners plan real business transactions with a business purpose, in light of the possibility of obtaining tax advantages.[162] As Canellos recognizes, all of these terms are subject to a challenge that they be defined more precisely: What makes a transaction real or unreal? What is the difference between a patina of substance and creative structuring? Ever more elaborate rules cannot provide the answers, however. Professional judgment is an irreducible aspect of the analysis, even though it may be possible to set out some standards or criteria that are germane to the exercise of judgment.[163]

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158 *See* Cunningham & Repetti, *supra* note 56, at 21–25 (reviewing business purpose and substance-over-form doctrines); Allen D. Madison, *The Tension Between Textualism and Substance-over-Form Doctrines in Tax Law*, 43 SANTA CLARA L. REV. 699, 722–36 (2003) (summarizing sham transaction and recharacterization doctrines).

159 Mark P. Gergen, *The Common Knowledge of Tax Abuse*, 54 SMU L. REV. 131, 136 (2001).

160 *Id.* at 138.

161 Peter C. Canellos, *A Tax Practitioner's Perspective on Substance, Form and Business Purpose in Structuring Business Transactions and in Tax Shelters*, 54 SMU L. REV. 47, 51–52 (2001) ("[E]xperienced tax professionals can usually readily distinguish tax shelters from real transactions . . . .").

162 *Id.* at 50.

163 *Id.* at 53–54 ("Although in theory the line between a tax shelter and an aggressively structured

Appeals to professional judgment lead to a predictable reaction—charges of unprincipled decisionmaking, arbitrariness, non-transparency, and a departure from the ideal of objectivity in law.[164] Critics are apt to cite, disparagingly, Justice Stewart's comment about hard-core pornography, that he cannot define it, but he knows it when he sees it.[165] But recall the previous discussion of judgment and objectivity. A judgment in this domain (e.g., "that is a tax shelter, not a legitimate transaction") can be objective as long as the decisionmaker is willing to base judgments on the subject itself, not personal idiosyncrasies, is willing to be open to evaluation of the correctness of her judgment, and makes a decision that exhibits some degree of invariance across judging subjects.[166] This kind of limited domain-specific objectivity can be secured by constraining all-things-considered contextual judgments using more specific criteria which are developed over a series of analogous cases. In the tax example, the taxpayer will not be denied tax benefits as long as the transaction has a legitimate business purpose. This standard can be defined further based on criteria such as:

- the way the transaction was marketed and sold—i.e., whether it was pitched by specialized tax professionals and marketed to the tax or finance department of a corporation, or instead developed by outside investment advisors or internal operations departments and marketed in terms of business or financing opportunities, rather than tax savings;
- the involvement of real or extraneous parties—i.e., whether it included real buyers and sellers, with financing at market rates, or accommodation parties such as foreign subsidiaries or partnerships;
- the use of a series of highly choreographed steps; and

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real transaction may appear difficult to draw, in actuality the distinction is rather easy to establish when the transaction involves most of the tax shelter elements described above.").

[164] The tax context provides several examples. *See* ACM P'ship v. Commissioner, 157 F.3d 231, 265 (3d Cir. 1998) (McKee, J., dissenting) ("I can't help but suspect that the majority's conclusion . . . is, in its essence, something akin to a 'smell test.'"); Isenbergh, *supra* note 150, at 874–76 (criticizing the economic substance doctrine in taxation as an "essentially aesthetic response" which violates the principle that tax rules should be interpreted narrowly and in accordance with the form, not the substance, of transactions); *id* at 882 ("It is not uncommon for professors to regard—and teach—the process of legal interpretation as a vehicle for their own aesthetic preferences."). In legal theory generally, see Farber, *Inevitability*, *supra* note 55, at 541–47, for a summary of critiques.

[165] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). For an interesting, sympathetic interpretation of Justice Stewart's reasoning, see Paul Gewirtz, *On "I Know It When I See It,"* 105 YALE L.J. 1023 (1996). Gewirtz's essay is a defense of what he calls nonrational elements of judicial reasoning, such as judgment and character, and I think he is correct that these qualities can be described as excellences or virtues. *See id.* at 1033.

[166] Postema, *supra* note 105, at 105–09.

- whether the workings of the transaction were concealed (and thus reliant upon the audit lottery) or publicly disclosed.[167]

Assuming that these evaluative criteria are generally shared within the relevant community, the judgment of legitimate business purpose is sufficiently objective.

I am hedging here a bit with the term "relevant" community. Canellos's article on tax shelters identifies two vastly different communities of practitioners—the tax bar and the tax shelter bar.[168] "Real" tax practitioners structure transactions that are otherwise legitimate in a way that maximizes tax advantages; they are concerned with their reputation and status, and often become involved with high-profile organizations such as the tax sections of the ABA and the New York State Bar Association, which are dedicated to improving the tax law. They consider exercising professional

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[167] Canellos, *supra* note 161, at 51–55. These criteria suggest that the community's evaluation—that a transaction exhibits either legitimate tax avoidance or illegitimate tax evasion—is to a considerably degree path dependent. *See* KATZ, *supra* note 15, at 57–73. As Katz puts it, there are deontological features of a situation that should not be exploited merely to achieve, in a roundabout way, an outcome that is more desirable from a consequentialist perspective. *Id.* at 57. This latter, specific principle does not appear to add much to the persons-as-ends formulation of the Kantian categorical imperative. *See* IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS *429, at 36 (James W. Ellington trans., 1981) (1785) ("Act in such a way that you treat humanity . . . always at the same time as an end and never simply as a means."). I am also uneasy about the reduction of deontological morality to path-dependent evaluations, because a strict deontologist would not approve of violating moral duties by any means. In the puzzles Katz considers, the actor would be subject to criticism for violating the rights of another either directly or indirectly, if both options had the effect of treating a person as a mere means, in violation of that form of the categorical imperative. *See* KATZ, *supra* note 15, at 1–9 (posing numerous hypotheticals). The more promising solution to the problems Katz considers is the distinction between regarding norms (legal or moral) either instrumentally or as legitimate reasons, which is the position defended here. This is closer to the deontologist's strategy of approving of actions only if they are done out of motives of duty. *See* KANT, *supra*, *397, at 9–10. For an insightful discussion of the problem of constructing maxims of action that do not beg the questions against puzzles like Katz's, see HERMAN, *supra* note 83, at 217–24. As Herman argues, considerations of value bear on the description of actions and the construction of maxims. If this is correct (and I believe it is), it provides a sufficient account of the choice-worthiness of a particular end and the path by which it is achieved, leaving nothing puzzling about Katz's cases.

[168] Canellos, *supra* note 161, at 55–57; *see also* Joseph Bankman, *The Business Purpose Doctrine and the Sociology of Tax*, 54 SMU L. REV. 149, 150 (2001) (elaborating on Canellos's sociological analysis of the two tax bars); Richard Lavoie, *Deputizing the Gunslingers: Co-Opting the Tax Bar into Dissuading Corporate Tax Shelters*, 21 VA. TAX. REV. 43, 46 (2001) (arguing that "[m]any lawyers involved in corporate tax-shelter activity are deeply troubled by the role they play"). Nancy Staudt suggested in conversation that this informal sociology of the profession may not be entirely accurate, but for the purposes of my normative argument, it is essential only to establish that different communities *could* exist, and that one may do better than the others, in virtue of the values lying behind the legal system. On the descriptive argument, I am not an expert in tax law, and must defer to others, who apparently disagree on the boundaries around the various communities and the norms to which they are committed. See also *infra* notes 174–177, and accompanying text, for a qualification on the ascription of intentions to communities.

judgment as a stock in trade.[169] Tax shelter practitioners, on the other hand, set up artificially contrived deals, care little about their reputation for probity and judgment, and provide legal opinions as a fig leaf for sheltering transactions that are widely derided by real practitioners. So which of these is the relevant community? If we specify real tax practitioners and then derive evaluative criteria from their shared norms, are we not engaging in circular reasoning? The shared norms of the tax shelter bar and the criteria they would generate for identifying abusive transactions (if any) would presumably look very different from those listed above. But why follow the interpretive principles of the tax bar, not the tax shelter bar? Or, why regard oneself as a member of the interpretive community that is constituted by fidelity to those norms? In theory, a lawyer may decide to remove herself from the tax bar and join the tax shelter bar, which recognizes a different set of standards of interpretation.[170] Even if the authority of a community's disciplining rules do not depend on assent to those norms,[171] it seems open to practitioners to opt out of the community and opt into a different community, with a different set of disciplining rules.

A different way to frame this objection might be to claim that the requirement of professionalism in interpretation only gains authority by bootstrapping. That is, the obligation imposed by the attitude of professionalism is a function of the relevant interpretive community and the standards it recognizes for evaluating the correctness of legal judgments (i.e., "although purely formal norms seem to permit X, the law as correctly interpreted prohibits X"). At the same time, I seem to be claiming that a lawyer ought to associate himself with the interpretive community that recognizes the attitude of professionalism and shun other communities that do not. What is the source of this meta-obligation? If the response were, "the obligation of professionalism," that would indeed be bootstrapping. But the correct response is given instead in terms of the social function of law: a relatively stable, determinate framework of legal rights and obligations is necessary to permit ordered cooperation among people who disagree on just about everything except the need to reach settlement of disagreements.

If lawyers were permitted to adopt a Holmesian bad man interpretive attitude (or to opt into a community which recognized that attitude as a

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[169] This description, particularly the elitism and emphasis on the exercise of judgment, calls to mind Anthony Kronman's lawyer-statesman. *See* ANTHONY T. KRONMAN, THE LOST LAWYER (1993).

[170] *See* ARTHUR ISAK APPLBAUM, ETHICS FOR ADVERSARIES 45–60 (1999) (discussing the possibility that even if the role of doctor were constituted with certain obligations, a practitioner might opt to become a "schmoctor" with different obligations, and that the concept of a role cannot prevent this kind of maneuver); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 855 (1990) (arguing that there are multiple, overlapping communities to which one may belong, and that privileging the dominant community tends to preserve the status quo); *cf.* HERMAN, *supra* note 83, at 222–23 (arguing that the form of maxims, for the purpose of consideration of conformity with the categorical imperative, is given by an agent's regulative standards or projects).

[171] Fiss, *supra* note 62, at 746.

proper interpretation of the relevant law), then the law would end up having no boundaries at all, no constraining capacity, and therefore no ability to create authoritative settlement. This conclusion may sound unduly apocalyptic, but experience with practices such as tax sheltering shows that lawyers can always plan around formal legal norms, given sufficient resources and creativity. Purely formal constraints such as legislation, rulemaking, and enhanced enforcement will never be sufficient to eliminate abuses because lawyers are involved in constructing the bounds of the law.[172] As Robert Gordon rightly observes, there are resources for strategic manipulation within any set of adjudicative or administrative rules and procedures.[173] As a result, the effectiveness of the law depends on constraints exogenous to formal legal norms.

Before moving on, however, we must consider one final objection.[174] I have discussed "the community" and its interpretive practices as if it were a thing to which an intention can be straightforwardly ascribed. In one sense, this is just a convenient fiction—communities don't have practices or disciplining rules; community members follow these norms. The community's standards can be located by observing convergent behavior by community members,[175] but the community itself is not an intentional being. On the other hand we speak quite naturally of collective intentions and norms and attribute these mental states to groups.[176] In this case, we mean literally that the group intends something and are no longer using collective intention as a metaphor. Moreover, we do so even in the absence of some formal procedure, such as taking a poll that reveals the intentions of individuals and aggregates them into a collective intention. Without formal procedures we may reach a premature and incorrect conclusion about the group's intention,[177] so we must regard an ascription of group intention as potentially revisable, but talking as though the group has an intention is not incoherent.

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[172] *Cf.* Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, *in* ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 177, 180 (Deborah L. Rhode ed., 2000) ("Good lawyers understand that the ethical practice of law involves lawyers simultaneously shaping legal boundaries and recognizing the real limits to this manipulation.").

[173] Gordon, *supra* note 43, at 45.

[174] I am indebted to Dennis Tuchler for pressing me to consider this problem.

[175] HART, *supra* note 27, at 108–09.

[176] Solan, *supra* note 81. I am aware of the extensive social-choice literature which purports to show that there is no such thing as "the collective will" with respect to some outcome. *See* KATZ, *supra* note 15, at 60–67 (citing studies and examples). Accepting that there is no single collective will prior to some kind of aggregation procedure such as voting, it may nevertheless be the case that a collective sense of the meaning of a scheme or rule emerges over time, as a series of test cases is decided, as members of the group debate among themselves about how to resolve hypothetical disputes, and so on. These collective understandings are often embodied in the form of uniform responses to paradigmatic cases and can be extended to new situations by drawing analogies and distinctions. Although this process is most familiar in common law reasoning, it is arguably a feature of moral reasoning as well. *See* ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY (1988).

[177] Solan, *supra* note 81.

In the example here, it may turn out that the elite tax bar is more tolerant of tax shelters than its more outspoken members would admit. This, however, is an empirical challenge to the norms of a particular group, not a conceptual impediment to the general practice of imputing intentions to a collective body.

2. Structured-Finance Transactions at Enron.—Enron had a problem. It had an ambitious plan for growth that required billions of dollars in cash, but it could not raise cash through conventional methods like selling stock or borrowing from banks. The reason was simple—additional borrowing would harm its credit rating and issuing additional equity would hurt the price of its stock, which would be unthinkable in a company driven by the need to constantly increase its share price.[178] The markets it had created in natural gas and wholesale electricity were maturing and profits from trading were diminishing in response to increasing competition.[179] Moreover, Jeffrey Skilling's insistence that the company use mark-to-market accounting placed tremendous pressure on corporate managers to show constant revenue growth, even if that meant sacrificing cash flow.[180]

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[178] MCLEAN & ELKIND, *supra* note 14, at 92–94, 150–51, 154–55, 161, 236–37, 296, 318; POWERS REPORT, *supra* note 11, at 36–37; Second Report of Neal Batson, Court-Appointed Examiner 15–22 (Jan. 21, 2003) [hereinafter, Second Batson Report]; Frank Partnoy, *A Revisionist View of Enron and the Sudden Death of "May,"* 48 VILL. L. REV. 1245, 1250 (2003) ("The key factor sustaining Enron's ability to secure a low cost of capital was an investment grade credit rating . . . which the major credit rating agencies gave to Enron's debt from 1995 until November 2001."); Schwarcz, *supra* note 15, at 1309–10.

[179] Douglas G. Baird & Robert K. Rasmussen, *Four (or Five) Easy Lessons from Enron*, 55 VAND. L. REV. 1787, 1801–02 (2002); Bratton, *supra* note 4, at 1299–1300.

[180] Mark-to-market accounting permits a company to book as revenue the entire estimated value of a stream of income from an asset. Cash will continue to flow in the door over the entire productive life of the asset, but all of the revenue will be realized in the quarter in which it was booked. Not only was this method highly susceptible to abuse in the form of fiddling with the estimated value of an asset, but it also amplifies the pressure from Wall Street to show continuing growth. Because realizing all the future profits when the asset is booked makes one quarter's revenue figures look good, it makes it that much harder to show growth in the subsequent quarter. *See generally* HOUSE COMM. ON ENERGY & COMMERCE, LESSONS LEARNED FROM ENRON'S COLLAPSE: AUDITING THE ACCOUNTING INDUSTRY, H.R. DOC. NO. 107–83, at 87 (Feb. 6, 2002) (statement of Bala G. Dharan) (claiming that mark-to-market accounting, as applied to private contracts for the sale of assets that do not have readily ascertainable market values, requires a great deal of guess work and assumptions about dozens of variables); *id.* at 76 (statement of James S. Chanos) (explaining that under mark-to-market accounting, if assumptions are not borne out and assets actually decline in value, the reporting company must adjust their book value downward, but in practice there is a powerful incentive to do new deals and book the value of those new deals, using questionable assumptions, to mask the effect of the previous decline in asset values); Second Batson Report, *supra* note 178, at 22–28 (noting that mark-to-market accounting can create a "quality of earnings" problem, because earnings are recognized long before the activity generates any cash); *id.* at 29–32 (explaining how a transaction to provide video on demand, with content supplied by Blockbuster, resulted in recognized gain of $53 million, even though Enron did not have the technology to deliver the content, which Blockbuster in any event could not obtain from the studios); MCLEAN & ELKIND, *supra* note 14, at 39–41, 126–29; Bratton, *supra* note 4, at 1303–04 (observing that no market sets values for over-the-counter derivatives, so values must be obtained from economic models; since Enron was at the cutting edge of creating new derivative products, generally accepted approaches to

These incentives explain the motivation for most of the convoluted transactions devised by Chief Financial Officer Andy Fastow. Fastow's innovation, if you can call it that, was to use techniques of structured financing and asset securitization to accomplish two principal goals: first, to borrow money while keeping debt off the books; and second, to enable Enron to book the long-term value of a deal immediately under mark-to-market accounting rules.[181] Significantly, Fastow's corporate finance department set up transactions to milk them for beneficial accounting treatment—in terms of the substantive economics of the business, they did nothing at all. This observation is crucial to evaluating the duties of the lawyers who were employed to provide the documentation for the transactions.[182]

Many of the Fastow transactions have become well known by names such as Chewco, LJM1 and LJM2, and the Raptors. These names refer to special purpose entities (SPE's) which were set up as part of the deals. SPE's are often used in the process of asset securitization, in which the owners of some asset convert a stream of income over time into something that could be repackaged as a security and sold immediately to investors in the capital markets.[183] For example, a bank with many outstanding mortgage loans is entitled to receive monthly payments over the life of those loans, but it may wish to convert those payments into a lump sum in cash that it can use immediately. To do so, it "bundles" the mortgages and transfers them to an SPE, which issues tradable financial instruments (mortgage-backed securities), offered to investors at a discount relative to the present value of the stream of payments. The investors make money because they

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valuation did not exist); Schwarcz, *supra* note 15, at 1309 n.2 (quoting e-mail communication between an accounting professor at Duke's business school and the author, a highly sophisticated scholar of structured finance, which incidentally illustrates how complex these transactions can be).

181 Structured finance techniques can be used for legitimate business purposes, such as enabling a company to obtain lower-cost financing, transferring risk to parties who are better able to evaluate it, and permitting the owner of illiquid but valuable assets to use them to obtain financing. *See, e.g.*, HOUSE COMM. ON ENERGY & COMMERCE, *supra* note 180, at 92–93 (statement of Bala G. Dharan); Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1 STAN. J. L. BUS. & FIN. 133 (1994).

182 Stephen Pepper offers the interesting observation that sophisticated clients may enjoy the benefit of access to "more" law to the extent they can initiate the discussion of the legal effect of a particular course of action. *See* Pepper, *supra* note 19, at 1581–82. Fastow's experience with accounting gimmickry gave him an advantage in the lawyer-client relationship, because he was able to suggest intricate, law-evading transactions that might superficially comply with formal legal rules. By comparison, a less sophisticated client who simply asked a lawyer to design a structure to accomplish some financial objective within the constraints of financial accounting rules might obtain access to "less" law because the lawyer may not think of the elaborate structures that someone like Fastow devised. As Pepper notes, the distinction between Fastow and the hypothetical unsophisticated client may not make a difference for the ethical analysis if the law respecting the transactions is the same in both instances. The lawyer's ethical obligation in either case is to give advice with respect to the law, and Fastow's superior ability to manipulate the law means only that the lawyer may have to push back harder against his determination to avoid legal regulation.

183 *See generally* MCLEAN & ELKIND, *supra* note 14, at 157–59.

paid less for the securities than the income over time is worth. The bank is happy because it has converted a formerly illiquid asset into cash.

The investors in these transactions are often investment banks who deal with large corporations on a regular basis, and in Enron's case they were subjected to a fair amount of bullying by Fastow.[184] The banks and other institutional investors would often contribute funds directly to an SPE created for the deal, which in turn purchased the asset from its owner. In all of these transactions, the SPE is supposed to be independent of the seller of the assets. But to be deemed independent, it actually need only have three percent of its equity owned by a party unaffiliated with the seller.[185] (If the SPE is independent, it need not be "consolidated"—i.e., reported on the financial statements of the company that transferred assets to the SPE.) Thus, if Citibank or J.P. Morgan contributed $3 million to an SPE and Enron contributed $97 million, Enron would be permitted to transfer assets to the SPE and book the transaction as a bona fide sale to an independent party. This situation was very much preferable, from Enron's perspective, to a $100 million loan from the bank, which would have had an adverse effect on Enron's credit rating.

Although the legal and accounting requirements for transactions with unconsolidated, off-balance-sheet SPE's are not terribly rigorous, Enron had a hard time complying even with those.[186] Or, to put it differently, Enron was not interested in consummating a genuine transfer of assets to a truly independent entity. Its motivation was rather to continue to realize the economic benefits of owning the asset, preferably as operating income as opposed to a one-time profit, but to move any debt associated with the acquisition of the asset off its balance sheet.[187] In order to accomplish this goal, Enron officers and employees, with the assistance of accountants and lawyers, attempted to structure transactions that conformed to the letter of financial accounting rules, while aggressively pushing the boundaries of permissibility. To return to the image which opened this Article, the lawyers and accountants were directed to create a duck, even though the transactions (in more than one sense!) were a dog.

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[184] *Id.* at 162–65.

[185] Bratton, *supra* note 4, at 1306 n.118 (citing SEC and GAAP authorities for the three-percent rule, and noting that while the SEC has consistently denied that the three-percent rule is a bright-line test, it is generally understood as such by accountants).

[186] Eventually Enron employed so many SPEs that it was impossible to find investors with capital representing three percent of the valuation of all of the off-balance-sheet vehicles. *See* MCLEAN & ELKIND, *supra* note 14, at 166, 189; POWERS REPORT, *supra* note 11, at 41 (explaining that the "Chewco" partnership was created because Enron managers were having a hard time finding outside investors to finance a buyout of the JEDI joint venture).

[187] Second Batson Report, *supra* note 178, at 36–39 (motivation for SPE transactions); MCLEAN & ELKIND, *supra* note 14, at 368–69 (abuse of recurring vs. nonrecurring distinction); Schwarcz, *supra* note 181, at 142–43 (legitimate use of off-balance-sheet financing).

The duck-creating rules for SPE transactions can be summarized very briefly as follows:[188]

- The SPE must be "bankruptcy remote" from the originating company (e.g., Enron), so that the originating company's credit risks do not affect the risks associated with owning the securities of the SPE.[189]
- Bankruptcy remoteness depends, in turn, on the genuine transfer of the economic risks and benefits associated with the assets from the originating company to the SPE.[190] In other words, the transfer must be a "true sale."[191]
- If the SPE is not truly independent (i.e., bankruptcy remote) from the originating company, the assets and liabilities of the SPE must be consolidated on the financial statements of the originating company.[192] Fleshing out the requirement of independent ownership, financial accounting standards set a minimum of three percent for the equity that must be contributed by entities unaffiliated with the originating company.[193]
- The independence of an SPE can be compromised by the originating company retaining control over the asset; this can be accomplished through side deals, such as loan guarantees, between the originating company and the SPE, and may be shown by the originating company's attempt to recognize gains in the value of the SPE as earnings on its own balance sheet.[194]

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188 *See generally* FIN. ACCOUNTING STANDARDS BD., ACCOUNTING FOR TRANSFERS AND SERVICING OF FINANCIAL ASSETS AND EXTINGUISHMENTS OF LIABILITY—A REPLACEMENT OF FASB STATEMENT NO. 125 (2000) (statement of Financial Accounting Standards No. 140). Several reports prepared under the supervision of the bankruptcy court provide useful summaries of the applicable financial accounting standards. *See, e.g.*, Report of Harrison J. Goldin, Court-Appointed Examiner in the Enron North America Bankruptcy Proceeding, Respecting His Investigation of the Role of Certain Entities in Transactions Pertaining to Special Purpose Entities (Nov. 14, 2003), *available at* http://www.enron.com/corp/por/supporting.html (last visited June 29, 2004) [hereinafter Goldin SPE Report]. For the relevant legal standards, see STEVEN L. SCHWARCZ, STRUCTURED FINANCE: A GUIDE TO THE PRINCIPLES OF ASSET SECURITIZATION (2d ed. 1993).

189 Schwarcz, *supra* note 181, at 135.

190 Second Batson Report, *supra* note 178, app. C at 9–11; POWERS REPORT, *supra* note 11, at 14; Bratton, *supra* note 4, at 1306–07 (citing numerous GAAP authorities); Schwarcz, *supra* note 181, at 141.

191 Second Batson Report, *supra* note 178, at 37–38.

192 POWERS REPORT, *supra* note 11, at 38–39 (claiming that consolidation is a presumptive requirement, and the presumption can be overcome only if two conditions are met, namely independence of ownership and control of the SPE).

193 *See supra* note 185.

194 Second Batson Report, *supra* note 178, app. C at 12–13, 20–23; POWERS REPORT, *supra* note 11, at 36–37; Christine E. Earley et al., *Some Thoughts on the Audit Failure at Enron, the Demise of Andersen, and the Ethical Climate of Public Accounting Firms*, 35 CONN. L. REV. 1013, 1019–20 (2003) (detailing side agreement between Enron and Michael Kopper, an Enron employee whose involvement

Notice, however, that these norms are subject to manipulation or gaming by lawyers who may be motivated to comply with them only formally. A complete analysis of the appropriateness of the Enron transactions would have to give additional content to those rules by tapping into the understandings of the relevant interpretive community, which are germane to the exercise of interpretive judgment by lawyers and accountants. These principles are relevant to interpretation and can constrain the exercise of judgment, but only if the lawyer engaged in the process of interpretation belongs to a community that is interested in maintaining a stable, publicly accessible framework for cooperative activity. A lawyer who belongs to Andy Fastow's interpretive community might be interested only in securing short-term economic benefits for her client, or worse, for an individual agent of her client. As I have argued, however, this interpretive stance cannot be given a normative justification that reaches all the way down to the bedrock of the social function of the law. If, on the other hand, a lawyer is interested in exercising judgment in a way that has plausible ethical foundations, she will probably discover that the interpretive community recognizes certain norms that differentiate artificially created ducks from real ducks—that is, distinguishing between transactions that are motivated only by the attempt to create accounting results and those that have a real economic substance. In addition to the rules for duck-ness, there are principles regulating interpretation that sort ducks from dogs dressed up as ducks, including:

- One of the benefits of SPE financing is "disintermediation," or the reduction of transaction costs by removing intermediaries such as banks from the financing process.[195] A transaction involving multiple intermediaries and a highly complex series of steps is unlikely to result in the transaction cost savings that usually justifies SPE transactions.
- Because SPE transactions can benefit both the originating company and investors in the SPE, one would expect a legitimate transaction to be fully disclosed in a sufficiently clear manner. One of the recurring themes of the commentary on the Enron transactions is the opacity of the disclosures.[196] An undisclosed

need not be disclosed as a related-party transaction, guaranteeing loan from Barclay's Bank to Kopper, for the purpose of acquiring a three-percent interest in Chewco, an SPE run by Andy Fastow); Schwarcz, *supra* note 181, at 136. Enron used complex financial devices, such as a transaction it called a Total Return Swap, to retain the benefits of an asset transferred to an SPE. Second Batson Report, *supra* note 178, app. C at 16–18.

[195] Schwarcz, *supra* note 15, at 1315.

[196] *See, e.g.*, POWERS REPORT, *supra* note 11, at 192; Bratton, *supra* note 4, at 1281 (calling financial statements "famously opaque"). The reaction of James Chanos, a sophisticated Wall Street hedge fund manager, is typical: "We read the footnotes in Enron's financial statements about these transactions over and over again, and . . . we could not decipher what impact they had on Enron's overall financial condition." Chanos, *supra* note 180, at 73; *see also* SWARTZ & WATKINS, *supra* note 10, at xi–xiii, 331 (reporting anecdote of Houston financial advisor who did not recommend Enron stock because he

transaction or one that is camouflaged in layers of obfuscating legalese should alert lawyers and accountants that something is fishy.[197]

- Additional caution is warranted when other aspects of the transaction are aggressive. For example, in the LJM transactions, Enron capitalized the SPEs with $1.2 billion of its own common stock, in exchange for notes issued by the SPEs. This is a once-disfavored funding mechanism, and GAAP requires that Enron reduce shareholder equity in the amount of the newly issued shares until the SPE pays down the notes.[198] Use of this kind of capitalization scheme, and the failure of Enron to account for the transaction properly, should have put professionals on notice that other aspects of the transaction should be scrutinized carefully.
- The financial accounting system in general is intended to provide transparent, accurate, easily understood information to managers, creditors, and investors regarding the financial condition of the reporting company.[199] If it appears that managers are valuing complexity for its own sake, it could be a red flag warning to lawyers and accountants that the transaction is intended to manipulate the numbers on the company's financial statements, rather than accomplish some economically useful end.

Like the disciplining rules that differentiate between legitimate structuring to capture favorable tax treatment from bogus tax shelters, these principles of interpretation are not binary, all-or-nothing rules. There is no algorithmic way to capture the process of reasoning from these principles to a correct application of the law to an SPE transaction. For this reason, there may be hard cases in which competent lawyers disagree over whether a given transaction is permissible, and there may be cases in which some lawyers are more aggressive than others in pushing the boundaries of the rules. This is as it should be. My claim is not that the appropriately constrained judgment of interpretive communities produces a single right answer in every case. Rather, the limit on lawyers' creativity that prevents it

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could not make sense of its financial statements and Warren Buffet's statement that he never understood how Enron made money). Indeed, the complexity of some of the SPE transactions, such as the "Raptor" hedges, made it difficult even for internal Enron managers to know how a given business unit was performing. *See* Baird & Rasmussen, *supra* note 179, at 1804–06.

197 I take the point that some structured finance transactions can be so complex that disclosure is necessarily imperfect—either it oversimplifies the transaction or it provides so much detail that it goes over the head of most investors. *See* Schwarcz, *supra* note 15, at 1316–17. When a transaction becomes this complicated, the clarity of the disclosure language, by itself, is an insufficient indication of abuse. In a case like this, however, professionals have a heightened obligation of inquiry and should rely even more heavily on other factors to guide their interpretation of the relevant legal and accounting standards.

198 Bratton, *supra* note 4, at 1314–15.

199 Second Batson Report, *supra* note 178, app. B at 3–5.

from degenerating into undue aggressiveness is the requirement of public justifiability. A lawyer must be prepared, in principle, to articulate a reason why the legal treatment (for tax, accounting, bankruptcy, etc., purposes) of a transaction is legitimate, in light of the end sought to be advanced by the regulatory regime in question. In the case of the Enron SPE transactions reviewed in the Powers and Batson reports, there is simply no plausible justification available. Fastow and his confederates had manipulated the techniques of structured financing to produce spurious accounting results which had no relationship whatsoever to the underlying economics of the transactions. Their abuse was abetted by the Holmesian bad man attitudes of lawyers and accountants, who in effect agreed with Fastow that if the rules do not explicitly prohibit an act, it is permissible.

3. Legal Restraints on Torture.—The invasion of Afghanistan in the wake of the September 11 attacks resulted in the capture of numerous detainees with possible al-Qaeda affiliation, who might have possessed information on the structure of the organization, personnel, or even future terrorist attacks. The Bush administration was therefore faced with an urgent question regarding the limits it should impose on interrogation techniques. Officials in the Department of Defense and advisers to the president naturally turned to lawyers to interpret and apply the domestic and international legal norms governing the treatment of prisoners.[200] The resulting memos, prepared by the Justice Department's Office of Legal Counsel, were leaked to the press and quickly dubbed the "torture memos." They were eventually disclosed by the White House and are now widely available in electronic form.[201] The memos consider a wide range of legal issues, from whether the Geneva Convention protections afforded to pris-

[200] There is considerable uncertainty in the law of lawyering over the identity of the client represented by federal government lawyers. As one commentator put it, on any given day the lawyer's client might be identified as a particular agency, an agency official, the executive branch of the government, the United States as a whole, or the public interest. *See* Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 955 (1991). Specifically with regard to the Office of Legal Counsel ("OLC"), there is controversy over how the role of OLC lawyers should be understood, with positions arrayed on a continuum between litigation-style advocacy on the one hand, and neutral judge-style reasoning on the other. *See* John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375 (1993); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1305–06 (2000). It should be clear that my sympathies lean toward the latter extreme, what Moss calls the "neutral expositor" model. In terms of the client-identity question, though, there is less controversy that OLC lawyers in particular, as opposed to government lawyers in general, owe their loyalty and obligation to render candid advice to an identifiable government official, namely the President. Moss, *supra*, at 1316–17. Thus, when I use the term "client" in this section I refer to the President and his top-level advisors.

[201] Two useful collections of the memos are FindLaw, *at* http://news.findlaw.com/hdocs/docs/dod/62204index.html (last visited Dec. 7, 2004), and the National Security Archive at George Washington University, *at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/index.htm (last visited Dec. 7, 2004).

oners of war extend to suspected Taliban or al-Qaeda detainees, to whether the President's power as Commander in Chief could be limited by an act of Congress criminalizing mistreatment of prisoners. One of the most notorious memos concluded that certain methods of interrogation might be cruel, inhuman, or degrading, yet fall outside the definition of prohibited acts of torture.[202] Moreover, even if an act were deemed torture, the memo concluded that it might be justified by self-defense or necessity.

Contrary to the suggestion by one of the authors of the memos that critics are implying that it is taboo even to ask legal questions about torture,[203] I do not perceive anything inherently wrong with the administration's decision to seek advice on the application of the law governing torture. The law governing what may be done to a given class of prisoners is quite complex, involving the overlapping norms of international, military, domestic criminal, and constitutional law. As government officials considered the interrogation of detainees ex ante, they could reasonably have worried that an act that did not appear to an ordinary observer to constitute torture might nevertheless contravene some technical legal rule. For example, the Geneva Convention on the treatment of prisoners of war prohibits "outrages upon personal dignity, in particular, humiliating and degrading treatment,"[204] which conceivably might be interpreted to include what domestic law enforcement personnel would regard as relatively innocuous interrogation tactics. The Army runs a school that teaches intelligence officers how to extract information from unwilling detainees, and although it trains soldiers to "lie . . . prey on a prisoner's ethnic stereotypes, sexual urges and religious prejudices," it nevertheless also claims to respect governing legal norms against *torture*, as opposed to harsh interrogation techniques.[205] To put the point in Hartian terms, the language of any prohibition on torture will contain a core prohibition of clearly immoral acts, with a penumbra of application to cases in which the immorality is not clear.[206] Thus, it is not immoral to seek legal advice on how to avoid the prohibition on a plainly immoral act, as long as the actor intends to commit a morally permitted, but possibly legally prohibited act.

It is also important to be careful about the role of moral and policy considerations in the process of giving legal advice. John Yoo, one of the

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202 *See* Aug. 1 OLC Memo, *supra* note 17.

203 *See* Liptak, *supra* note 18 (quoting John Yoo's statement that "[s]ome critics of the Justice Department's work seem to assume that it is politically incorrect to ask the meaning of a publicly enacted law").

204 *See* Geneva Convention (III) Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, art. 3(1)(c), 6 U.S.T. 3316, 75 U.N.T.S. 135.

205 *See* Sanford Levinson, *"Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013, 2025 (2003) (quoting Jess Bravin, *Interrogation School Tells Army Recruits How Grilling Works; 30 Techniques in 16 Weeks, Just Short of Torture; Do They Yield Much?*, WALL ST. J., Apr. 26, 2002, at A1).

206 *See* HART, *supra* note 27, at 144–47.

principal drafters of the torture memos, has argued that the Justice Department lawyers were not asked to consider policy or moral issues.[207] From this fact about the instructions given to the lawyers, Yoo seeks to infer the conclusion that moral and policy considerations should be somehow hermetically separated from legal advice. As Yoo argues: "[T]he memo sought to answer a discrete question: What is the meaning of 'torture' under the federal criminal laws? What the law permits and what policymakers chose to do are entirely different things."[208] True enough, but it may be the case that "[w]hat the law permits" cannot be determined without reference to moral considerations. Consider, for example, the analysis of the necessity defense to federal criminal liability under the statute implementing the international Convention Against Torture.[209] The Justice Department's memo on the Convention concludes that a necessity defense should be available to a charge of having violated the federal statute.[210] On the standard formulation of the necessity defense, the trier of fact is called upon to decide whether the actor promoted higher-valued goods at the expense of lesser values; if so, the act was justified by the necessity.[211] This evaluation in effect incorporates moral values by reference into the application of legal rules, because "[t]he actor and the court that judges him must know what is good and bad, beneficial and harmful, and it must know comparatively what sorts of things are *worse* than others."[212] Moreover, to the extent courts and other legal officials have consistently invoked moral considerations to justify their decisions, they are deemed part of law by the rule of recognition prevalent in the legal system.[213] When the lawyers were asked to interpret the *law* governing torture, there was no way for them to avoid dealing with moral and policy issues.[214]

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[207] *See* John C. Yoo, *A Critical Look at Torture Law*, L.A. TIMES, June 6, 2004, at B11.

[208] *Id.*; *see also* Posner & Vermeule, *supra* note 16 ("[T]he Justice Department lawyers . . . were not asked for moral or political advice . . . .").

[209] The federal statute implementing the convention is 18 U.S.C. §§ 2340–2340A (2000). The full title of the relevant convention is *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (1984) [hereinafter *Convention Against Torture*].

[210] *See* Aug. 1 OLC Memo, *supra* note 17, at 39–41.

[211] *See* WAYNE R. LAFAVE, CRIMINAL LAW § 5.4(a) (3d ed. 2000). The authors of the memos followed this formulation of the necessity defense. *See* Aug. 1 OLC Memo, *supra* note 17, at 39–40; Working Group Report on Detainee Interrogations in the Global War on Terrorism 25–26 (March 6, 2003), *available at* http://www.cdi.org/news/law/pentagon-torture-memo.pdf [hereinafter Working Group Report].

[212] Moore, *supra* note 86, at 286. Joseph Raz argues that the law does not incorporate morality by reference in this case, because the decisionmaker is already required to take moral considerations into account; the law merely reiterates that it does not *exclude* moral considerations from the decision. *See* Raz, *supra* note 144. Whether one prefers to see the issue as non-exclusion or incorporation, the point remains that the interpretation of the law *as such* requires reference to moral values.

[213] *See* Hart, *supra* note 77, at 265.

[214] In any event, it is highly disingenuous for Yoo to defend the memos by claiming that lawyers were not asked to give policy advice when the memos contain extensive discussion of policy issues.

Similarly, some of the government lawyers' arguments make sense only from an artificially narrow perspective, focused only on particular legal texts divorced from their historical and policy contexts. Administration officials referred repeatedly to the novel nature of the conflict with al-Qaeda, implying that the law ought to be interpreted less rigorously.[215] This argument is blocked, however, by specific provisions in the international law against torture. The 1984 Convention Against Torture contains a non-derogation provision, which bluntly states that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[216] The non-derogation language was included specifically to prevent states from attempting to define a category of *crimen exceptum*, or crimes so dangerous to society that law enforcement officials should be permitted extraordinary latitude.[217] The enactment history of the 1984 Convention shows that an argument from the unprecedented nature of the conflict with al-Qaeda is simply going to be a nonstarter. States frequently try to justify torture as a reasonable self-defense measure against an extraordinary threat, which is precisely why the non-derogation provision was included in the Convention. Calling this a "policy" argument, and then trying to argue that the government had not asked for policy advice, misses the point that it may be impossible to ascertain the content of the law without reference to policy considerations.

Not only did the government lawyers exclude moral, policy, and historical considerations from their analysis, but they ignored other clearly

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See, e.g., Memorandum from Jay S. Bybee to Alberto R. Gonzales and William J. Haynes 25–28 (Jan. 22, 2002). The discussion of necessity, in particular, specifically acknowledges that "the purpose behind necessity is one of public policy." Aug. 1 OLC Memo, *supra* note 17, at 40; Working Group Report, *supra* note 211, at 25.

215 *See, e.g.*, the statements of White House Counsel Gonzales accompanying the release of the memos:

> America today does face a different kind of enemy in al Qaeda and its affiliates. And we face an enemy that targets innocent civilians, and we have seen certainly graphic evidence of that in recent days. We face an enemy that lies in the shadows, an enemy that doesn't sign treaties, they don't wear uniforms, an enemy that owes no allegiance to any country, they do not cherish life. An enemy that doesn't fight, attack or plan according to accepted laws of war, in particular Geneva Conventions.

Press Briefing, White House Counsel Judge Alberto Gonzales (Jun. 22, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html; *see also* Draft Memorandum from Alberto R. Gonzales to the President 3 (Jan. 25, 2002) ("[T]his is a new type of warfare—one not contemplated in 1949 when [the Geneva Convention] was framed . . . ."). Again it is ironic to read defenders of the administration arguing that lawyers should engage only in formalistic "legal" interpretation, while at the same time invoking historical and policy-based considerations in support of their own legal arguments.

216 *Convention Against Torture*, *supra* note 209, art. 2(2). In ratifying the treaty, the United States stated reservations to the definition of torture (evidently to exempt capital punishment from the reach of the Convention) but it did not state any reservations to the non-derogation provision in Article 2(2). *See* Levinson, *supra* note 205, at 2014–16.

217 *See* EDWARD PETERS, TORTURE 6 (2d ed. 1996).

relevant legal texts and traditional techniques for interpreting texts. In other words, even if the lawyers believed they were justified in adopting a textualist style of interpretation, they did a lousy job at textualism. Consider, for example, the memorandum which concluded that an act constitutes torture under a federal statute only if, *inter alia*, the actor specifically intended to cause severe physical mental pain or suffering, with "severe" defined in terms of other federal statutes defining a medical emergency for the purpose of establishing a right to health benefits.[218] To put it mildly, it is peculiar to make an argument analogizing "severe pain" for the purposes of a statute prohibiting torture with another statute defining an emergency as involving a "serious dysfunction of any bodily organ or part." The health benefits statute notes, almost in passing, that in an emergency the patient will exhibit symptoms including severe pain. This is not a definition of severe pain in terms of organ dysfunction. It is a definition of *emergency* in terms of organ dysfunction with possible accompanying severe pain. Imagine a definition of "winter" as "a season whose manifestations include snow, ice, and cold weather." It does not follow from that definition that cold weather is weather in which there is snow—obviously enough it can be cold outside and not snowing. Similarly, a person can experience severe pain (and be entitled to health benefits under the statute) without being in imminent jeopardy of organ failure or dysfunction.

The government lawyers would not have made this definitional mistake if they had used a different set of texts for their argument by analogy. In addition to the statute under consideration, implementing the 1984 Convention Against Torture, the U.S. Immigration and Naturalization Service adopted regulations implementing the Convention, permitting aliens otherwise subject to removal to apply for an exemption on the ground that he or she would be subject to torture if returned or extradited to another country.[219] The regulations define torture as "any act by which severe pain or suffering . . . is intentionally inflicted."[220] Unsurprisingly, there is a substantial body of cases interpreting the term "torture" in the context of immigration proceedings,[221] none of which were cited in the Justice Department memo. Perhaps these cases are distinguishable, but their omission is striking in the context of an analysis of the term "severe pain" in a torture-related statute. Surely they are better analogies for the criminal prohibition on torture than the statute authorizing health benefits for patients experiencing a medical emergency.

This kind of crabbed argumentation strongly suggests that the lawyers

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218 *See* Aug. 1 OLC Memo, *supra* note 17, at 5–6 (citing the health benefits statutes).

219 *See* 8 C.F.R. § 208.11–208.3 (1999).

220 *Id.* § 208.18(a)(1).

221 *See, e.g.*, Zubeda v. Ashcroft, 333 F.3d 463, 472 (3d Cir. 2003) (stating that rape can constitute torture); Al-Saher v. INS, 268 F.3d 1143, 1147 (9th Cir. 2001) (stating that electric shocks to the genitals, beatings, and suspension from rotating ceiling fans can constitute torture).

had a motive other than providing their client with an impartial and objective analysis of the law. There is nothing wrong with advising a client to take a novel or creative position under existing law, in the hope that a legal official might treat the client's position favorably. If transactional lawyers were permitted to give only the most conservative legal advice, a significant avenue for legal change would be closed off. If a lawyer's advice is creative and the client's position is unlikely to prevail, however, the lawyer owes an obligation to explain this clearly to the client, so that the client can decide whether to incur the risk of an unfavorable ruling.[222] One of the striking things about the whole set of Justice Department memos is that they do not acknowledge how far out of the mainstream their position is, with respect to executive power, the application of international legal norms, the construction of federal statutes, and other legal issues they address. Two of the defenders of the government lawyers argue, in effect, that the position taken in the memos, particularly with respect to executive power, is so cutting edge that it has wrongly been thought crazy rather than innovative.[223] The trouble with this defense is that nowhere in the memos do the authors flag the argument as a challenge to received wisdom. Instead, it is presented without qualification, almost blandly, as a factual report on what the law is, not what it might be if the innovative arguments of the authors were accepted.

As suggested previously, the explanation for the poor quality of the legal analysis in the memos may be the attitude that the lawyers were instructed—perhaps expressly, but likely tacitly—to adopt when analyzing legal restrictions on torture. According to published reports, the administration repeated the mantra "forward-leaning" to describe the type of advice it wanted.[224] Lawyers were expected to take risks, think outside the box, and in effect approach the law from an adversarial point of view, rather than as a set of legitimate reasons upon which to act. This direction from the "client" is quite likely to have biased the lawyers' advice by causing them to adopt a Holmesian bad man attitude toward the law. If this stance is troublesome in the context of taxation and financial accounting, it seems almost monstrous when applied to law that is aimed at protecting the most fundamental aspects of human dignity. The obvious context and purpose of certain categories of law compels individuals and lawyers not just to avoid violations, but to "avoid avoidance." That is, some kinds of laws command citizens, in effect, not to calibrate their actions finely in close proximity to

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[222] The state bar disciplinary rules in effect in most jurisdictions require a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." MODEL RULES, *supra* note 20, R. 1.4(b).

[223] *See* Posner & Vermeule, *supra* note 16 (arguing that the "conventional view" of executive power "has been challenged in recent years by a dynamic generation of younger scholars" including John Yoo).

[224] *See* Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1.

legal boundaries. Jeremy Waldron offers a nice example: "Someone for whom the important question is 'How much may I flirt with my student before it counts as harassment?' is already poorly positioned with regard to the concerns underlying harassment law."[225] In the case of harassment, as well as torture, the nature of the prohibited activity exerts a feedback effect on the attitude that one should take when interpreting the law. It is not "routine lawyerly stuff" at all to ignore these interpretive norms; rather, the intelligibility of the law depends on them.

I want to make clear a perhaps unsettling implication of the lawyer's duty to apply the law as it actually is, as opposed to the way the lawyer would like it to be. If the law, properly interpreted, prohibits a certain interrogation technique, then it is irrelevant if a government official would prefer a more "forward-leaning" approach to dealing with detainees. But, if the law permits a technique, such as the use of "stress positions," sleep deprivation, or bombardment by lights and sound,[226] then the lawyer's belief that these techniques are morally wrong should be excluded from the lawyer's analysis of the law. The law governing lawyers permits (but does not require) a lawyer to advise a client on the basis of relevant "moral, economic, social and political factors."[227] Thus, there is nothing wrong with saying to the client, in effect, "That is legal but it is a rotten thing to do." (That was exactly the reaction of the State Department to the White House Counsel's advice that the Geneva Conventions did not apply to the conflict in Afghanistan.[228]) If the client has heard that advice, however, and still decides to go forward with a course of action that the lawyer finds morally wrong, the lawyer's obligation is to assist the client, regardless of her moral objection. The reason is the settlement and coordination function of the law that is the centerpiece of this approach to legal ethics.

People disagree in good faith over the morality of harsh interrogation techniques, even outright torture, and the scope of cases in which it should be permissible. Judge Posner has argued that no one should be in a position of public responsibility who doubts that, if the stakes are high enough, torture is permissible.[229] Naturally there are others who maintain that torture is

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225 Waldron, *supra* note 90, at 535–36 n.66.

226 *See* Levinson, *supra* note 205, at 2027 (quoting Bravin, *supra* note 205, at A1 (discussing military's protocols for conducting harsh investigations)); Don Van Natta, Jr., *Questioning Terror Suspects in a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, at A1 (reporting on interrogation techniques used by U.S. personnel).

227 MODEL RULES, *supra* note 20, R. 2.1; *see also* Pepper, *supra* note 19, at 1563–64.

228 *See* Memorandum from William H. Taft IV to Counsel for the President (Feb. 2, 2002).

229 Richard A. Posner, *The Best Offense*, NEW REPUBLIC, Sept. 2, 2002, at 28, 30; *see also* Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, Oct. 2003, at 51, 76 ("[C]oercion is an issue that is rightly handled with a wink[;] . . . it should be banned but also quietly practiced.").

never permissible, even in so-called "ticking bomb" cases.[230] Then there are a variety of middle-ground positions, including doubts about the generalizability of the ticking bomb hypothetical,[231] and attempts to qualify the limited permissibility of torture with various democratic process controls.[232] There are undoubtedly cases on which all would agree that torture is wrong, but there are circumstances in which thoughtful and fully informed citizens would reasonably disagree about the moral acceptability of a certain technique, or whether it deserves the normatively laden ascription "torture." Because of the shared interest in working together on the common project of national defense within a constitutional framework that protects human rights, individuals have set up a system of legal procedures for resolving these normative conflicts. Insofar as they are engaging in practical, rather than theoretical reasoning, they have a second-order moral reason to respect the law's position on one of these questions.[233] No matter how serious or strongly felt the lawyer's moral objection to the law, the law nevertheless dictates what is permissible in the context of the attorney-client relationship, absent some kind of catastrophic moral horror.[234] Even if the lawyer believes, as many do, that the present climate of fear has made us too willing to discard humanitarian considerations, lawmaking is a democratic process, and the lawyer's conscience cannot trump the result of fair proce-

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230 *See, e.g.*, Oren Gross, *The Prohibition on Torture and the Limits of the Law*, *in* TORTURE (Sanford Levinson ed., 2004); Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124 (1978); Anthony Lewis, *Making Torture Legal*, N.Y. REV. BOOKS, July 15, 2004, at 4.

231 *See, e.g.*, Moore, *supra* note 86; *see also* Winfried Brugger, *May Government Ever Use Torture? Two Responses from German Law*, 48 AM. J. COMP. L. 661 (2000).

232 *See, e.g.*, ALAN M. DERSHOWITZ, WHY TERRORISM WORKS (2002) (proposing "torture warrants" to subject interrogations to judicial oversight); MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR (2004) (arguing for constraints like transparency and accountability).

233 For the terminology of first- and second-order reasons, and the argument for the authority of law, see Wendel, *supra* note 6, at 365, 376–84.

234 To the obvious rejoinder that torture is a paradigmatic case of a catastrophic moral horror, the response is that it is true in some cases. The politically motivated torture of opponents of the government in order to silence dissent, or the wholly gratuitous torture of innocent detainees, would count as a catastrophic moral horror, and no legal permission to engage in these acts would preempt the lawyer's first-order moral reasons not to take part in it. But the cases we are concerned about here do not fall within the core of clear moral catastrophes because one could believe in the permissibility of using coercive or pain-inducing interrogation techniques in some cases, on some suspects, given a sufficiently compelling justification. In order to be warranted in "opting out" of the authority of law, a lawyer must believe not only that the law is wrong, but that anyone who disagrees is completely failing to function as a moral agent, or is "massively, corruptly, stupidly wrong," as I have previously put the point. *See id.* at 417 n.190. A community is justified in shunning a citizen whose moral beliefs are so clearly beyond the pale that it would be impossible to engage in cooperative, peaceful coexistence with the individual. To the extent a person's views are wrong, but not so wrong that the person should be shunned, those views are part of the background of normative debate that makes it necessary to establish democratic and legal procedures in order to facilitate cooperative endeavors. Thus, lawyers acting in a representative capacity are obligated to respect the resolution achieved by the legal system, with respect to positions that are within the range of good faith moral disagreement.

dures where the law on point is clear. As a private citizen, the lawyer is free to lobby or protest the law; the lawyer may withdraw from representing the client; and the lawyer may employ legal channels (with the client's consent, of course) on behalf of the client to attempt to change the law. But the negative aspect of professionalism, which is an implication of the authority conception of legal ethics, precludes reference to first-order moral reasons, except to the extent they are incorporated into law or made relevant to the interpretation of law by the conventional practices of courts and lawyers.

IV. CONCLUSION

In response to public criticism of the role of lawyers in the corporate scandals which came to light in 2002, lawyers argued that they were simply responding rationally to the competitive pressures of the marketplace. Similarly, one excuse offered by apologists for the so-called torture memos is that the lawyers were responding to administration pressure to think "outside the box" in the war on terrorism. In both of these cases, we are supposed to grant normative significance to the fact that clients desire aggressive and creative lawyers who are willing to walk right up to the line between legality and illegality, and even push the boundaries if necessary. Lawyers and accountants have described how clients demand, "Show me where it says I can't do that,"[235] when professionals raise concerns about suspicious transactions. In the end, however, it is not for clients to say what the law is. If the client demands that the lawyer paste an orange plastic beak on a dog and call it a duck, the lawyer's response must be that the rules may *appear* to permit creating ducks out of dogs, but that the law *properly interpreted* would characterize the creature as a dog. Legal rules are not self-interpreting, and a conclusion about what the law says, with respect to some transaction, depends on the interpretive attitude that one takes toward the rules. The instrumentalist attitude, which treats the law as merely an obstacle to be planned around, cannot be justified in terms of the social function of law, which is to permit people to coordinate their activities in a complex, highly legalistic society. Recognizing this function of law, professional communities have developed what we can refer to as disciplining rules, principles of interpretation, or regulative norms that stabilize interpretation and permit discrimination between legitimate and illegitimate constructions of law. Lawyers reasoning on the basis of these disciplining rules, can articulate criteria for the exercise of professional judgment, which are justified on the basis of the purposes standing behind the regime of law that applies in a given domain.

This Article has set out a theory of legal ethics which is grounded in fidelity to the law. Professionalism, in the sense we have been discussing

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[235] *Cf. Fundamental Causes of the Accounting Debacle at Enron: Show Me Where It Says I Can't: Summary of Testimony Before the House Comm. on Energy and Commerce*, 107th Cong. (Feb. 6, 2002) (statement of Roman L. Weil), *available at* http://gsb.uchicago.edu/pdf/weil_testimony.pdf.

here, does not mean that the lawyer's responsibility is to do right on an all-things-considered basis. Nor is the lawyer acting as an individual moral agent, doing right by her own lights. The lodestar here is always an interpretation of applicable legal norms. Because we disagree in good faith and, in many cases intractably, it is unrealistic to expect the process of moral reasoning alone to provide a stable framework for cooperative social activity. The law has authority to the extent it permits us to move beyond moral disagreement and settle on a common framework for action. As a corollary to this theory of authority, lawyers must not be permitted to unsettle the settlement, and to evade the requirements that have been laid down by a procedural mechanism for resolving moral conflict. The Holmesian bad man attitude toward the law would have exactly that effect. For this reason, it is an unacceptable interpretive stance to take toward the law.