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Civil Obedience

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Discussions of legal ethics generally assume that lawyers should deliberate straightforwardly on the basis of reasons to act or refrain from acting. This model of deliberation fails to account for the role of the law in resolving normative disagreement and coordinating social activity by people who do not share comprehensive ethical doctrines. The law represents a collective decision about what citizens ought to do, which replaces the reasons individuals would otherwise have to act. This Article contends that legal ethics ought to be understood as an aspect of this theory of the authority of law. On this account, lawyers have a duty not to reintroduce contested moral beliefs into the law by relying on them as a justification for action within the lawyer-client relationship. Lawyers should not act on the basis of their principled moral beliefs, but on the basis of legal directives. This does not mean that lawyers should blindly defer to their clients' wishes, and it does not entail the familiar maxim of zealous advocacy within the bounds of the law. In many cases, this conception of legal ethics is closer to the traditional vision of the lawyers as guardians of the public purposes of the law. In the course of developing this argument, this Article uses case studies of lawyering dilemmas to illustrate how respect for the law makes a difference to legal ethics.

INTRODUCTION

Lawyers are not ordinary moral agents, free to act on the balance of reasons that would inform the actions of non-professional persons in similar situations. Rather, they are quasi-political actors, constrained by their obligations both to represent clients and to respect legal norms. Most legal scholars believe that legal ethics theory is essentially a branch of moral philosophy. For example, Deborah Rhode argues that lawyers should "act on the basis of their own principled convictions, even when they recognize that others could in good faith hold different views."[1] Even proponents of a strongly client-centered view of legal ethics argue

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1. Deborah L. Rhode, In the Interests of Justice 58 (2001).

from moral values such as the autonomy of clients[2] or loyalty.[3] Although they argue for different outcomes, the participants in these debates are generally united in assuming that lawyers should deliberate on the basis of ordinary first-order moral values when representing clients. I believe, by contrast, legal ethics theory is properly the concern of *political* philosophy—that is, the principles that govern citizens acting collectively to settle the rights and obligations they owe to one another while living together in society. The moral reasoning in which individuals engage pertains to the obligations owed to one another in the context of a society with political institutions for resolving normative conflict. For this reason, political officials and quasi-officials, such as lawyers, may not understand their obligations simply in terms of the ordinary moral principles that apply to individuals outside the political domain. Thus, except in cases where the law governing lawyers expressly permits the exercise of discretion on the basis of first-order moral considerations, lawyers should be prohibited from making reference to these values when deliberating about their actions in the course of representing clients.

This model of legal ethics, to which I refer as the authority conception, is not the same as the familiar "zealous advocacy within the bounds of the law" model, which goes by labels such as the "dominant view" or the "standard conception" among scholars.[4] Unlike the highly client-focused dominant view, which emphasizes the autonomy of clients, the authority conception derives its moral force from the reasons that confer legitimacy upon legal directives. Accordingly, before deriving a theory of legal ethics, it is first necessary to understand the function of law and the reasons why legal directives possess legitimate authority over citizens.

The authority of law depends on its capacity to enable collective social action despite ethical pluralism. The role of law, as I will argue, is to resolve and supersede the normative controversy that is the subject matter of personal ethics or moral philosophy. Law exists in order to provide a framework for coordinated social action in the face of persistent moral

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2. Stephen L. Pepper, The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities, 1986 Am. B. Found. Res. J. 613, 617 [hereinafter Pepper, Amoral Role] (arguing that the lawyer's role is fundamentally concerned with furthering client autonomy).

3. Charles Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 Yale L.J. 1060, 1071–76 (1976) (analogizing the lawyer-client relationship to one of friendship, and arguing for similar intrinsic values and duties).

4. David Luban, Lawyers and Justice 7 (1988) [hereinafter Luban, Lawyers and Justice] (standard conception); William H. Simon, The Practice of Justice 7–9 (1998) [hereinafter Simon, Practice of Justice] (dominant view); 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) [hereinafter Gordon, Hired Guns] (libertarian-positivist view); Gerald J. Postema, Moral Responsibility in Professional Ethics, 55 N.Y.U. L. Rev. 63, 73 (1980) (standard conception); Norman W. Spaulding, Reinterpreting Professional Identity, 54 U. Colo. L. Rev. 1, 52 (2003) (neutral partisanship).

disagreement.[5] Law takes moral conflict as given and replaces (or at least strongly outweighs) the first-order moral reasons for action with second-order moral reasons for agents not to act on the underlying values that are the basis for the conflict, in order to secure a basis for collective action. First-order reasons are reasons for action, while second-order reasons are reasons to act, or refrain from acting, directly on reasons.[6] In light of the need for coordinated action notwithstanding normative disagreement, citizens have a *second-order* obligation to obey the law:

> It is an essential part of the function of law in society to mark the point at which a private view of members of the society, or of influential sections or powerful groups in it, ceases to be their private view and becomes . . . a view binding on all members notwithstanding their disagreement with it.[7]

A person who sincerely believes that a law is morally wrong nevertheless has an obligation to obey it, because the law represents a social decision about what ought to be done, collectively speaking, in the circumstances of persistent disagreement. Citizens and lawyers are free to challenge the law openly, through arguments made in litigation, by lobbying for legislative or administrative changes, or by employing overt attempts to receive favorable regulatory treatment of a particular transaction. Covert nullification of the law, on the other hand, is ruled out by the authority conception.

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5. See generally Larry Alexander & Emily Sherwin, The Rule of Rules (2001); Leslie Green, The Authority of the State (1988); Henry M. Hart, Jr. & Albert Sacks, The Legal Process: Basic Problems in the Making and Application of Law 104–05, 109–10 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Henry M. Hart, Jr., Note on Some Essentials of a Working Theory of Law, *in* Hart & Sacks, supra, at lxxxiv; Jeremy Waldron, Law and Disagreement (1999) [hereinafter Waldron, Disagreement]; Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1359 (1997) [hereinafter Alexander & Schauer, Extrajudicial Interpretation]. Cf. Gilman v. City of Philadelphia, 70 U.S. (3 Wall.) 713, 724 (1865) ("It is almost as important that the law should be settled permanently, as that it should be settled correctly."). This aphorism is often associated with Justice Brandeis, who was fond of its use. See, e.g., Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

6. Joseph Raz, The Authority of Law 16–18 (1979) [hereinafter Raz, Authority]. Raz's example of a second-order reason is a father's command to his son that he obey his mother. To satisfy the father's directive, it is not enough that the son obey his mother; he must also obey *because* his father told him to. Id. at 16–17. Christine Korsgaard offers a different example, although she does not use the first- and second-order terminology. Suppose a philosophy department requires that Ph.D. candidates take a course in calculus. There are many first-order reasons why this would be a good thing, including the observation that mathematics has historically been taken by philosophers as the model for knowledge in its elegant, a priori beauty. Despite these excellent reasons, the department's rule is expected to induce a second-order attitude in students toward the rule. Graduate students take calculus because it is the department's rule, not for any of the underlying reasons that motivated the department to adopt the rule. The students justifiably submit themselves to the authority of their teachers, and as a result, exclude the first-order reasons from their consideration. See Christine M. Korsgaard, The Authority of Reflection, *in* The Sources of Normativity 105–06 (Onora O'Neill ed., 1996).

7. Raz, Authority, supra note 6, at 51.

The authority conception derives reasons for lawyers' actions from the reasons citizens have for obeying the law. The law represents a substantial social achievement, namely the creation of a set of rules that facilitate coordinated social action on normatively contested matters. Under the authority conception of legal ethics, lawyers are duty-bound not to frustrate the achievement of law by reintroducing contested moral values into the domain of law, either in the guise of principles of interpretation or as the basis for an ethically motivated decision to act or not to act on behalf of a client. In other words, lawyers should not treat the law instrumentally, as an obstacle to furthering the autonomy of their clients, but instead should treat it as an inherently valuable achievement of a pluralistic democracy. Lawyers have an obligation to preserve the common framework of law and respect for legal institutions as public goods, rather than permit clients to free ride on trust, expectations of cooperation, and compliance by others.[8] Lawyers may of course challenge the status quo and need not acquiesce in the continued vitality of an unjust rule, but they are obligated to seek to modify the law overtly, not through covert means, such as creating complex structures of entities to prevent the detection of a sham transaction or withholding relevant information in response to a legitimate discovery request in litigation. I am aware that this principle casts lawyers as adjunct enforcers of legal norms in some sense—that is why I refer to them as quasi-official actors. The polemical use of terms like "junior G-Men"[9] and "government informants"[10] to describe lawyers should not obscure central features of the role of legal professionals, which include enhancing social stability and preventing a rule-of-law governed society from slipping into either anarchy or a police state.[11]

In order to define the authority conception, Part I puts forth the reasons for treating the law as an authoritative settlement and demon-

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8. Rhode, supra note 1, at 66; Gordon, Hired Guns, supra note 4, at 44–46, 53.

9. John Gibeaut, Junior G-Men, 89 A.B.A. J. 46, 48 (2003).

10. United States v. Chen, 99 F.3d 1495, 1500 (9th Cir. 1996) (Kleinfeld, J.) ("This valuable social service of counseling clients and bringing them into compliance with the law cannot be performed effectively if clients are scared to tell their lawyers what they are doing, for fear that their lawyers will be turned into government informants.").

11. This is a significant theme of the work of legal scholar Robert Gordon, who observes that lawyers historically assumed an obligation to maintain the common good of a secure framework of voluntary cooperation with legal institutions. See, e.g., Robert W. Gordon, A Collective Failure of Nerve: The Bar's Response to Kaye Scholer, 23 Law & Soc. Inquiry 315, 320–22 (1998); Robert W. Gordon, Corporate Law Practice as a Public Calling, 49 Md. L. Rev. 255, 255–58 (1990) [hereinafter Gordon, Public Calling]; Robert W. Gordon, The Independence of Lawyers, 68 B.U. L. Rev. 1, 11–30 (1988) [hereinafter Gordon, Independence]; Robert W. Gordon, A New Role for Lawyers?: The Corporate Counselor After Enron, 35 Conn. L. Rev. 1185, 1200–16 (2003) [hereinafter Gordon, New Role]; Gordon, Hired Guns, supra note 4, at 44–48. The authority conception would reach many of the same results as Gordon's professional ideal, but the jurisprudential route to those results is somewhat different. Nevertheless, I must acknowledge a significant intellectual debt to Gordon's historically informed scholarship.

strates how existing models currently marginalize the law. Part II then outlines a theory of the law's authority for citizens and connects that theory to a conception of ethics for lawyers. Part III applies the authority conception to examples of practical dilemmas faced by lawyers in practice. Finally, Part IV acknowledges objections to the authority conception and offers responses. The most difficult of these objections is based on observations about the dysfunctional or even corrupt nature of the democratic lawmaking process. Moreover, compliance with the authority conception could be understood as an endorsement of widespread, relatively mechanical obedience to law, resulting in cases of serious injustices. Although this argument will obviously be developed in greater detail, the preliminary response to these concerns presupposes that substantive criteria of the legitimacy of law are themselves contested in a pluralistic society; thus, if the law is to serve its function of grounding coordinated social action in the face of disagreement, the law may be judged legitimate only on fairly thin procedural criteria.

I. THE DOMINANT VIEW AND ALTERNATIVES: ARGUMENTS FROM FIRST-ORDER REASONS

A remarkably stable debate has developed in legal ethics between those who argue that a lawyer should always act on the balance of first-order moral reasons as they would apply to a similarly situated non-lawyer actor, and those who believe that a lawyer is prohibited from taking into account certain ordinary first-order moral reasons because of some feature of the lawyer's role, such as the obligations of partisanship and neutrality. In crude terms, the first camp regards lawyers as primarily moral agents who are under ordinary moral obligations notwithstanding their professional role, while the second camp relies on the professional role to create a kind of excuse for conduct that would be considered immoral if engaged in by non-professionals.[12] Examples which seem to force the lawyer to reason either as a lawyer or as a non-lawyer agent are familiar from the legal ethics literature: a client wishes to draft a will disinheriting his son for opposing the Vietnam War;[13] a large agribusiness client seeks to exploit a loophole in a statute intended to benefit family farmers;[14] a manufacturer of medical devices asks the lawyer to slow down the regulatory process through non-frivolous legal means in order to continue selling products the lawyer believes are defective;[15] the lawyer knows of a life-

12. For an excellent summary of this debate, from the perspective of someone who believes professional roles do not generally provide a justification for wrongful actions, see Arthur Isak Applbaum, Ethics for Adversaries 43–109 (1999) [hereinafter Applbaum, Ethics].

13. Richard Wasserstrom, Lawyers as Professionals: Some Moral Issues, 5 Hum. Rts. 1, 7–8 (1975).

14. Simon, Practice of Justice, supra note 4, at 4–5.

15. These are, very roughly, the facts of Balla v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991). See also Alan H. Goldman, The Moral Foundations of Professional Ethics 102

threatening medical condition of the adverse party, which opposing counsel has mistakenly failed to learn about in discovery.[16] In each scenario, if we assume that the moral dialogue between lawyer and client has reached an impasse, and the client insists that the lawyer assist her in obtaining the relevant legal entitlement, the issue is squarely posed: Does the lawyer have moral discretion to refuse to permit the client to pursue a lawful end for which legal assistance is necessary?

A. *The Dominant View*

William Simon calls the prevailing ideology of practicing lawyers the "dominant view," which usefully emphasizes how pervasive and entrenched this conception is.[17] The slogan of the dominant view is "zealous representation within the bounds of law," a phrase taken from an early set of rules regulating the practice of law.[18] This definition applies to not only adversarial litigation, but also negotiations, business transactions, client counseling, and regulatory compliance matters. In all cases, holds the dominant view, once the lawyer and client have established a professional relationship, the lawyer is required to use best efforts to further the client's legally permissible ends, as long as these activities will not expose the lawyer or client to some risk of legal liability.[19] One of the staunchest defenders of the dominant view, Monroe Freedman, believes that a lawyer may be criticized in moral terms for accepting a particular representation or for failing to withdraw if legally permissible.[20] Even this weaker version of the dominant view would require a lawyer to ex-

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(1980) (citing example of wine producer who asks lawyer to delay proceedings in order to ship wine made with a chemical preservative that is about to be banned as carcinogenic).

16. One classic case is Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962), discussed infra notes 149–154 and accompanying text.

17. Simon, Practice of Justice, supra note 4, at 7.

18. Model Code of Prof'l Responsibility EC 7–1 (1969); see also Monroe H. Freedman & Abbe Smith, Understanding Lawyers' Ethics 79–80 (2d ed. 2002) (defending "the ethic of zeal" as the central principle of professional responsibility). Incidentally, I will follow common practice in legal ethics and cite Freedman's textbook, now in a second edition with Abbe Smith as co-author, as a theoretical work. See, e.g., Simon, Practice of Justice, supra note 4, at 243. The Freedman and Smith book is not a conventional textbook at all, but rather an extended brief that cogently argues for the dominant view, summarizing many previous articles.

19. Charles P. Curtis, The Ethics of Advocacy, 4 Stan. L. Rev. 3, 3 (1951); Monroe H. Freedman, Professionalism in the American Adversary System, 41 Emory L.J. 467, 471 (1992).

20. See Monroe H. Freedman, The Lawyer's Moral Obligation of Justification, 74 Tex. L. Rev. 111, 116–17 (1995). Freedman argues that a lawyer must be prepared to offer a moral justification for a given representation, but he believes that lawyers do have sufficient justification in many of the difficult representations for which it is demanded. Even in the case of defending John Demjanjuk, the alleged concentration camp guard "Ivan the Terrible," Freedman concedes that a lawyer (in this case, Michael Tigar) may be morally justified in providing adequate defense due to reasons such as not dishonoring the memory of the Holocaust by permitting the government to take away individual liberties without due process. Id. at 115.

clude first-order moral considerations from her deliberations, unless those considerations preceded a decision to refrain from working on a matter or an attempt to withdraw. Similarly, some dominant-view proponents permit lawyers to engage their clients in moral conversation,[21] making reference to first-order moral reasons, but if this conversation fails to change the client's mind, the lawyer is required to follow the client's lawful instructions.

Although the basic principle of the dominant view is that a lawyer should disregard otherwise applicable first-order moral reasons when representing a client, the dominant view is generally justified on the basis of countervailing moral reasons that also exist at the first order, or what are often called ordinary moral reasons. These reasons include furthering the client's autonomy[22] and preserving the intrinsic values of loyalty and friendship embodied in the lawyer-client relationship.[23] Alternatively, one might make a straightforwardly consequentialist argument, pointing to the benefits of some act required by the lawyer's professional duties. For example, the long-run benefits of enhanced trust between lawyers and clients may outweigh the costs of secret-keeping by lawyers, especially if that trust increases the likelihood of client compliance with the law.[24] In any event, these arguments underwrite a broad preclusion of most first-order values from the lawyer's deliberation.[25] The dominant view might, for example, specifically conclude that a lawyer should not consider the harm to third parties as a reason against assisting a client in resisting a regulatory requirement.

B. *Moralist and Legalist Critics of the Dominant View*

Opponents of the dominant view can be divided into two camps: moralists and legalists.[26] The moralists, who comprise the majority of

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21. The term "moral conversation" is generally associated with Thomas Shaffer's work. See Thomas L. Shaffer & Robert F. Cochran, Jr., Lawyers, Clients, and Moral Responsibility 40–54 (1994); Thomas L. Shaffer, The Practice of Law as Moral Discourse, 55 Notre Dame L. Rev. 231, 232–34 (1979); see also Stephen L. Pepper, Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering, 104 Yale L.J. 1545, 1606–07 (1995) (indicating that conversations may remove ethical problems at hand). In an economic idiom one might refer to this as the "voice" option in the lawyer-client relationship. See Albert O. Hirschman, Exit, Voice, and Loyalty 30–43 (1970). Thanks to Greg Alexander for reminding me of the connection with Hirschman's book.

22. Freedman & Smith, supra note 18, at 56–58, 69–70; Pepper, Amoral Role, supra note 2, at 616–17.

23. Fried, supra note 3, at 1071.

24. Freedman & Smith, supra note 18, at 127–28.

25. See Mortimer R. Kadish & Sanford H. Kadish, Discretion to Disobey: A Study of Lawful Departures from Legal Rules 27 (1973) (differentiating between "role reasons" and "excluded reasons," which an agent may recognize as an individual but the role cannot take into account).

26. This distinction is clearly drawn by Luban in a critique of Simon's book, The Practice of Justice, supra note 4. David Luban, Reason and Passion in Legal Ethics, 51 Stan. L. Rev. 873, 877–78 (1999) (book review).

dominant-view critics, locate the relevant values that should bear on lawyers' actions within the domain of ordinary morality.[27] For example, the dominant view emphasis on client autonomy is criticized by moralists because the value of that autonomy is purely instrumental; it does not represent a moral good in itself, but is useful only in allowing a client to accomplish her ends.[28] Whether those ends are themselves worthy is a further moral question that must be answered before we can evaluate the permissibility of the lawyer's assistance. Furthermore, the dominant view instructs lawyers to advance their clients' ends without considering harm to adversaries and non-parties. If the defendant in a personal injury case refuses to permit the lawyer to disclose information about the plaintiff's medical condition that is unknown to the plaintiff, in some cases there may be a risk that the plaintiff will die from a preventable cause.[29] That is a harm for which the lawyer may be morally blameworthy (because he could easily have prevented it), yet not legally culpable.

Many lawyers think they need no moral justification for nondisclosure beyond the existence of the attorney-client relationship and the duty of confidentiality stated in the rules of professional conduct.[30] As Luban and other critics point out, however, that merely begs the question.[31] The priority of one's duty of loyalty and confidentiality to a client is the conclusion of a moral argument, not a premise of it. Sophisticated versions of the dominant view do offer arguments, often based on the positive long-run consequences that flow from what appear to be short-run injustices: Clients cannot be persuaded to trust their lawyers without assurances of confidentiality, the dominant-view defenders argue, and ultimately clients who trust their lawyers can be persuaded to have a candid discussion of their legal problems with a lawyer, who in turn will bring the clients into compliance with the law.[32] Critics challenge the empirical and normative bases for these arguments,[33] and the debate goes on. Sim-

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27. See, e.g., Goldman, supra note 15, at 20–24; Donald Nicolson & Julian Webb, Professional Legal Ethics: Critical Interrogations 123–30, 150–56, 160–65, 169–75 (1999); Rhode, supra note 1, at 49–58, 66–70; Rob Atkinson, Beyond the New Role Morality for Lawyers, 51 Md. L. Rev. 853, 856–59, 868–71 (1992); Maura Strassberg, Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics, 80 Iowa L. Rev. 901, 914–21, 928–37 (1995) (relying on ordinary moral values considered in conjunction with the interpretive virtue of integrity).

28. Luban, Lawyers and Justice, supra note 4, at 11; David Luban, The Lysistratian Prerogative: A Response to Stephen Pepper, 1986 Am. B. Found. Res. J. 637, 639.

29. See discussion of Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962), infra notes 148–153 and accompanying text.

30. Model Rules of Prof'l Conduct R. 1.6 (2002) [hereinafter Model Rules]; Model Code of Prof'l Responsibility Canon 4 (1969).

31. See, e.g., Goldman, supra note 15, at 133–37; Luban, Lawyers and Justice, supra note 4, at 177–205; Simon, Practice of Justice, supra note 4, at 54–68; Daniel R. Fischel, Lawyers and Confidentiality, 65 U. Chi. L. Rev. 1, 3 (1998); Fred C. Zacharias, Rethinking Confidentiality, 74 Iowa L. Rev. 351, 361–70, 376–96 (1989).

32. See, e.g., Freedman & Smith, supra note 18, at 127–28.

33. See supra note 31.

ilarly, when the debate concerns the frequently cited first-order moral value of truth, proponents of the dominant view line up to argue either that the dominant view is the best available method of getting at the truth,[34] or that truth-finding in any event is not the only, or the principal, goal of the legal system.[35] Again, the mainstream academic critics respond that there are better methods for discovering truth than adversarial litigation,[36] that the value of truth cannot justify truth-defeating actions,[37] that the ability of the system to find the truth depends on boundary conditions (such as equally competent counsel) that are not often satisfied,[38] and that lawyers are relying on unwarranted arguments from epistemological skepticism which are belied by the way they act in practice.[39]

The legalists, represented most prominently by William Simon, offer a very different critique of the dominant view. Simon's maxim is: "Lawyers should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice."[40] For Simon, the political and moral values that bear on the evaluation of a lawyer's actions are internal to the legal system.[41] Contrast this position with the moralist critics who contend that the relevant values belong to the domain of ordinary morality, independent of any existing legal sys-

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34. See, e.g., Am. Bar Ass'n & Ass'n of Am. Law Schs., Report of the Joint Conference on Prof'l Responsibility, 44 A.B.A. J. 1159, 1160–61 (1958); Goldman, supra note 15, at 113–16.

35. See, e.g., Steven Lubet, Nothing But the Truth: Why Trial Lawyers Don't, Can't, and Shouldn't Have to Tell the Whole Truth 1–2, 5–6, 146–58, 176–79, 186–87 (2001) (arguing that trial lawyers are permitted to use narrative techniques to frame their clients' stories, and that these narratives may appeal to values other than bare factual truth); John B. Mitchell, Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission," 1 Geo. J. Legal Ethics 339, 340–43 (1987) (arguing that "the principal focus of the criminal justice system is not 'truth'" but instead ascertaining legal, not factual, guilt).

36. Luban, Lawyers and Justice, supra note 4, at 68–74.

37. See, e.g., Marvin E. Frankel, The Search for Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031, 1032–33, 1035–41 (1975) (theorizing that "our adversary system rates truth too low among the values that institutions of justice are meant to serve"); Harry I. Subin, The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case, 1 Geo. J. Legal Ethics 125, 129 (1987) (arguing that "neither the right to a defense nor the needs of the adversary system justify the presentation of a false defense").

38. Rhode, supra note 1, at 55–56 (stating that a model adversarial process is "more the exception than the rule in a society that tolerates vast disparities in wealth, high litigation costs, and grossly inadequate access to legal assistance").

39. See, e.g., A. Kenneth Pye, The Role of Counsel in the Suppression of Truth, 1978 Duke L.J. 921, 949–50 (rejecting the argument that lawyers never know whether testimony is truthful); Murray L. Schwartz, On Making the True Look False and the False Look True, 41 Sw. L.J. 1135, 1140–41 (1988) (noting that the Supreme Court has refused to accept the argument that lawyers do not know whether a client is telling the truth).

40. Simon, Practice of Justice, supra note 4, at 138.

41. Id. ("Decisions about justice are not assertions of personal preferences, nor . . . applications of ordinary morality. . . . [but] are legal judgments grounded in the methods and sources of authority of the professional culture.").

tem. Because a lawyer's work on behalf of a client involves the interpretation and application of law, the moral permissibility of the lawyer's assistance to a client turns on whether the client is *legally* entitled to realize some goal. The "contextual" approach favored by Simon is not the same thing as reasoning from ordinary moral principles, and he is well aware that unguided ethical discretion exercised by lawyers would threaten the rule of law.[42] He contends that the lawyer's beliefs about the justice of an action are not simply hers, but represent an intersubjectively valid style of legal decisionmaking, generally associated with judges and prosecutors, but available to private lawyers as well. This style of reasoning differs from the dominant view in that it regards reference to formal legal norms as only the first step in the process of interpretation. In order to decide whether to undertake some action on behalf of a client, a lawyer must additionally consider broader substantive principles of justice that provide the basis for regarding legal rules as legitimate. For a lawyer to fail to do so, Simon argues, is to employ a formalistic, mechanical process of reasoning that has been utterly discredited as a jurisprudential matter when applied to the reasoning processes of judges.[43] Thus, rather than asking lawyers to rediscover ordinary moral reasoning, as the moralistic critics do, Simon simply suggests that they rediscover mainstream legal theory.

C. *Taking the Law Out of Lawyering*

Both the dominant view and its moralistic and legalistic competitors share one important characteristic: In prescribing the lawyer's deliberations, none of these ethical theories gives much weight to the fact that the client's action is permissible under the law. For the dominant view, the law is treated only instrumentally, as a means for setting boundaries around permissible state interference with the client's autonomy.[44] The source of the lawyer's ethical obligation is the value of the client's autonomy *qua* individual, not anything intrinsic to the law. The moralists similarly discount the fact of legal permissibility, pointing out that legal entitlements are not conclusive of moral rights—one may have a legal right to do something morally wrong.[45] Luban argues that dominant-view lawyers exhibit disrespect for the law by using it instrumentally, but his own theory of "moral activist" lawyering disrespects law in a different way: by treating the client's legal right as irrelevant to the lawyer's deliberations unless it is morally justifiable on grounds independent of its status as law.

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42. See William H. Simon, Ethical Discretion in Lawyering, 101 Harv. L. Rev. 1083, 1115 (1988) (arguing that fidelity to law requires evaluating whether the legal system meets certain normative preconditions of respect and authority).

43. See Simon, Practice of Justice, supra note 4, at 156.

44. See Luban, Lawyers and Justice, supra note 4, at 14–15, 48–49.

45. Id. at 12; cf. Jeremy Waldron, A Right to Do Wrong, 92 Ethics 21 (1981) (arguing that there may be good moral reasons for there to be a moral—not just a legal—right to engage in wrongdoing).

The moralists seek to preserve the lawyer's moral agency by permitting her to refuse to assist the client in obtaining entitlements or taking actions the lawyer regards as unjust. In prioritizing the lawyer's moral agency to the client's legal entitlement, however, they essentially concede no moral weight to the lawyer's *legal* obligation, under agency law, to carry out the lawful instructions of her principal, the client.

The legalist critics seem to have the greatest stake in the legitimacy of legal rights, but the most prominent member of this group, Simon, takes a rather surprising tack in the direction of natural law, arguing that apparent legal entitlements are not really part of the law unless they track moral principles.[46] Moral reasoning is essential to the process of legal reasoning for Simon because selecting among competing legal principles ultimately questions the constructive interpretation of the entire legal system, guided by principles of political morality. Simon's critique of the dominant view is that it requires lawyers to pursue clients' ends regardless of whether those ends are warranted by principles of justice. He is strongly influenced by Ronald Dworkin, who claims that "propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."[47] In Dworkin's jurisprudence, verifying propositions of law as true requires a large-scale constructive political argument, in which moral principles, such as fairness and justice, are prominently featured. On this account, the legitimacy of any legal norm depends on the extent to which it can be justified with reference to the community's moral and political principles.[48] Otherwise, the law would have de facto authority but not legitimacy. Thus, every legal decision must be seen as part of a public narrative—"an overall story worth telling now"[49]—that gives meaning to the community's political practices. Framed in terms of the well-known metaphor of a chain novel,[50] the decisions of individual officials must fit within this narrative, thereby exhibiting the virtue of integrity, the sine qua non of legitimacy.[51]

Simon picks up on this idea of an extended justificatory narrative and applies it to lawyers' ethics, placing responsibility on lawyers to vindicate legal justice in cases where other actors cannot be expected to reach the just result. He has a complex, multifactorial procedure for deciding when an apparent legal entitlement is conclusive of legal justice, as compared with a case in which the relevant legal merits are not embodied in a

46. See Simon, Practice of Justice, supra note 4, at 82–108.

47. Ronald Dworkin, Law's Empire 225 (1986).

48. Id. at 164–68.

49. Id. at 227.

50. Id. at 228–39. Dworkin imagines legal interpreters as authors of successive chapters of a novel, each of whom strives to make the product the best it can be, within the constraint of fitting with the contributions of previous authors.

51. Id. at 255–56.

rule.[52] For example, if other legal actors, such as judges and juries, are in a good position to decide legal and factual questions, the lawyer ought to defer to their judgment; however, if those actors are corrupt, uninformed, incompetent, or for some other reason unable to reach reliable decisions, the lawyer must assume personal responsibility for the justice of the outcome. Throughout Simon's argument, the lawyer is not acting merely on the basis of her subjective beliefs about justice, but is making complex discretionary judgments that are characteristic of all reasoning about legal justice.

For the dominant view and its moralistic and legalistic critics, first-order moral principles are in the driver's seat, with legality being only a prudential constraint on action. The relatively low deliberative significance of legality in legal ethics is unsurprising, in light of the conventional wisdom in political philosophy that there is no general obligation to obey the law.[53] The traditional arguments offered in justification of a general duty to obey—express and implied consent, gratitude, fairness, and utility—have all been subjected to devastating criticism.[54] For this

52. See Simon, Practice of Justice, supra note 4, at 138–56. For example, a lawyer might decide that a tribunal is better positioned to make reliable determinations about legal merit. On the other hand, where relevant procedures and institutions are less reliable, the lawyer cannot shun the responsibility of making a decision concerning the substantive justice of the outcome. Similarly, lawyers have discretion, which they must exercise with reference to the polestar value of substantial justice, in choosing whether to interpret legal norms formally or according to their purpose.

53. See, e.g., A. John Simmons, Moral Principles and Political Obligations (1979) (reviewing arguments from consent, fairness, natural duties, and gratitude, and finding them inadequate); Joseph Raz, The Obligation to Obey: Revision and Tradition, 1 Notre Dame J.L. Ethics & Pub. Pol'y 139, 142 (1984) (defending a limited conception of authority); Rolf Sartorius, Political Authority and Political Obligation, 67 Va. L. Rev. 3, 11, 17 (1981) (suggesting separation of authority and obligation, such that government may claim a moral right to rule even though citizens may not have duty to obey); William H. Simon, Should Lawyers Obey the Law?, 38 Wm. & Mary L. Rev. 217, 228–39 (1996) (arguing that a lawyer's obligation to obey the law cannot be understood categorically, and must be determined on a contextual basis); M.B.E. Smith, Is There a Prima Facie Obligation to Obey the Law?, 82 Yale L.J. 950, 955–69 (1973) (dismissing three sets of arguments in support of obeying the law: those relying on benefits received from the government, those emphasizing implied consent, and those appealing to the general good); R.P. Wolff, The Conflict Between Authority and Autonomy, *in* Authority 20, 29–30 (Joseph Raz ed., 1990) (explaining inherent conflict between individual autonomy and obligation to obey the law); see also Applbaum, Ethics, supra note 12, at 115–34 (summarizing criticism); Luban, Lawyers and Justice, supra note 4, at 32–46 (same).

54. It is only possible to suggest briefly some of these critiques. The argument from consent, for example, is vulnerable to the observation that citizens have not expressly consented to be bound by the law, and it is difficult to locate an act that counts as evidence of (tacit) consent; the absence of express consent would persist, even if people were sufficiently informed and had an adequate exit option such that they could give genuine consent. See, e.g., Simmons, supra note 53, at 57–100. As for the argument from fairness, it may require a sacrifice disproportionate to the benefit realized by the individual, and again the individual may not have a viable option not to receive benefits. See, e.g., Robert Nozick, Anarchy, State, and Utopia 93–95 (1968). Utilitarian arguments imagine the social disintegration that might accompany widespread disobedience, but the natural response to

reason, theoretical discussions of the lawyer's role have generally proceeded from the position that legal obligation or permission is not conclusive of moral deliberation.[55] A moral "ought" must instead imply all-things-considered deliberation on first-order reasons for action. An action is morally permitted or required only if morally permitted or required on its own merits, so to speak, leaving aside any general considerations of legality.

From the client's perspective, this sort of reasoning makes a legal entitlement meaningless. A dominant-view lawyer would of course assist the client in taking advantage of the legal entitlement, but only because that lawyer is dedicated to the value of the client's autonomy. If the client has a lawyer who disagrees with the dominant view, however, the client cannot obtain technical assistance from that lawyer to pursue certain legally permissible ends.[56] In Hohfeldian terms, the client's claim-right to *X* is rendered empty by severing its connection with a duty on the part of the lawyer to facilitate the client's access to *X*.[57] The lawyer is in effect overriding the client's legal entitlement to *X* on the basis of moral reasons. If the client does not share those reasons, she is likely to feel betrayed by the lawyer's refusal to provide assistance.

The dominant view and its opponents are therefore setting out competing priority principles, which justify subordinating the moral agency of one of the parties—lawyer or client—to the other's judgment about how to proceed. My objective in the following Part is to offer a philosophically robust argument for the authority conception, in which, contrary to Rhode's suggestion, good faith disagreement would be resolved by the lawyer's deference to governing legal norms. In other words, the exercise of moral judgment on the basis of first-order deliberation would be preempted by law, which gives a sufficient reason not to act on what would otherwise be the balance of first-order moral reasons. The authority conception defended here is different from the traditional dominant view advanced by lawyers, however, because it vests lawyers with considerable public responsibilities: ensuring that legal institutions can fulfill their distinctive social function of resolving disagreement and providing a stable

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these parades of horribles is to question the causal connection between any given act of disobedience and the resulting anarchy. See, e.g., Richard A. Wasserstrom, The Obligation to Obey the Law, 10 UCLA L. Rev. 780, 790–93 (1963). In this connection, it is useful to mention a later-developed point: The authority conception acknowledges consequentialist arguments, but importantly, does not rely on them. See infra notes 97–99 and accompanying text.

55. See, e.g., Luban, Lawyers and Justice, supra note 4, at 44–47; Simon, Practice of Justice, supra note 4, at 77.

56. For a consideration of the rejoinder that a client could always find another lawyer, and the counter-rejoinder imagining the "last lawyer in town," see infra notes 94–99 and accompanying text.

57. Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16, 35–38 (1913).

framework for coordinated action notwithstanding persistent normative disagreement.

II. The Authority Conception: Second-Order Reasons to Respect the Law

A. *Why Law Has Authority for Citizens*

In the political domain, action on the basis of considerations of justice, fairness, rights, or the good is of an essentially collective or social character. It does not make sense to think about action in a sphere governed by the law as being grounded in an individual decision about what one ought to do. Rather, individuals should bring only provisional or partial beliefs to a process of collective debate and resolution,[58] It is crucial to this process that it give no greater weight to any one person's views about rights or justice.[59] Attempts to persuade one's fellow citizens are crucial to the democratic process and often change the shape and texture of societal decisions. However, it is necessary that the end vote be respected as final and acknowledged as binding. Although it does not directly represent each affected citizen's vote, the democratic process, with all its flaws, nevertheless exhibits the virtue of being respectful to the competing views of those with whom we disagree, consistent with the importance of reaching a decision and putting an end to the process of deliberation.[60] When we think in a philosophical mindset about matters of justice, we naturally believe we are right and that our view should prevail, although we acknowledge that others disagree with us.[61] When we are dealing with *politics*, however, the "felt need, shared by the disputants, for common action in spite of such disagreement"[62] impels us toward a procedural resolution of the dispute, with a view toward settling on a single, definitive position representing our collective solution. To put it an-

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58. Waldron, Disagreement, supra note 5, at 202–08 ("[W]e understand that we are not dictators, and that each of us is not the only candidate for *conscience of the society*.").

59. Naturally, the voices of some citizens, because of their wealth, status, or connections, may have greater salience in public debate and in the political process. At some point, if this disparity were too great, the process would become so dysfunctional that the resulting laws would lack legitimacy. A dictator's voice has infinite weight; his subjects' voices have none. As I will discuss later, however, in a basically well-functioning democratic process, lawyers should not be permitted to argue that a given legal directive lacks authority because the voice of some person or group was granted insufficient weight. See infra notes 165–175 and accompanying text. Lawyers are not permitted to assume the role of judges, whom John Ely envisioned evaluating whether invalidating a particular law would have the effect of furthering democracy. Cf. John Hart Ely, Democracy and Distrust (1980) (arguing that judicial review of majoritarian political decisions is justified to the extent it improves the ability of the democratic process to take account of the interests of "discrete and insular minorities").

60. Waldron, Disagreement, supra note 5, at 111–14.

61. Id. at 159–61, 227–30 ("[E]ven on the matters we think *most* important, a common decision may be necessary despite the existence of disagreement about what that decision should be.").

62. Id. at 207.

other way, "a central moral function of law is to settle what ought to be done."[63]

How can the result of this process be authoritative with respect to individuals who disagree with, yet are subject to, the resulting legal obligations? A law may settle a question in that it declares one side in the debate as winner, but there is no necessary basis for supposing that the decision is the correct one, given the background reasons that supported the contending positions in the original debate. Even if one accepts that collective action is necessary despite moral disagreement, acting on the basis of a law with which one disagrees appears to abdicate one's moral agency; Sartre would describe this as acting in "bad faith."[64] The most promising way to justify the legitimacy of a legal directive, and therefore to provide a second-order reason for an individual to comply with it notwithstanding its conflict with her moral beliefs, is to appeal to reasons that apply independently of the law to the person subject to the directive. In that way, the law would not override the will of the individual, but the reasons to respect the law would be based upon reasons that the person endorsed, quite apart from the law.

Authority is legitimate when compliance with authoritative directives is a better way to achieve some end that an agent has, as compared with the agent trying to work out the balance of reasons for himself.[65] By analogy, the justification for following expert authority works in this way: If I want to make a good brown beef stock, I would do better at that end by following Jacques Pépin's instructions than by trying to work out the procedure myself.[66] Significantly, I am not acting in bad faith or subordinating my will to Pépin, because in following his directives, I am acting on the basis of reasons that are my own—namely, the desire to make a good brown beef stock. The same could be said of legal authority. One might follow Joseph Raz and take a fairly cautious attitude toward claims of legal authority.[67] We might regard legal directives as legitimate only where the

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63. Larry Alexander & Frederick Schauer, Defending Judicial Supremacy: A Reply, 17 Const. Comment. 455, 457 (2000) [hereinafter Alexander & Schauer, Defending].

64. Jean-Paul Sartre, Being and Nothingness 86–112 (Hazel E. Barnes trans., 1956) (defining bad faith as refusing to recognize that one has freedom to make moral decisions and is not constrained by one's social roles). Robert Paul Wolff makes something like "bad faith" central to his critique of authority. For Wolff, persons have a moral obligation to take responsibility for their actions, which means that they must deliberate about what to do, based on their own knowledge, reasons, and reflection. Wolff, supra note 53, at 25–26. The concern about acting in bad faith appears to be what motivates Deborah Rhode to call for lawyers to "accept personal responsibility for the moral consequences of their professional actions." Rhode, supra note 1, at 66–67; see also Goldman, supra note 15, at 129 (arguing a lawyer should not relinquish "all moral control over his own actions to the client" because "the moral autonomy of the lawyer himself is at stake").

65. Joseph Raz, The Morality of Freedom 53 (1986) [hereinafter Raz, Morality].

66. Raz, Authority, supra note 6, at 21–22.

67. See Raz, Morality, supra note 65, at 74–80. Compare Raz, Authority, supra note 6, at 233, where Raz argues that there is not even a prima facie obligation to obey the law, even in a good society whose legal system is basically just.

ostensible authority can claim expertise by virtue of being wiser, better informed, steadier of will, more efficient in decisionmaking, or better positioned to accomplish some objective as compared with individuals.[68] We can see how this model of legitimacy works with respect to something like a regulation requiring that a drug be sold only on a physician's prescription. Presumably, the physicians working for the Food and Drug Administration are better than most individuals at figuring out whether a drug needs to be taken under medical supervision. For the government to claim superior expertise in working out purely normative issues, however, seems either arrogant or risible; no one believes that the U.S. Congress is a better moral decisionmaker than a reasonably thoughtful citizen.[69]

Alternatively, one might take a much more expansive view of the domain of legitimate legal authority. The argument goes like this: We all share reasons that would justify deferring the resolution of normative issues to a lawmaking body. We all perceive the need for coordinated action in the "circumstances of politics," that is, in the condition of coexisting with others with whom we do not share beliefs about the good, justice, or rights.[70] "[A] just social structure is something we must secure together; no one can do it on his own."[71] Another way to put the point is to say that we are disputatious but sociable creatures by nature; we each seek our own advantage, but we have a desire for peaceable society with

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68. Raz, Morality, supra note 65, at 75.

69. One may have a moral obligation to do what a law commands, but in that case the legal directive is merely redundant with the moral duty, so the law does not add anything to the balance of the actor's reasons over and above the moral obligation. See Raz, Authority, supra note 6, at 233–34; Joseph Raz, Ethics in the Public Domain 341–44 (1994) [hereinafter Raz, Ethics].

70. Waldron, Disagreement, supra note 5, at 105. When I talk about "coordinated action" in the circumstances of politics, I am not using that term in the technical game-theoretical sense. Cf. Douglas G. Baird et al., Game Theory and the Law 41–42 (1994). Familiar coordination problems include questions like whether a society should recognize a rule that one drives on the left or the right side of the road. It makes no difference which rule is chosen, as long as everyone follows it. The examples I discuss in this Article, and the normative issues that concern political philosophers, are not cases in which it is irrelevant which solution is chosen, as long as everyone settles on the same one. By contrast, these are cases in which people care a great deal which rule is chosen. No one thinks that the issue of whether abortion should be legal is arbitrary, like driving on the right or left side of the road. Nevertheless, coordinated social action does depend on resolving the normative dispute with some certainty and finality. I will use the term "coordinated social action" to refer to the desired end state of reaching political settlement of a disputed normative issue, and ask readers familiar with game theory not to construe this domain too narrowly.

71. Waldron, Disagreement, supra note 5, at 201. As Raz notes, there are moral requirements imposed on us by virtue of living in a pluralistic society. These requirements include recognizing constraints on our own liberty so as to protect the interests of others and conforming to "the necessities of social co-operation." Raz, Authority, supra note 6, at 280.

one another.[72] From the standpoint of each affected citizen, one does better at living in a harmonious society with other quarrelsome beings by following legal directives, which are established pursuant to a process for treating disagreements fairly, with due respect for the moral agency of other citizens. In addition to desiring to pursue our own advantage in a stable, peaceful society, we also desire to settle disputes through a process in which all of the contending parties are treated respectfully. In ethical terms, we care that the reasons we give in favor of a procedure for resolving disputes are generalizable, so that any right we have to participate in the resolution of a disagreement is tempered by the equal right of others to participate on the same terms.[73] Legal directives—including administrative regulations, judicial decisions, and legislation—derive authority from the process that creates them. The process creates authority because it responds to the shared reason of desiring to settle on a course of action in the name of society as a whole, taking due account of the views of the affected participants. We regard the directives issued by the legal system as authoritative on the grounds that we do better at figuring out what ought to be done, in the name of society as a whole, when we take due account of the views of the affected participants about some disputed normative issue.[74]

To the extent that one wishes to treat one's fellow citizens respectfully in normative disagreements, and similarly believes that legislative and judicial decisions are carefully rendered, one has a dependent reason[75] to respect the legal system's resolution of disputes. Furthermore, this reason preempts recourse to the first-order moral reasons that were the subject of the disagreement. "[W]hat is validly required by a legitimate authority is one's duty."[76] Because the citizen is now subject to a legitimate legal directive, she has a reason not to rely on these first-order

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72. J.B. Schneewind, The Invention of Autonomy 70–72 and *passim* (1998) (naming this duality the "Grotian problematic" after Hugo Grotius); see also Hart & Sacks, supra note 5, at 105 ("Every human being . . . has to reckon with the fact that other people want what they want in the same way also. He and they being dependent on one another if any of them are to have the things they want, it follows that he and they have to work together on terms which are acceptable to all . . . .").

73. See Waldron, Disagreement, supra note 5, at 234–36 (defining democratic participation as right to contribute to political process "tempered by principles of fairness and equality implied in the universalization" of that right).

74. In Part IV.A, I consider the objection that citizens have only a formally equal right to participate in the process of determining what the law should be, and that in practice the influence of money, interest-group politics, regulatory capture, and other dysfunctions of the political process undercut the legitimacy of law.

75. Raz, Morality, supra note 65, at 41. A "dependent reason" is one that is based on reasons that already apply to the subject of a directive. In Raz's example, if two people refer a dispute to an arbitrator, the arbitrator's decision is supposed to reflect and be based upon the reasons put forward by the disputing parties. Id. In large-scale social disagreements, the law functions in a similar manner; it embodies reasons held by citizens independent of the law.

76. Id. at 60.

reasons in her deliberation about how to act. This reasoning has the seemingly paradoxical result of requiring a morally conscientious person not to act on the basis of what her conscience tells her is the right thing to do, but on the basis of legal rules.

The apparent paradox disappears, however, when we realize that morally conscientious people recognize the existence of disagreement about moral questions and uncertainty over the application of moral norms to concrete practical dilemmas.[77] To take a simple example, our hypothetical actor may accept the moral norm, "do not kill," and may believe that it is an objective rule of morality that applies to everyone with whom she interacts. Nevertheless, she acknowledges that in a society it is important to settle killing-related issues, such as the permissibility of voluntary euthanasia, the obligation to perform military service, the circumstances under which the use of deadly force in self-defense is permitted, and the acceptability of abortion and capital punishment. For the collective settlement of these matters, she cannot rely solely on her own deliberation, because she recognizes good faith disagreement over the question of how the universal moral norm, "do not kill," should be applied to determine concrete cases.

When the law speaks with legitimate authority, citizens may not evade the obligation to obey by arguing that legal duties are contrary to first-order moral reasons. To do so would be to rely on their own deliberation, which is presumptively less reliable than the reasoning of authorities. The advantage obtained by recognizing authorities would be lost if the subjects of authoritative directives were permitted to quibble with individual commands and declare them mistaken:

> If every time a directive is mistaken, i.e. every time it fails to reflect reason correctly, it were open to challenge as mistaken, the advantage gained by accepting the authority as a more reliable and successful guide to right reason would disappear. In trying to establish whether or not the directive correctly reflects right reason the subjects will be relying on their own judgments rather than on that of the authority, which, we are assuming, is more reliable.[78]

This is a very strong conception of authority. It is plausible when applied to expert authority; of course, it would be a waste of time and would reflect a misunderstanding of the nature of expert authority if I tried to work out on my own whether Jacques Pépin's stock-making technique was correct. Authority is supposed to give *content-independent* reasons for action—that is, reasons that do not depend on whether we agree with the

77. Alexander & Sherwin, supra note 5, at 218–19.

78. Raz, Morality, supra note 65, at 61. Raz also uses the term "exclusionary" to describe the nature of the obligation to obey the law: If a second-order reason is counted as exclusionary, then one should disregard moral reasons, however weighty, which would otherwise count against doing what the law requires. Raz, Authority, supra note 6, at 236–37.

substance of the authoritative directive.[79] When applied to normative authority, demanding that agents not challenge the substantive reasoning behind an authoritative comment is extremely troubling for the reasons identified by Wolff and Sartre. Deferring to the law as an authority on moral issues appears to involve an abdication of both one's own moral agency and of the responsibility to act on the basis of one's own deliberation on moral reasons.

The more ambitious view of legal authority faces this difficulty squarely by observing that individuals living together in society may not always be able to resolve moral debates by reason and persuasion alone. We recognize that, although we have confidence in the objective rightness of our judgments, others disagree with us, and perhaps for good reason. However, we also desire to live and act together with those people, instead of living like a nation of Robinson Crusoes who happen to be neighbors. The question therefore arises of how we should make collective decisions about the structure of laws that will govern our society. In other words, it is possible to believe in moral objectivity, but nevertheless maintain that, in the domain of *politics*, a different attitude toward normative claims is warranted. Ethical pluralists observe the diversity of reasonable moral beliefs.[80] Some values and preferences, such as the desire to torture innocent people, can be ruled out as incompatible with any plausible conception of human nature, but there are still multiple sources of value that can be engaged by a decent person's life. We can disagree about the priorities or weights those values should have, or how various competing principles should apply to a particular case, or over empirical questions that arise as part of the application of moral principles to concrete circumstances. Because we recognize that reasonable people can disagree about these matters, we have "a second-order reason not to act peremptorily—at least not in the name of the whole society—on the basis of one's own estimate of those first-order reasons."[81] Thus, we may believe ourselves to be correct about some moral position, but recognize that those with whom we disagree may be reasoning in good faith.[82]

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79. Raz's definition is that "[a] reason is content-independent if there is no direct connection between the reason and the action for which it is a reason." Raz, Morality, supra note 65, at 35. For a less technical definition, see Alexander & Schauer, Extrajudicial Interpretation, supra note 5, at 1369 ("To obey is to accept the decision of another as authoritative even when we disagree with its substance.").

80. Ethical pluralism is the view that people might reasonably value different goods, forms of life, or entire cultures or traditions. See, e.g., Charles E. Larmore, Patterns of Moral Complexity 4–15, 131–33, 137–38 (1987); John Rawls, Political Liberalism 54–58 (1993) [hereinafter Rawls, Liberalism]; Raz, Morality, supra note 65, at 321–66. See generally Isaiah Berlin, Four Essays on Liberty (1969); Thomas Nagel, The Fragmentation of Value, *in* Mortal Questions 128–38 (1979).

81. Waldron, Disagreement, supra note 5, at 196.

82. In other words, we have reason not to act like Nicholas Kristof's description of President George W. Bush: "Mr. Bush always exudes a sense that the issues are crystal clear and that anyone who disagrees with him is playing political games." Nicholas D. Kristof, Editorial, In Blair We Trust, N.Y. Times, July 8, 2003, at A23. Recognition of reasonable

B. *Authority for Lawyers*

Even if one accepts this outline of the justification of authority for citizens, the further question remains of how it may be extended to preempt recourse by *lawyers* to first-order moral reasons. If the need to act collectively in the face of disagreement is a second-order reason for citizens to obey the law, namely that they do better by following legal directives than by trying to work out the balance of competing values on their own, it still does not appear to be a reason for lawyers, who are acting on behalf of someone else, as representatives, advisors, or advocates. We still need a similar kind of second-order reason for lawyers.

One plausible candidate for this reason is the obligation of respect we owe to the law, in light of the kind of achievement it represents. Because the law enables collective action notwithstanding deep and persistent disagreement, it ought to be taken seriously, in the sense that those who act in the name of society as a whole ought not to try to come up with ways to nullify, defy, or evade the law.[83] Lawyers have a great deal of power to do harm here and can undermine the collective achievement of lawmaking in any number of ways, e.g., structuring transactions to evade statutory or regulatory requirements. They may also interfere with the operation of the law by resisting it on moral grounds. If the lawyer says to the client, in effect, "You have a legal entitlement to *X*, but I refuse to assist you in obtaining that entitlement for moral reasons," the lawyer is simply reinscribing in the attorney-client relationship the very moral disagreement the law was intended to preempt.

A theory of legal ethics that respects the achievement represented by law must build in an ethical constraint that expects lawyers to further the end of facilitating collective action in the face of disagreement. In jurisprudential terms, this means that the authority conception presupposes a positivist view of the nature of legal directives. In order for the law to provide a final settlement of moral disputes, it must be possible in principle to identify "the law" without reference to socially contested moral criteria.[84] Unless the identification of the law was independent of normative considerations, the law would be unable to provide a framework for social cooperation. A theory that made the authority of law depend on substantive criteria to establish legitimacy—that is, one that denies that

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ethical pluralism requires treating disagreement not as a sign of partisanship or ideologically motivated obstructionism, but as the result of genuine uncertainty about how various human values should be weighed and applied in concrete moral dilemmas.

83. Waldron, Disagreement, supra note 5, at 100; see also Fred C. Zacharias, The Lawyer as Conscientious Objector, 54 Rutgers L. Rev. 191, 208 (2001) ("[Lawyers] must acknowledge that they are part of a system that cannot operate if each lawyer follows idiosyncratic unbounded notions of right and wrong.").

84. See, e.g., H.L.A. Hart, The Concept of Law 91–100 (2d ed. 1994); Andrei Marmor, Interpretation and Legal Theory 124 (1992); Raz, Ethics, supra note 69, at 202–04; Raz, Authority, supra note 6, at 39–40, 45–52; Jules L. Coleman, Rules and Social Facts, 14 Harv. J.L. & Pub. Pol'y 703, 706–08 (1991).

an unjust rule should have the same effect on our practical reasoning as a just rule[85]—would appear to be unable to provide a means for getting beyond moral disagreement.[86] If the authority of law depended on substantive criteria of legitimacy, the normative disputes that made law necessary in the first place would simply reappear in the form of arguments about whether such-and-such a rule is in fact "law," undercutting the ability of law to provide a settlement of these disputes. A lawyer who believes that the client's ends are unjust may withdraw from the representation if it can be accomplished without prejudice to the client[87] and may try to talk the client out of some unjust action.[88] Within the context of the professional relationship, however, the lawyer may not refuse to act on the basis of her belief that applicable legal norms lack legitimacy for substantive moral reasons. The authority conception therefore presupposes a *prescriptive* legal positivism, in which the correct understanding of law is taken to be one in which it is possible to identify legal directives without recapitulating the normative disagreement that makes law necessary in the first place.

A corollary of prescriptive legal positivism is that lawyers have a further obligation not to exploit inevitable ambiguities in legal norms that result from the vagueness and imprecision of ordinary language.[89] This has significant implications for the authority conception. Although no single methodology of legal interpretation results from the authority conception, lawyers are ethically required to act and employ principles of interpretation that enhance, rather than undermine, the effective functioning of the legal system. For example, a lawyer may not structure an off-balance-sheet financing transaction that works only if investors and regulators are unable to understand the economic substance of the transaction. To do so would evade the settlement of normative conflict represented by the law, in effect substituting the lawyer's (or the client's) judg-

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85. For this definition of natural law, see Brian Bix, Jules Coleman, Legal Positivism, and Legal Authority, 16 Quinnipiac L. Rev. 241, 243 (1996) (citations omitted).

86. More precisely, a positivist might try to maintain a "weak social thesis" in arguing that the actual conventions of a given society's legal system require judges to use moral reasoning to fill in gaps in legal rules. Raz argues that this thesis does not actually characterize positivism, properly understood, because it is compatible with the claim that it is conceptually necessary to test law by moral argument, which is clearly on the natural law side. Raz, Authority, supra note 6, at 45–47. Instead, he argues that positivism must be characterized by a "sources thesis," which is that "[a] law has a source if its contents and existence can be determined without using moral arguments." Id. at 47. This is the version of positivism I adopt in this Article.

87. Model Rules, supra note 30, R. 1.16.

88. Id. R. 2.1.

89. Whether one puts this in terms of the Wittgensteinian commonplace that rules do not determine their own application, or instead in terms of a Kelsenian *grundnorm* or H.L.A. Hart's ultimate rule of recognition, the central point is that the status of a legal text cannot ultimately, and cannot without infinite regress, be determined by that text itself.

Alexander & Schauer, Defending, supra note 63, at 460–61 (citations omitted).

ment about the accounting treatment and disclosure that are appropriate for the transaction. For example, a lawyer may not structure a complex tax-avoidance entity that decreases the possibility that the barely non-frivolous tax treatment of a transaction will be discovered and tested by the government. To do so would evade the settlement of normative conflict represented by the law, in effect substituting the lawyer's (or the client's) judgment about how much disclosure should be required in, or what tax consequences should attach to, certain transactions.

The requirement that lawyers further the goal of enabling coordinated social action notwithstanding moral conflict is based on the recognition that lawyers are quasi-political actors, and importantly, different from citizens in their relationship to state power.[90] Most lawyers are not literally officials in the same way that judges and executive officers are (although prosecutors exercise similar discretionary power in many instances), but they nevertheless act in the name of society by providing a mechanism through which normative disagreements are channeled into an authoritative process of resolution. The quasi-official nature of the lawyer's role can be perceived more clearly by considering the analogy with the above discussed countermajoritarian problem in constitutional law. Suppose a client has a legal right to *X*—keeping a secret at the expense of public safety, challenging a union election, raising a particular defense or objection at trial, etc.—but the lawyer believes that *X* is immoral and, further, that assisting the client in obtaining *X* is immoral. If the client needs the lawyer to obtain *X*, the lawyer is in effect overriding the client's legal entitlement to *X* on the basis of moral reasons. The lawyer is therefore a kind of negative political official, with near-absolute veto power over the client's access to a legal entitlement.[91] The authority

90. See Gordon, New Role, supra note 11, at 1200, 1207 (stating lawyers are not only agents of clients, but also have duties to the legal system); David B. Wilkins, In Defense of Law *and* Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law, 38 Wm. & Mary L. Rev. 269, 274 (1996) ("Lawyers are more than ordinary citizens; they have been given a monopoly by the state to occupy a position of trust both with respect to the interests of their clients and the public purposes of the legal framework."); cf. Model Rules, supra note 30, pmbl. para. 6. The Model Rules also refer to lawyers as "officers of the legal system," see id. pmbl. para. 1, which is a metaphor to which judges seem particularly attracted. Judges often label lawyers as officers of the court as a shorthand way of indicating that they have obligations to the court, such as refraining from putting on perjured testimony, or not interfering with the functioning of the trial process. See, e.g., Gentile v. State Bar, 501 U.S. 1030, 1072 (1991); Neb. Press Ass'n v. Stuart, 427 U.S. 539, 601 n.27 (1976) (Brennan, J., concurring); In re Sawyer, 360 U.S. 622, 668 (1959) (Frankfurter, J., dissenting); Howell v. State Bar, 843 F.2d 205, 207 (5th Cir. 1988); Hirschkop v. Snead, 594 F.2d 356, 366 (4th Cir. 1979); Hallinan v. Comm. of Bar Exam'rs, 421 P.2d 76, 87 (Cal. 1966); In re Johnson, 729 P.2d 1175, 1179 (Kan. 1986); In re Williams, 414 N.W.2d 394, 397 (Minn. 1987). As I have discussed elsewhere, this label has no accepted normative significance, causing endless confusion. See W. Bradley Wendel, Free Speech for Lawyers, 28 Hastings Const. L.Q. 305, 432–36 (2001). Thus, I will not use it here.

91. In some cases, the client could obtain the entitlement without legal assistance, by litigating pro se or using legal self-help books to set up an entity or structure a transaction.

conception of legal ethics, which takes the authority of law seriously, would rule out the use of moral reasons that are not embodied in governing legal texts to block the client's attempt to exercise a legal right.

One might respond that the legal system seems to be working just fine. Theoretically, the use of law to resolve disagreement and enable coordinated action might be undermined by the conscientious refusal by lawyers to respect the law, but this practice does not appear to be widespread. The difficulty in responding to this objection is that unless the system has gone completely off the rails—resulting in social anarchy—evidence of the effects of covert disrespect for the law by lawyers will be difficult to detect. The most dangerous second-order violations are, by hypothesis, covert, and tend not to be apparent to observers of the process. More to the point, my argument is conceptual rather than empirical and is aimed at scholars who have defended conscientious objection and nullification of various sorts as appropriate choices for agents acting within the legal system.[92] I hope to convince readers that these practices should be discouraged to the greatest extent possible, but it is not part of my argument to show that existing practices within the legal system are pervaded by harmful nullification.

Nonetheless, the authority conception can also be critiqued on practical grounds. Lawyers may be less capable of frustrating the will of a legislature, because the client can always obtain a different lawyer who will not have the same moral objection to the client's project. Suppose a client has a lawyer, call him Dudley Do-Right, who insists on reasoning through dilemmas posed by representing the client on the basis of first-order moral reasons. In other words, Dudley will only assist the client if the client's goals and the means used to attain them are morally permissible. Now suppose the client wishes to engage in some conduct that is legally permissible but, at least from Dudley's point of view, morally wrong. Imagine, for example, that Dudley is representing the client as the plaintiff in a litigated matter and, due to the negligence of the opposing lawyer, has an opportunity to obtain a default judgment against the defendant. Reasoning on the basis of first-order moral considerations, Dudley argues that it would be "sneaky," "underhanded," and "dishonora-

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These are second-best solutions, and a client who was refused legal assistance is often made worse off by virtue of using options other than professional legal assistance. By analogy, a person could probably read a medical self-help book and treat various illnesses at home, but we would still think there is a prima facie injustice if that person were denied medical treatment for the same conditions on the basis of a doctor's refusal to treat her.

92. See, e.g., Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 Yale L.J. 677, 690–95, 705–18 (1995) (advocating limited scope for African American jurors to refuse to convict nonviolent criminal defendants in order to shift power from white prosecutors and judges to African American communities); William H. Simon, Moral Pluck: Legal Ethics in Popular Culture, 101 Colum. L. Rev. 421, 440–45 (2001) (contrasting conformist, "categorical and authoritarian" approach to legal ethics taken by the organized bar with the greater tolerance for lawlessness in popular portrayals of heroic lawyers).

ble" to exploit the error of the other lawyer and refuses to file a motion for a default judgment.[93] The client is always free to discharge Dudley and hire another lawyer, call him Snidely Whiplash, who has no such moral scruples.[94] Alternatively, Dudley may withdraw from representing the client if Dudley regards her action as repugnant.[95] Assuming that there are lawyers like Snidely in the world, it seems unrealistic to charge Dudley with the moral obligation of preserving his client's access to the legal entitlement of the default judgment. Dudley can preserve his moral agency by refusing to assist the client in what he believes to be a morally wrongful course of action without depriving his client of a legal right.

One response to this move would be to imagine the situation of a hypothetical "last lawyer in town."[96] Suppose there is no Snidely, because Dudley is either the only lawyer in town or, more realistically, the only lawyer with the relevant expertise. In that case, a morally motivated refusal by Dudley to seek a default judgment would indeed have the effect of blocking the client's ability to exercise a legal entitlement. What would be wrong with that? The answer cannot be that it is a moral bad that the client has lost the default judgment, because the client may end up winning at trial anyway. More importantly, whether the client is morally entitled to the judgment is not the issue. Moral controversies regarding the distribution of rights, liberties, powers, and the rest of the juridical relations that people care about do not have settled answers—this is why we have a litigation system. Moral conflict is the backdrop for much of our complex process of procedural rules, use of precedent, separation of judges and juries, and creation of statutes. All of this is simply to say that there are second-order moral reasons to put aside one's ordinary moral reasoning process and defer instead to legal norms for resolving practical dilemmas. If there are good reasons for regarding the law as authoritative over some domain of action, then Dudley does wrong by permitting first-order moral reasons to enter into his deliberations.

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93. This example is based on Sprung v. Newger Materials, Inc., 775 S.W.2d 97 (Mo. 1989) (en banc). In *Sprung*, a majority of the Missouri Supreme Court refused to vacate a default judgment obtained after the defendant's lawyer mistakenly sent a notice of appearance and request for an extension of time in which to file an answer to the wrong address. A dissenting judge would have set aside the default judgment, on the basis, inter alia, that the plaintiff's lawyer's conduct should "shock all right-thinking lawyers." See id. at 109 (Blackmar, C.J., dissenting).

94. For information regarding the client's right to discharge her lawyer at any time, see Model Rules, supra note 30, R. 1.16(a)(3); Restatement (Third) of the Law Governing Lawyers § 32(1) (2000).

95. Model Rules, supra note 30, R. 1.16(b)(4); Restatement (Third) of Lawyers, supra note 94, § 32(3)(f).

96. See, e.g., Rhode, supra note 1, at 57; Charles W. Wolfram, Modern Legal Ethics § 10.2.2 (1986); Teresa Stanton Collett, The Common Good and the Duty to Represent: Must the Last Lawyer in Town Take Any Case?, 40 S. Tex. L. Rev. 137, 140 (1999); W. William Hodes, Accepting and Rejecting Clients—The Moral Autonomy of the Second-to-Last Lawyer in Town, 48 Kan. L. Rev. 977, 984 (2000); Murray L. Schwartz, The Zeal of the Civil Advocate, *in* The Good Lawyer 150, 168–69 (David Luban ed., 1983).

I have never been terribly worried about the last-lawyer-in-town problem, because the reasons that Dudley should continue to represent the client if he is the last lawyer in town are generalizable to the situation of the second-to-last lawyer as well.[97] Snidely's willingness to represent the client does not alter the reasons for regarding the law as authoritative. At most, it gives Dudley cover to refuse to follow the second-order reasons to respect the law. The lack of any adverse consequences, due to the fortuitous existence of Snidely, would be relevant to the second-order moral arguments only if these reasons were consequentialist in nature. One might argue that the social benefits created by legal ordering provide the reasons for regarding the law as authoritative.[98] This is a plausible consequentialist argument, but it is not the one I am relying on here. The authority conception, drawn as it is from Raz's justification of political

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97. Cf. Goldman, supra note 15, at 124 (noting inconsistency between the collective obligation to represent unpopular clients and the individual right of lawyers to refuse to represent them); Geoffrey C. Hazard, Jr., Ethics in the Practice of Law 144 (1978) ("If taken seriously, [the sanction of a lawyer's withdrawal] should be applicable only when any right-thinking advisor would resign. But this is to say that such a client ought to have no right-thinking advisor at all . . . .").

98. Several readers have understood the authority conception as giving only utilitarian reasons to obey the law and therefore ignoring the moral rights that a deliberating moral agent must take into account. (Greg Cooper, Tony Kronman, and Irma Russell have all raised this point in personal communications with the author.) Another way of putting it is that any argument relying on the good of coordinated social action must be consequentialist. Other arguments that have influenced my own are explicitly utilitarian—consider, for example, Robert Gordon's invocation of the social goods of peace, prosperity, cooperation, and order. Gordon, New Role, supra note 11, at 1198. It appears, therefore, that individual rights may be sacrificed in order to achieve good consequences, thereby removing the protection of rights from the foundations of the lawyer's role.

The response to this objection is that rights are subject to disagreement—people do not have rights in a vacuum, and settling on the right resolution to deontological conflicts is also a matter for politics. The basic Coasian insight which any first-year torts student learns is that the scope of any one person's rights is bounded by the claimed rights of others, and some mechanism is required for adjusting these claimed rights to permit individuals to live together in harmony. Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1090 (1972). Asserting a right to freedom of expression is not helpful in determining what I can say, unless we also consider the rights of others to be free from harassment, defamation, and fear. My right to make productive use of my land is limited by my neighbor's right to freedom from intrusions by my "beasts, or water, or filth, or stenches," as a classic English case memorably observed. Fletcher v. Rylands, 1 L.R.-Ex. 265, 280 (Ex. Ch. 1866). Once rights are deployed in a political setting, whether in a public debate about what legislation ought to be enacted or in an argument to a court about the scope of one's right, assertions about rights become claims that one's right ought to take precedence over another's. We may think about the rights we ought to have from a first-person point of view, but from a political perspective, rights always present questions of balancing and accommodation. See Jeremy Waldron, Rights in Conflict, *in* Liberal Rights 203, 218–20 (1993). Thus, the authority conception is not necessarily a utilitarian argument for the authority of law, but a political principle that can be used to resolve purely deontological conflicts as well.

authority,[99] depends on the observation that, by subjecting herself to the commands of an authority, a person is better off acting for reasons that apply to her in any event, as compared with how she would act in the absence of authoritative guidance. As applied to this example, the authority conception would direct Dudley to defer to legal norms in determining when an action is sneaky or underhanded. There may be perfectly good reasons for permitting a lawyer to seek a default judgment in a case like this one. These first-order reasons are contestable, and Dudley may disagree with the law's resolution, but in order to perform its coordinating function, the law's resolution of the disagreement must preempt other reasons for action. Because this is a noninstrumental or nonconsequentialist justification for the authority of law, it is irrelevant that Snidely is available to take the case. Dudley, the second-to-last lawyer in town, still has an obligation to respect the resolution of the moral issues provided by the governing law.

Although a lawyer has an obligation to respect the law, the authority conception does not prevent a lawyer from advocating for a change in the law, taking a nonfrivolous position in litigation that is intended to force a court to decide an issue, or even consciously casting oneself as an oppositional or "cause" lawyer.[100] By inventing the Dudley Do-Right character, I do not mean to disparage lawyers who are motivated by moral commitments and the desire to work for a more just society. The point is only that Dudley, or any lawyer, must work for change within the framework provided by the legal system, which is made necessary by the coexistence of multitudes of Dudleys, all of whom believe they have correctly resolved some normative issue. The authority conception rules out acting directly on the basis of these first-order reasons and circumventing the law, but not morally motivated lawyering within the law. Moreover, to the extent they are not acting as representatives of clients, lawyers are as free as any other citizen to engage in grassroots organizing, campaigning, lobbying, and efforts at persuasion. Indeed, some lawyers may enjoy heightened visibility because of their occupation and may be more effective political communicators or organizers as a result. None of this activity is threatening to the capacity of the legal system to enable coordinated social action, so it in no way violates the second-order reasons to respect the law.

III. Application of the Authority Conception to Lawyers' Dilemmas

Among the most memorable aspects of the legal ethics literature are the gripping cases and the moral dilemmas they present. In this Part, I present three cases which I hope engage the reader's moral sensibili-

99. Raz, Morality, supra note 65, at 71.

100. See Austin Sarat & Stuart Scheingold, Cause Lawyering and the Reproduction of Professional Authority: An Introduction, *in* Cause Lawyering: Political Commitments and Professional Responsibilities 3, 3–4 (Austin Sarat & Stuart Scheingold eds., 1998) (describing a conception of lawyering which connects law and morality and which emphasizes altering some aspect of the status quo).

ties.[101] The difficulty with cases is that it is not always clear what one should do if the application of an ethical theory is disquieting. The conflict of our considered moral judgment in response to a case and theoretically prescribed result does not, on its face, suggest that either the theory or the intuition should take precedence.[102] As Rawls describes the process of reflective equilibrium, we may find it necessary to revise our judgments to conform to theoretical principles, but we may also believe that we should hold fast to our judgments and adjust the theory to take them into account.[103] When dealing with the authority of law, however, it is easier to figure out what to do with considered moral judgments—they are irrelevant if they are based on the first-order values that have been superseded by legal directive. The only role for our first-order evaluations is to preserve a carefully circumscribed exception for catastrophic moral horrors, in which case the second-order reasons for treating the legal rule as authoritative can be overridden. As I will discuss, none of these cases present catastrophic moral horrors that would justify overriding second-order reasons to obey the law. The last case, however, may be an example of unavoidable moral wrongdoing. In this instance, a conscientious moral agent may choose to disregard second-order reasons to obey the law and act on the basis of first-order values. In that case, the lawyer is not taking advantage of an exception to the justification of the law's authority, but is actually committing a moral wrong, in terms of second-order reasons.

A. *Black Lung Benefits*[104]

> You are an outside lawyer for Matewan Mines, which for many decades has operated a coal mine in West Virginia. Under a federal statute, Matewan is required to pay benefits to particular classes of miners who had been employed by Matewan and who have now become totally disabled due to pneumoconiosis, commonly known as "black lung disease." As the preamble to the statute observes, black lung disease is a serious occupational health hazard for coal miners, and few states provide disability benefits. "It is, therefore, the purpose of this [statute] . . . to ensure that . . . adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to [black lung disease]."[105]

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101. Two of the three are frequently-debated cases from the legal literature, but the first is a case from my law school's legal clinic.

102. See David Luban, Professional Ethics, *in* A Companion to Applied Ethics 583, 585 (R. G. Frey & Christopher Heath Wellman eds., 2003) ("Hard cases . . . call into question the adequacy of the very moral theories that philosophers originally hoped would resolve the cases.").

103. John Rawls, A Theory of Justice 48 (1971) [hereinafter Rawls, Theory].

104. This hypothetical is loosely based on a case handled by students in the Legal Practice Clinic at Washington and Lee Law School. I have changed the facts freely to make it interesting.

105. 30 U.S.C. § 901(a) (2000).

For the companies, black lung claims are an expensive administrative headache, and Matewan wishes to avoid paying them whenever possible. Lately, Matewan has been facing increased competition from foreign mining companies, which are not required to pay benefits to miners suffering from black lung disease; thus, its profits have been gradually dwindling relative to foreign competitors, leading to some consternation among shareholders. The board of Matewan is worried that if its profits decline any further, the company may be taken over by a multinational conglomerate, possibly leading to a loss of jobs in the area.

Cole Minor was employed by Matewan for all of his working life and recently contracted black lung disease. Thus, the injury "arose out of the course of his employment," as required by the statute. Last year, he had a chest X-ray which revealed that he was suffering from black lung disease and had a lesion on his lung which measured 1.5 cm. Under the governing statute and regulations, Cole was presumed to be "totally disabled," and therefore eligible for benefits simply because of the presence of the 1.5 cm lesion. Matewan therefore began paying benefits of $760 per month to Cole.

Cole's doctor was concerned that the disease might spread rapidly, so she put Cole on the list for a lung transplant. Two months ago, he was approved for a transplant and successfully underwent lung transplantation surgery. His rapid recovery from the surgery was due in part to powerful (and expensive) drugs used by his treating physicians to prevent Cole's body from rejecting the new lung. Upon learning of the operation, a representative of Matewan had a creative idea. He called the law firm representing the company and demanded that the company's lawyers file a motion to terminate Cole's benefits, on the ground that his disability had ended. Without the 1.5 cm lesion, the company representative reasoned, Cole would not be permitted to take advantage of the statutory presumption of disability and would be required to establish disability through a lengthy process involving several medical examinations and hearings before an Administrative Law Judge. In the meantime, the company would save the cost of paying the black lung benefits. Cole could die, however, if he were unable to obtain the anti-rejection drugs because his benefits had been terminated. The client representative was determined to terminate benefits. "Look, mining is a dangerous occupation," he said. "We take reasonable precautions, but we're not obligated to eliminate all risks. We're also not obligated to pay benefits to every person who's ever worked for us. Cole has recovered—he's not disabled—just look at the statute." What should the company's lawyer do?

The result given in this case would differ whether analyzed under the authority conception or the dominant view. The black lung benefits stat-

ute embodies a compromise between the principle that injured miners deserve compensation and the realistic consideration that benefits cannot be limitless. Yet, it is clear from considering the legislative history that the statute is remedial in its design and intended to lower the procedural barriers for miners who urgently seek to obtain compensation. The 1.5 cm presumption of total disability is just that—a presumption, intended to simplify the process of establishing disability. Under the dominant view, that statutory purpose would be irrelevant if there is a nonfrivolous argument that the 1.5 cm standard is not only a presumption, but is a hard and fast dividing line between miners who are entitled to total disability benefits and those who are not. The lawyer would be entitled to file the motion and, would, in fact, be *required* to file the motion if she were in an existing lawyer-client relationship with the company from which she could not withdraw. The authority conception, however, would look not to whether there is a nonfrivolous argument available, but to the function of the statute in enabling coordinated social action. The economically useful activity of coal mining could not occur if miners and employers were locked in endless disputes about the duty to pay compensation for work-related injuries. There would be no way to settle the questions of whether and to what extent the companies owe compensation simply by referring to substantive moral principles. As an alternative to an impasse in which nothing gets done, Congress enacted the statute to establish the level of benefits that should be provided to miners.

The differences between the dominant view and the authority conception come at the level of interpretation, the constraint of ordinary meaning, and the interpretive attitude that a lawyer ought to adopt. In short, the dominant view encourages lawyers to find loopholes.[106] The authority conception, on the other hand, is keyed to the meaning that is ascribed to the statutory provision by the community of lawyers and judges who interpret it. My understanding of the case is that *everyone* who handles black lung cases, for the claimants or for the defense, understands that the 1.5 cm criterion is a presumption only; it is in effect a permanent, conclusive presumption of total disability. The apparent opening for the company in this case to terminate benefits is solely a function of Congress's inability to anticipate and draft around all possible

106. The dominant-view attitude toward legal regulation is familiar in jurisprudence as the Holmesian "bad man" interpretive stance. Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 459 (1897). For a clear statement of the position that is antithetical to the authority conception's interpretive mandate, see Frank H. Easterbrook & Daniel R. Fischel, Antitrust Suits by Targets of Tender Offers, 80 Mich. L. Rev. 1155, 1177 n.57 (1982). Easterbrook and Fischel note:

> [M]anagers do not have an ethical duty to obey economic regulatory laws just because the laws exist. They must determine the importance of these 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.

contingencies. Quite probably, no one was thinking about the case of a miner who obtained a lung transplant, but anyone who did think about it would have provided in the statute that the transplant would not change the miner's total disability status. Notice that the reason for not filing the motion is *not* the harm that would befall the miner if his benefits are terminated. That choice encompasses a first-order moral reason and is preempted by second-order reasons to respect the authority of the statute. The authority conception reaches the same conclusion that critics of the dominant view, such as Luban, Simon, and Rhode, would reach, but on different grounds.

It matters a great deal for the authority conception that the meaning of a statute or common law rule be relatively stable and accessible.[107] Again, I do not believe that there is a direct relationship between this conception of legal ethics and any particular methodology of interpreting statutes. A wide variety of materials may be relevant to determining the meaning of a statutory provision, starting of course with the text, but also including enactment history, the debate surrounding the passage of the measure, the social problem the statute was intended to address (the "mischief" to be remedied, in the old common law terminology[108]), other provisions in the same statute, traditional canons of construction such as *ejusdem generis* and *noscitur a sociis*, interpretations placed on the statute or related statutes by courts, and even assumptions about what the legislature would have done if faced with a novel situation.[109] A similar point

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107. Parenthetically, I believe the argument for the authority of statutes is equally applicable to common law decisions, despite the different processes by which these norms are respectively created. The second-order reason we share is the desire to engage in the process of reasoning about the rights and obligations we ought to have as citizens, in view of the reasonable claims of others. This reasoning process demands us to think from the first- and third-person points of view at the same time, using what Anthony Kronman calls the virtues of sympathy and detachment. Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession 113–16 (1993). This kind of simultaneous adoption of subjective and objective points of view also underlies Nagel's ethical theory. Thomas Nagel, The View from Nowhere 3 (1986) (identifying as a central task of ethics the project of combining "the perspective of a particular person inside the world with an objective view of that same world, the person and his viewpoint included").

It seems plausible that a long history of case-by-case adjudication would eventually produce a rule that is pretty good at balancing the interests of all affected parties. There may be a dysfunctional rule, which for some reason does not reflect careful adjustment of the competing claims; in such an instance, the argument for authority would run out. This problem seems most likely to arise where new technology or rapid changes to the law confront courts with novel problems. Eventually, the common law works itself out, though, as demonstrated by some well-known episodes during which courts struggled to find the right rule and eventually got it about right. See, e.g., Edward H. Levi, An Introduction to Legal Reasoning 6–19 (1949) (describing the evolution of strict liability for sellers of defective products). For this reason, I will refer to statutory or decisional law interchangeably, with respect to the second-order reasons to obey the law.

108. See Heydon's Case, 76 Eng. Rep. 637, 638 (1584).

109. For discussion of these principles, see generally William N. Eskridge, Jr., The Circumstances of Politics and the Application of Statutes, 100 Colum. L. Rev. 558 (2000); William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479 (1987).

can be made about common law rules. Lawyers, judges, and legal scholars of course disagree about the relevance or weight of these sources of interpretive guidance. But in the relevant interpretive community of lawyers and judges who regularly work with a given body of law, there are a great many cases in which there is at least an overlapping consensus as to the meaning of a provision. The only ethical requirement imposed by the authority conception is that lawyers understand their role in the process of interpreting legal texts as coordination-enhancing. In this respect, the authority conception supports the traditional ideal of professionalism, in which lawyers serve as crucial mediating institutions between the interests of individuals and the needs of the society.[110]

From the standpoint of this particular interpretive community, the black lung hypothetical is an easy case. There will, of course, be hard cases, and if there is genuine disagreement about how to interpret a statutory provision, it is less clear that the authority conception provides a *moral* reason to adopt an interpretation that takes harms to third parties into account, as opposed to a client-favoring interpretation (as the dominant view would require). There are naturally pragmatic constraints, such as the requirement of agency law that agents carry out their principal's lawful instructions, and the reality that lawyers who need to pay their bills generally are not going to refuse to assist a client where it is not clearly illegal. In addition, though, one might argue that an ambiguous statute ought to be interpreted against a background of broadly shared values.[111] In the black lung case, if there were interpretive ambiguity as to whether the 1.5 cm standard was a presumption or a bright-line standard for disability, an interpreter might consider the social policy of compensating injured miners for workplace injuries and conclude that the standard is a presumption, not a bright line. The problem with this argu-

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110. See Kenneth J. Arrow, Social Responsibility and Economic Efficiency, 21 Pub. Pol'y 303, 314 (1973) ("Purely selfish behavior of individuals is really incompatible with any kind of settled economic life."); Gordon, Public Calling, supra note 11, at 255 (defending traditional conception of professionalism as mediating between client demands and the public interest); Robert W. Gordon & William H. Simon, The Redemption of Professionalism?, *in* Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession 230, 230–31 (Robert L. Nelson et al. eds., 1992) (defining this ideal as a "learned disposition on the part of individual lawyers to contribute to the social goals to which the profession is committed and to comply with social norms"); William H. Simon, Babbitt v. Brandeis: The Decline of the Professional Ideal, 37 Stan. L. Rev. 565, 568–69 (1985) (describing progressive-functionalist conception of professionalism which is in sharp contrast to the liberal notion that law is nothing more than a framework of rules that may be exploited for one's client's advantage).

111. See William N. Eskridge, Jr., Public Values in Statutory Interpretation, 137 U. Pa. L. Rev. 1007, 1019–61 (1989) (identifying three primary sources of broadly shared principles: constitutional, statutory, and common law values); see also Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 411 n.21 (1989) (questioning "the dichotomy between interpretation that rests on fidelity to text and interpretation that is based on extratextual values" and proposing that "ordinary interpretation is also pervaded by 'public values'").

ment is that there are usually countervailing policies or public values that would justify the opposite interpretation.

Indeed, the whole coordination function of law could unravel if any problem of interpretation presented multiple plausible readings of the applicable statutes, rules, and cases.[112] One does not have to believe that words have no determinate meaning in order to be troubled by some of the interpretive issues that courts deal with routinely. Does a statute prohibiting the interstate transportation of motor vehicles apply to airplanes?[113] Does a prohibition on "using" a gun in connection with a drug trafficking offense cover the act of driving around with a loaded gun in the trunk of a car?[114] Does a voluntary affirmative action program constitute "discrimination" under Title VII of the 1964 Civil Rights Act?[115] Not only are these statutes ambiguous, but the sorts of political disagreements they were intended to resolve are recapitulated as statutory interpretation issues.[116] A person who believes that negative liberty is prior to equality or other positive rights is likely to support a principle of statutory interpretation that the words of legislation should be read narrowly, or that Congress should not be presumed to have the constitutional power to legislate on some matter. Conversely, someone who believes that government has a valuable role in remedying social ills might be expected to endorse something like the traditional common law rule that remedial statutes should be construed broadly, or the assumption that Congress has broad powers under the Commerce Clause to enact beneficial legisla-

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112. Cf. Susan P. Koniak & George M. Cohen, In Hell There Will Be Lawyers Without Clients or Law, *in* Ethics in Practice: Lawyers' Roles, Responsbilities, and Regulation 177, 179 (Deborah L. Rhode ed., 2000) ("[T]o accept, without discussion or qualification, that lawyers generally obey the law, one must first believe that for lawyers, if not for everybody, determining what the law demands is relatively easy.").

113. McBoyle v. United States, 283 U.S. 25, 25–26 (1931).

114. Bailey v. United States, 516 U.S. 137, 138–39 (1995).

115. United Steelworkers v. Weber, 443 U.S. 193, 197 (1979).

116. Cf. Marmor, supra note 84, at 121–24. As Marmor recognizes, discussing Michael Moore's criticism of Raz, the Razian argument for the authority of law would be undermined if there were "no easy cases" where it were possible to identify the law without reference to considerations of what the law ought to be in a given case. This is also Fuller's criticism of Hart. See Lon L. Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630, 666 (1958) ("We must . . . be sufficiently capable of putting ourselves in the position of those who drafted the rule to know what they thought 'ought to be.' It is in the light of this 'ought' that we must decide what the rule 'is.'"). Marmor is correct to caution against conflating descriptive considerations of what following a rule consists of, with normative considerations of whether one should follow a rule in a particular instance. Marmor, supra note 84, at 136–37. Although there is insufficient space here to consider the argument in detail, I think Marmor is right in reading Hart, in light of the later Wittgenstein, to have defended a positivist theory of law that rests on a theory of meaning in which understanding a rule consists of the ability to specify what actions are in accord with it. See id. at 153. Thus, it is possible to understand and apply rules without necessarily referring to underlying purposes or moral principles. (Although there may of course be cases in which a rule is ambiguous and further interpretation, perhaps purposivist in nature, is required.).

tion. By couching political disagreements in terms of principles of statutory interpretation, courts can appear to be deferring to the authority of law, when in fact they are simply rehashing the same political disputes that gave rise to the need for the statute in the first place.[117]

At the very least, I want to make clear that the authority conception does real work in *ruling out* particular actions taken by lawyers, even if it underdetermines action in cases with multiple plausible interpretations of the governing legal norms. As mentioned previously, the clearest cases of prohibited actions are those in which the lawyer subjectively believes that the law should be different or similarly believes that the law is substantively illegitimate for moral reasons. For example, Dworkin's conception of legitimacy requires an interpreter of law to choose an interpretive principle that *she thinks* puts the legal system in its best light,[118] seemingly privileging an individual's beliefs about justice over rules grounded in legal texts which have a democratic or common law pedigree.[119] According to Dworkin, there are intersubjective principles of integrity that ensure against interpretive subjectivity run amok, but Dworkin has never really provided a satisfactory answer to his critics who have dogged him with the objection that there is no clear line between a policy (subjective) and a principle (intersubjective).[120] The authority conception can be understood as an anti-Dworkinian model, which prohibits lawyers from engaging in the kind of constructive, substantive moral arguments that Dworkin favors. This is not to say that first-order moral considerations may not be incorporated by reference into legal norms,[121] or that legal norms may underdetermine the decision and permit the lawyer to resolve the question on the basis of first-order moral considerations. In cases where the applicable legal directives are clear, however, the authority conception rules out resort to preempted moral reasons.

The authority conception also rules out the kind of "loophole lawyering" that occurs through the use of formally valid, but highly implausible, interpretations of legal texts in order to accomplish the client's objectives. As acknowledged earlier, legal texts—legislation, administrative

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117. See Jeffrey Goldsworthy, Legislation, Interpretation, and Judicial Review, 51 U. Toronto L.J. 75, 82–84 (2001).

118. Dworkin, supra note 47, at 190–216.

119. See Dennis Patterson, Law and Truth 95 (1996) (arguing that Dworkin's conception of legal interpretation "renders the individual judge's moral and/or political philosophy morally superior to other (e.g. legal) modes of justification"); Gerald J. Postema, "Protestant" Interpretation and Social Practice, 6 Law & Phil. 283, 287 (1987) (criticizing Dworkin's view of interpretation as "concerned with what one does in trying to understand *one's own* (private/individual) action, rather than with trying to understand common activity in which one takes part with others").

120. See, e.g., Kent Greenawalt, Policy, Rights, and Judicial Decision, 11 Ga. L. Rev. 991, 992 (1977) (criticizing Dworkin for not sufficiently exploring "the boundary between principles and polices that he makes so crucial"); George C. Christie, Dworkin's "Empire," 1987 Duke L.J. 157, 183–85 (book review) (suggesting a focus on decisional content and institutional competency rather than the "verbal question of principle versus policy").

121. See infra notes 193–198 and accompanying text.

regulations, and judicial decisions—can encompass a range of meaning. While the actual language of each indicates what is logically possible, the interpretive community supplies constraints by declaring the plausible meanings of those texts. A loophole is thus created by the logical possibility of meaning that lies outside the range of plausibility. I am aware that the concept of plausible meaning is highly contestable, possibly even within the same interpretive community. But to the extent there is any intersubjective agreement within a community on the range of plausible interpretation to be given to a legal text, the authority conception would require lawyers not to take advantage of an interpretation that lies outside the range of plausibility.[122] The following case provides an additional example.

B. *Tax Avoidance for the Wealthy*

> Your law firm has an established practice representing wealthy individuals in financial planning matters. It has recently begun marketing a planning technique to dramatically reduce the income taxes of its clients. The transactions are complicated, but they essentially involve the use of partnerships, trusts, and subchapter S corporations to isolate a sheltering scheme from an individual's tax return. The sheltering mechanism itself uses a variation on an investment hedging technique, the details of which are not relevant to this discussion.[123] The gains and losses are reported through the partnerships, so that it is harder for the IRS to learn about the substance of the transactions merely by auditing individual taxpayer returns.
>
> There are some rules that judges and tax lawyers use in evaluating the legitimacy of these sorts of transactions. First, a device may be disallowed if "it yields a tax result that no sensible legislator would have approved of if the transaction had been called to the legislator's attention when the statute was drafted."[124] Second, courts and the IRS consider whether the

122. See Gordon, Hired Guns, supra note 4, at 48 ("[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.").

123. See The Avoidance Dynamic: A Tale of Tax Planning, Tax Ethics, and Tax Reform, 80 Colum. L. Rev. 1553 (George Cooper ed., 1980). We can use a generic transaction as an example, because law firms, accounting firms, and investment advisors have a seemingly inexhaustible supply of ingenuity for devising sheltering schemes of mind-boggling complexity. See, e.g., David Cay Johnston, I.R.S. Seeking Buyers' Names in Tax Shelters, N.Y. Times, June 20, 2003, at C1 (describing "Cobra" shelter which uses "foreign-currency trades to generate losses").

124. Alan Gunn, The Use and Misuse of Antiabuse Rules: Lessons from the Partnership Antiabuse Regulations, 54 SMU L. Rev. 159, 160 (2001). For further discussion of the economic substance doctrine in taxation, see generally Joseph Bankman, The Economic Substance Doctrine, 74 S. Cal. L. Rev. 5 (2000); David P. Hariton, Sorting Out the Tangle of Economic Substance, 52 Tax Law. 235 (1999); David A. Weisbach, Formalism in the Tax Law, 66 U. Chi. L. Rev. 860 (1999). Anti-abuse rules and the

> transaction is purely tax-motivated. If that were the case, the transaction may be characterized as a "sham," and possibly disallowed by the IRS if challenged.[125] The firm, however, might argue that there is just enough "investment risk" associated with the transaction so that the transaction may not be treated as a sham by the IRS. An associate in the firm's tax department concluded, in a confidential memo, that the taxpayer would have between a 25%–85% probability of prevailing if the issue arose during an audit.[126] Significantly, the audit rate for partnerships is low—approximately 1 in 400—as compared with the audit rate of 1 in 142 for individual income tax returns for taxpayers reporting over $100,000 in income.[127] Thus, even taking the downside risk into account, the transaction is likely to reduce her total tax bill by roughly one-third.

Examples like this one have been discussed regularly in the legal ethics literature, but the responses to it have been somewhat unsatisfactory. For example, Luban says of tax shelters: "Supposedly enacted to channel the flow of money in socially beneficial directions, the laws creating certain tax shelters are in fact used by the wealthy simply to avoid paying taxes. . . . Formally, such tax laws may satisfy the generality requirement; in actuality, they do not."[128] He is right in acknowledging that the rule permitting the transaction is superficially formal but actually of use only to a small number of taxpayers; however, the same can be said of countless statutes. Indeed, every major congressional appropriations bill seems to include some formally general provision that actually ends up being useful only to a company in some member's home district.[129] I am no fan of legislative logrolling and pork-barrel spending, but if a law had to be substantively as well as formally general in order to have authority, then there would be a lot of holes in the statute books. Simon approaches tax sheltering using his contextual factors for assigning interpretive responsibility to the lawyer[130] and observes that the lawyer may reasonably believe that the IRS and the courts will not have an opportu-

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common law economic substance doctrine are devices within the law that enforce an attitude of respect toward the law on the part of lawyers representing clients. In this way, these doctrines backstop the interpretive attitude mandated by the authority conception.

125. See, e.g., Frank Lyon Co. v. United States, 435 U.S. 561, 573–81 (1978) (ruling for taxpayer, but setting out standards that are generally followed in tax sheltering cases); ACM P'ship v. Comm'r, 157 F.3d 231, 248–63 (3d Cir. 1998) (concluding that the transaction had insufficient economic substance to be respected for tax purposes).

126. Cooper, supra note 123, at 1569.

127. See David Cay Johnston, Big Accounting Firm's Tax Plans Help the Wealthy Conceal Income, N.Y. Times, June 20, 2002, at A1.

128. Luban, Lawyers and Justice, supra note 4, at 48.

129. The tax cut proposal presented by President George W. Bush, for example, contains tax breaks that would primarily benefit campaign donors such as Waste Management, Inc. and the Golden Rule Insurance Company. See David E. Rosenbaum, Bush Seeks Tax Cuts He Had Scorned, N.Y. Times, Feb. 9, 2003, at A28.

130. Simon, Practice of Justice, supra note 4, at 138–39.

nity to decide on the legality of the transaction.[131] Thus, Simon would empower the lawyer to effectively nullify the client's entitlement by refusing to assist in setting up the transaction: "If *she thinks* that the device should be held invalid, she should refuse to assist with it."[132] The basis for the lawyer's judgment is her belief that the IRS would disagree with the tax treatment of the transaction and also her estimation of the likelihood that the relevant institutional actors would have an opportunity to decide the question themselves.

The authority conception's focus on law's function as enabling coordinated action is no less important with regard to tax policy, an area of the law equally susceptible to normative disagreement. It is imperative that these questions about justice be settled by law. The complexity of tax regulations and the range of technically accurate, yet clearly advantageous, transactions make extratextual sources even more important. This gives rise to the possibility of exploiting loopholes.[133] One of two things seems likely to be true about the definition of tax loopholes:

> (1) The Internal Revenue Code and the complex apparatus of regulations, revenue rulings, and the like may be no less subject than other statutes to constraints on the range of plausible meanings, supplied by sources such as enactment history, the treatment of parallel provisions in the courts, and principles of statutory interpretation. In that case, there would be little disagreement within the relevant interpretive community about what the provision in question "really" means. Thus, something like the T-bill futures straddle would be an obvious use of the form of a transaction to obtain favorable tax treatment that is not justified by the substance.
>
> (2) Alternatively, the tax code and its associated administrative interpretation may be uniquely *internally* contradictory, in the sense of embodying inconsistent purposes. There may be no "real" meaning to any given provision of the Code, because it is part of a compromise mechanism of regulation that is intended to accomplish several different, and perhaps contradictory, purposes at the same time. If that were the case, there would be no way to avoid begging the question of what constitutes a loophole, because the normative disagreement over what the purpose of the Code section *should* be was never resolved by the statute.

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131. Id. at 142.

132. Id. at 142–43 (emphasis added). I realize the entitlement is not nullified if the client can obtain another lawyer to set up the tax shelter. One response is to return to the hypothetical last lawyer in town. If that lawyer would be morally required to respect the client's entitlement, then I suggest all lawyers would be, whether or not they are the last lawyer in town. See the discussion of the last lawyer in town problem, supra notes 96–100 and accompanying text.

133. Luban, Lawyers and Justice, supra note 4, at 47–48; see also Weisbach, supra note 124, at 872–75 (illustrating how rules, as opposed to standards, create opportunities for tax arbitrage).

I suspect that in some of the more blatant sheltering cases, the first alternative accurately describes the relevant community's understanding of the meaning of the applicable Code provisions, but it would not surprise me to learn there are cases that fall within the second description as well. In any event, telling tax lawyers that they must "observe high ethics principles, not minimal legal standards"[134] simply begs the question. Observing high ethical principles depends on lawyers having access to a conception of ethics that locates a line between loophole-exploitation and legitimate planning that takes account of tax consequences. For a dominant-view lawyer, high ethical principles would actually require loophole lawyering, because the dominant view directs lawyers to increase the autonomy of their clients and treats legal penalties as nothing more than a cost to be included in the client's cost-benefit calculations.[135] Academic critics of the dominant view would ultimately urge the lawyer to use her own conscience to establish the line between permissible tax planning and unethical loophole-lawyering. The authority conception, by contrast, calls upon lawyers to give effect to the settlement of the normative controversy that the tax laws represent.

The authority conception recognizes that within the range of plausible meanings of a statutory provision, the interpretive attitude taken by lawyers and judges toward statutes and common law decisions can have a great deal of beneficial or harmful effect on the capacity of those legal texts to enable collective social action. My claim is that the constraint, stability, and certainty that are virtues of a legal system do not reside exclusively within texts, but also are a property of the interpretive community of lawyers, judges, and academic commentators who apply legal texts in light of traditional canons of statutory interpretation, principles of common law reasoning (such as the faculty of discriminating between legitimate and spurious arguments from analogy), and other rhetorical and hermeneutic techniques that are distinctive properties of legal reasoning.[136] This is a kind of "wide" positivism, in contrast with a narrow or formalistic positivism that some philosophers favor,[137] but it is emphatically not a natural law theory of interpretation, which would simply return us to the territory of normative disputes from which the law promises an escape.[138]

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134. Michael Bologna, IRS Chief Counsel Calls on Attorneys to Embrace Stricter Ethical Principles, 18 ABA/BNA Law. Manual Prof'l Conduct 727 (2002) (citing comments by IRS Chief Counsel B. John Williams).

135. See Easterbrook & Fischel, supra note 106, at 1156–57.

136. See generally Benjamin N. Cardozo, The Nature of the Judicial Process (1921); Karl N. Llewellyn, The Common Law Tradition (1960).

137. For the contrast between formalism and sophisticated positivism such as Hart's, see Marmor, supra note 84, at 127–28.

138. In W.J. Waluchow's terms, it is "exclusive" positivism rather than "inclusive" positivism, a position he associates with Joseph Raz. See W.J. Waluchow, Inclusive Legal Positivism 82–84 (1994); cf. Raz, Authority, supra note 6, at 39–40 (setting out the strong

But this move simply invites the further objection that reasonable lawyers can also disagree about the interpretive attitude one ought to take toward the law. One principle might be that it is wrong to exploit loopholes, where a loophole is defined as a reading of the literal text of the statute in a way that is contrary to its obvious purpose. This position is close to Simon's and that of other critics of the dominant view. Of course, another lawyer might argue that one person's loophole is just another person's clever or aggressive legal position, and if Congress had intended to prevent the activity in question, it would have drafted the text with greater specificity. This is the attitude toward statutory interpretation adopted by dominant-view lawyers. In order to settle this interpretive question, it seems that some kind of meta-statute is needed, specifying how statutes should be interpreted, but of course even a meta-statute would be subject to disagreement at some level of interpretation. There is no way out of this never-ending series of interpretive problems, as long as principles of interpretation are given only by texts enacted by legislatures or courts.[139]

As a result, judges' and lawyers' interpretive attitudes are a critical extra-legal variable in the effectiveness of the law in resolving disagreement and providing a focal point for collective action. If interpretive attitudes are something else that we can all disagree about in good faith, there would be no alternative other than to submit this issue also to the democratic process, with the result that yet another legal text would stand in need of interpretation, creating an infinite regress of interpretive problems. I think it is possible—indeed, must be possible—to derive principles of interpretation from the authority conception of legal ethics itself, without feeding the issue back into the mechanism of disagreement resolution through the democratic process. In other words, these arguments stand apart from the circumstances of politics, or are conditions for the possibility of using politics to move beyond disagreement.[140] If the reason we respect legal rules and treat them as authoritative directives is that they provide a basis for collective social action in the face of disagreement, lawyers can be criticized in second-order moral terms for attempting to recreate the impasse that preceded the enactment of the legal rule. As Waldron puts it, "[w]hen something is enacted as law . . . it makes on us a demand not to immediately disparage it, or think of ways of nullifying it or getting around it, or mobilizing the immune system of the *corpus juris* so as to resist its incorporation."[141] There is accordingly a

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"social thesis" that law should be "capable of being described in value-neutral terms . . . without resort to moral argument").

139. Alexander & Sherwin, supra note 5, at 20.

140. Compare Popper's paradox of democracy, which argues that the concept of democracy is a presupposition of the process of democracy, and is not dependent upon the democratic process for its justification. 1 Karl R. Popper, The Open Society and Its Enemies 124–25 (5th ed. 1966).

141. Waldron, Disagreement, supra note 5, at 100.

moral demand placed on officials—anyone who has the ability to influence the distribution of legal entitlements—to interpret the law in such a way that enhances its finality, stability, and capacity for enabling coordinated action.[142] Again, this is not to preclude overt challenges to existing law, but rather to ensure that the interpretation of legal texts respects the existing social settlement unless it is changed through certain channels, such as legislation, administrative rulemaking, or the evolution of the common law.

This demand does not necessarily issue in a particular methodology of statutory interpretation. But the authority conception of legal ethics does help us define techniques of statutory interpretation negatively. For example, a sensible approach would not be to proliferate the standards that a lawyer can use in interpreting legal texts, trusting a faculty of discretion or contextual judgment to provide stability.[143]

Simon's approach is to create a sliding scale, so that "the clearer and less problematic the relevant [statutory] purposes, the more the lawyer should consider herself bound by them."[144] In this formulation, both "problematic" and "clear" require further definition, and Simon's glosses themselves require explication. For example, "[p]roblematic purposes . . . pose an especially grave threat to fundamental legal values."[145] Even a passing familiarity with the Supreme Court's substantive due process jurisprudence should make one skeptical of the determinacy of the term "fundamental legal values." Indeed, Simon encourages this skepticism by citing, as an example of a problematic purpose, "transferring wealth to or conferring economic power on powerful interest groups."[146] One does not have to be a committed public choice theorist to believe that much legislation is exactly that—a transfer of power or wealth to an interest group.[147] Simon's discretionary approach therefore threatens the capacity of the statutory directive to promote coordinated action.

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142. See Alexander & Schauer, Defending, supra note 63, at 457 ("Where the meaning of a legal settlement . . . is itself controverted, it is a central moral function of judicial interpretation to settle the meaning of that (attempted) settlement."). Alexander and Schauer make this moral argument because legal arguments cannot settle the question of who should have interpretive authority. "On the Constitution we do have, the question of who should interpret it, and the status others should grant to those interpretations, remains stunningly open." Id. at 462.

143. Compare Simon, supra note 42, at 1090–91 (proposing interpretive methodology for lawyers that is pragmatic, ad hoc, contextual, noncategorical, and discretionary).

144. Id. at 1103.

145. Id. at 1104 (internal quotation marks omitted).

146. Id.

147. To take only one example, the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998), extending copyright terms by twenty years, obviously transfers wealth to existing copyright holders such as the Walt Disney Corporation, who had lobbied for its passage, but the Supreme Court nevertheless held that the Act was a constitutional exercise of congressional power. See Eldred v. Ashcroft, 537 U.S. 186, 199–208 (2003).

C. *Disclosure to Save a Life*[148]

Spaulding and Zimmerman were involved in a car accident. Spaulding filed a lawsuit against Zimmerman, alleging that Zimmerman was negligent and that this negligence was the cause of Spaulding's injuries. As part of the post-accident litigation, Zimmerman's lawyer required Spaulding to submit to an independent medical examination (IME) in order to verify the extent of his injuries. This doctor diagnosed an aortic aneurysm—a dilation and weakening of a major blood vessel, which might rupture if not repaired surgically.

Zimmerman's lawyer immediately realized the significance of this information. Spaulding's own doctors had missed the diagnosis of the aneurysm, and the plaintiff's lawyer was therefore preparing the case for trial or settlement on the assumption that his damages were relatively modest. Disclosing the aneurysm would eliminate the lurking risk of Spaulding's death, but would drive up Zimmerman's damages, perhaps over the limits of his liability insurance policy. The defendant may be ruined financially. Settlement negotiations have begun, and Zimmerman's lawyer wonders whether he should disclose the aneurysm to Spaulding. Under the applicable disciplinary rule, Zimmerman's lawyer would be subject to discipline if he revealed the information about the aneurysm without Zimmerman's permission.[149] To make the problem difficult, assume that Zimmerman is a mean-spirited and cantankerous person who is completely indifferent to Spaulding's welfare and refuses to consent to the disclosure of the information.[150]

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148. This description is altered somewhat from the facts of Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962), but the dilemma presented in the actual case was substantially the same. For an excellent discussion of this case and the extensive commentary it has generated, see generally Roger C. Cramton & Lori P. Knowles, Professional Secrecy and Its Exceptions: *Spaulding v. Zimmerman* Revisited, 83 Minn. L. Rev. 63 (1998).

149. The 1983 version of the ABA Model Rules would prohibit disclosure unless necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or serious bodily harm." Model Rules of Prof'l Conduct R. 1.6(b)(1) (1983). The facts in *Spaulding* do not satisfy the "criminal act" requirement of the rule permitting disclosure. Many jurisdictions that have adopted disciplinary rules patterned after the Model Rules have varied Rule 1.6, and some would permit disclosure even if the death or serious bodily injury is not the expected result of a client's crime. See, e.g., Regulation of Lawyers: Statutes and Standards 84–85 (Stephen Gillers & Roy D. Simon eds., 2003) (citing Florida and Georgia as states following Model Rules). The 2002 or so-called Ethics 2000 version of the rules removed the requirements that the harm be the result of the client's criminal act; the rule now permits disclosure "to prevent reasonably certain death or substantial bodily harm." See Model Rules, supra note 30, R. 1.6(b)(1). In an "E2K" jurisdiction, Zimmerman's lawyer would be permitted to disclose the information without the client's consent.

150. In fact, Zimmerman was 19 years old at the time of the accident; Spaulding was 20, and riding in Zimmerman's car, so it is fair to infer that they were friends. Cramton & Knowles, supra note 148, at 88. In light of the prevailing norms within the insurance defense practice, Zimmerman probably did not know the extent of Spaulding's injuries.

The *Spaulding* case is the quintessential legal ethics chestnut, but the authority conception provides a different way to think about it. Assuming the event took place in a jurisdiction that legally prohibited disclosure through applicable rules of professional conduct, the question is whether the reasons to respect this rule outweigh first-order moral reasons to prevent the impending harm. This is not a case where the legal directive (here, the professional disciplinary rule) lacks authority, either because it fails to do a better job of coordinating social activity than individuals could do on their own, or because it is the product of a pervasively unjust society in which the lawyer would not find herself in the circumstances of politics. On the contrary, the debate over professional secrecy is a perfect example of the circumstances of politics, in that professional regulators must settle on some rule respecting the lawyer's duty of confidentiality, despite deep and persistent disagreement over what that rule should be.[151] If retail-level conscientious objection were permissible, this course of action would be required here.[152] But the impetus behind the authority conception is to remove lawyers' own moral beliefs as bases for refusing to act according to a legal directive, because an individual lawyer's beliefs are just that—a subjective, partial contribution to a debate, but

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Id. at 93–94. Cramton and Knowles are absolutely correct that the lawyer should engage the client in moral dialogue, and that Zimmerman would probably agree that it was morally required that Spaulding be told of the full extent of his injuries. To keep the hypothetical hard, though, we will assume that Zimmerman, for whatever reason, is not moved by the lawyer's appeal to his moral principles.

151. See Michael Davis, The Moral Authority of a Professional Code, *in* Nomos XXIX: Authority Revisited 302, 316–18 (J. Roland Pennock & John W. Chapman eds., 1987) (arguing that the authority of professional codes of ethics derives from their capacity to settle coordination problems that arise in the course of professional activity). Bill Simon raised the objection in personal communication with the author that the process of adopting disciplinary rules is corrupt, captured by lawyers, and incapable of producing a reasonable resolution of the debate over confidentiality. See William H. Simon, Who Needs the Bar?: Professionalism Without Monopoly, 30 Fla. St. U. L. Rev. 639, 641 (2003) (observing that state bar disciplinary rules are strongly influenced by the lawyers they regulate). To the extent the guild-like quality of the bar's self-regulation prevents the interests of other affected persons—such as the victims of serious crimes or frauds by represented clients—from being taken into account, the bar's norms may lack legitimacy. This argument rests on flaws in the process, however, rather than on the basis of an incorrect balance of the competing values. See infra notes 161–175 and accompanying text (discussing the debate between procedural and substantive criteria of legitimacy).

On the other hand, one might also argue that the process by which the ABA settled on the confidentiality rule is not even procedurally defective. Ted Schneyer, for example, characterizes the debate over confidentiality as relatively democratic. See, e.g., Ted Schneyer, Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct, 14 Law & Soc. Inquiry 677, 678 (1989). It is true that interest groups, such as corporate lawyers, played a prominent role in lobbying for the strict confidentiality rule, but the same can be said about the enactment history of almost any legislation or regulation. It is not surprising that Simon, who favors substantive criteria of legitimacy, would react in a strongly negative way to the debate surrounding the confidentiality rule. His objection proves too much, though, where there is so much room for good-faith disagreement over substantive criteria of legitimacy.

152. See Cramton & Knowles, supra note 148, at 101.

not conclusive of the moral rights and obligations of other citizens. Thus, conscientious objection must be regarded as a serious breach of professional ethics, not an escape valve that may be employed in troublesome cases.

At this point, a critic from the moralism camp may object that surely there is no good-faith disagreement over the value of human life, nor over the proposition that a person should take action to save someone's life if it can be accomplished with little or no risk to the rescuer. Even if everyone agrees with this proposition, however, there is likely to be less agreement over a different specification of the issue in this case: Given that lawyers' practices will sometimes concern activities by clients that are likely to result in death or serious bodily injury to third parties, should lawyers be permitted to disclose information to the extent that it may help prevent those harms? Putting the question this way envisions *Spaulding* as analogous to something like the tobacco litigation, where lawyers used legal procedures to forestall regulations that would undoubtedly save lives.[153] The focus shifts to evaluating the justice of a widely applicable confidentiality rule—a question on which there is likely to be considerable good-faith disagreement.

In the end, I think the lawyer should disclose the information, but I want to make clear that the lawyer is doing so at a moral cost.[154] As suggested, the second-order reasons for respecting the legal rule here still have force, but the lawyer is also faced with first-order considerations which have such a great weight that they override the second-order reasons in terms of deliberative priority.[155] In that case, the lawyer should disobey the law and disclose, but because of the second-order moral reasons that are still in force, the lawyer must be prepared to accept *justified* (that is, legitimate) legal punishment for disobedience.[156] Most of the

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153. See Bruce A. Green, Thoughts About Corporate Lawyers After Reading *The Cigarette Papers*: Has the "Wise Counselor" Given Way to the "Hired Gun"?, 51 DePaul L. Rev. 407, 416–18 (2001) (discussing defense strategy used to prevent discovery of unfavorable scientific research); Robert L. Rabin, A Sociolegal History of the Tobacco Tort Litigation, 44 Stan. L. Rev. 853, 858–60, 868–69 (1992) (explaining how structural advantages enabled defense counsel to mount "stonewall" defense).

154. Moral costs are "features of one's action and its consequences touching on important concerns, interests, and needs of others that, in the absence of special justification, would provide substantial if not conclusive moral reasons against performing it." Postema, supra note 4, at 69. See also Bernard Williams, Politics and Moral Character, *in* Moral Luck 54, 58 (1981) (stating that moral costs attach to "acts, done in pursuit of worthy political ends, which 'honourable and scrupulous people might, *prima facie* at least, be disinclined to do'").

155. For the distinction between deliberative "oughts" and retrospective non-action-guiding moral evaluations, see Christopher W. Gowans, Innocence Lost: An Examination of Inescapable Moral Wrongdoing 66–80, 88–90 (1994).

156. Willingness to accept the legal consequences of one's act is generally regarded as a condition of justified civil disobedience. See, e.g., Rawls, Theory, supra note 103, at 366; Martin Luther King, Jr., Letter from Birmingham City Jail, *in* Civil Disobedience in Focus 68, 74 (Hugo Adam Bedau ed., 1991) ("One who breaks an unjust law must do it *openly, lovingly* . . . and with a willingness to accept the penalty."). The reason is that civil

time second-order reasons preclude reweighting all the reasons for action, including the reasons for regarding the law as authoritative, but in some exceptional cases, first-order considerations do come to the fore. These situations are unusual, and even in the extraordinary circumstances of a case like *Spaulding* the lawyer has an obligation of fidelity to the law that would be violated by an act of covert nullification or conscientious objection. This obligation is the basis for justified punishment of the lawyer, who would be engaging in civil disobedience by disclosing.

IV. Some Objections and Responses

We may grant that the law is a useful institution for enabling coordinated social action but nevertheless doubt that agents should abandon the process of engaging in first-order moral reasoning merely because there is a legal rule prescribing some action. No matter how much we may approve of the law, it seems like a drastic step to abandon the authority to think through a practical dilemma because of moral reasons. As I have emphasized, the authority conception does not require a comprehensive surrender of moral agency by lawyers; instead, it expects deference to law in situations where lawyers are acting as representatives of clients. Several objections to this conception, however, remain. The first is that the lawmaking process is so corrupt that trust in it as a means of resolving moral conflict is misplaced. The second is that there seems to be no "safety valve" for cases in which the law would command grave injustice. The third might be that I am overstating the preclusive effect of the role of lawyer on first-order moral reasoning, and in fact the role properly understood requires reference to ordinary moral values. Finally, one might object that the second-order reasons for respecting the law are insufficient, because the law does not enable coordinated action. I will consider these objections in turn.

A. *The Democratic Process Is Rotten*

Many people react strongly to the idea that one should look to the results of a chaotic, perhaps even corrupt, democratic process for moral guidance. As legal ethicist Tom Shaffer said in a different context, at a presentation to the professional responsibility section at the Association of American Law Schools annual meeting, "I don't get my morals from the law." He's right about that—no one should get his or her morals from the law; morality must be understood as existing independent of the law, as a standpoint from which individuals can criticize legal rules. Moreover, the lawmaking process might not consider ethical reasons as

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disobedience "expresses disobedience to law within the limits of fidelity to law." Rawls, Theory, supra note 103, at 366. By accepting punishment, the person engaged in civil disobedience not only gives public assurances of her sincerity, but also complies with the still-existing second-order moral reasons to respect the law, which do not evaporate in the presence of an overwhelming first-order reason justifying disobedience.

well as an individual moral agent considering the same situation. In that case, the resulting legal directives would not have authority if their claim to authority were based on those directives being wiser than an individual agent's decisions. But consider the difficulty of coordinating action and accomplishing anything useful against a background of persistent normative disagreement. In a society of people, none of whom get their morals from the law, nothing is going to get done that potentially interferes with someone's rights, unless we can secure the agreement of the rightholder. Agreement would ordinarily be the result of respectful, conscientious deliberation and persuasion,[157] but if ethical pluralists such as Isaiah Berlin are correct, reasonable people may nevertheless continue to disagree about what rights and duties we all should have.[158] From the point of view of a nation of Tom Shaffers, none of whom get their morals from the law, what is to be done?

To the extent that these individuals think there are important public matters for which we need to settle on *some* solution, they are in what Waldron calls the "circumstances of politics"; they are in "an arena in which the members of some group debate and find ways of reaching decisions on various issues in spite of the fact that they disagree about the values and principles that the merits of those issues engage."[159]

Maybe a person feels no need to make common cause with those with whom he disagrees. In that case, he is always free to opt out of coordinated action with those persons entirely. But it is not fair for someone to bounce back and forth from the circumstances of politics to a situation in which the individual can treat his beliefs as conclusive of the debate. If there is need for concerted action together with those with whom we disagree, then there is a sufficient reason to submit the disagreement to a political process that treats each person's views as respectfully as possible, but only provisionally, as one point of view in the debate. That reason further justifies treating the resulting directive as authoritative over the subject matter of the debate, even if that directive requires something that is contrary to the individual's moral belief. This is not getting one's

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157. Amy Gutmann & Dennis Thompson, Democracy and Disagreement 55–94 (1996) (arguing for a "deliberative" conception of democracy in which citizens who make moral claims offer reasons that can be shared by similarly motivated citizens and in which dialogue is conducted under conditions of accommodation and mutual respect).

158. I think the persistence of normative disagreement can be explained by ethical pluralism, as opposed to any failure of moral reasoning to deliver objective truths. Cf. Waldron, Disagreement, supra note 5, at 164–87 (trying hard not to sound like a skeptic, but conceding a great deal to epistemological skepticism in ethics). One can be an "objective pluralist," believing that there are moral truths that we can know, yet still accepting that there may be many different and irreducible models of human excellence that are incompatible in a single life or culture. See, e.g., Isaiah Berlin, The Crooked Timber of Humanity 11–12 (1990); John Gray, Isaiah Berlin 45–46, 54 (1996) (summarizing Berlin's position); see also Larmore, supra note 80, at 28 ("[T]wo moral principles might both be 'objective' . . . and yet we might not have a way of rationally settling conflicts that arise between the directives they yield in particular circumstances.").

159. Waldron, Disagreement, supra note 5, at 159–60.

morals from the law; it is submitting one's morals to the democratic process, in light of the pluralism of our society. Even that extent of deference to the law strikes many as a betrayal of their moral agency. I have a great deal of respect for people who conscientiously consider themselves as outsiders in our culture, but it must be remembered that they are permanent outsiders[160] and cannot complain that they do not benefit from coordinated social action with the insiders.

The superior capacity of the law for coordinating social action persists even though no one really believes that legal norms are necessarily the result of reasoned deliberation but instead reflect "deal-making, log-rolling, interest-pandering, pork-barrelling, horse-trading, and Arrovian cycling."[161] The public choice critique of legislation shows that a statute is not a coherent aggregation of preferences, and indeed cannot be, because of structural features of the legislative process itself; instead, the legislative process should be understood as a scramble for advantage by self-interested factions and interest groups.[162] Critics of the process of regulation by administrative agencies observe that agencies are often "captured" by regulated industries and fail to act in the public interest.[163] And when it comes to common law decisions, few objections are more familiar than the exaggerated claim (incorrectly attributed to the legal realists and some in the critical legal studies movement) that judicial opinions are the product of nothing more than what the judge had for breakfast that morning.[164]

Rather than trying to respond to this objection by showing that the regulatory, legislative, and common law decisionmaking processes are not

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160. This is a theme of the writing of theological ethicist Stanley Hauerwas. See, e.g., Stanley Hauerwas, Dispatches from the Front: Theological Engagements with the Secular *passim* (1994).

161. Waldron, Disagreement, supra note 5, at 30.

162. Jerry L. Mashaw, Greed, Chaos, and Governance: Using Public Choice to Improve Public Law 81–105 (1997); Frank H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 547 (1983); Richard Davies Parker, The Past of Constitutional Theory—And Its Future, 42 Ohio St. L.J. 223, 240–46 (1981); Robert D. Tollison, Public Choice and Legislation, 74 Va. L. Rev. 339, 341 (1988).

163. See, e.g., Mashaw, supra note 162, at 118–19, 140–42; Michael E. Levine & Jennifer L. Forrence, Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis, 6 J.L. Econ. & Org. 167, 169 (1990); Thomas W. Merrill, Capture Theory and the Courts: 1967–1983, 72 Chi.-Kent L. Rev. 1039, 1043 (1997); David B. Spence & Frank Cross, A Public Choice Case for the Administrative State, 89 Geo. L.J. 97, 114 (2000).

164. See Charles M. Yablon, Justifying the Judge's Hunch: An Essay on Discretion, 41 Hastings L.J. 231 (1990) (arguing that realists were correct in emphasizing non-rule-based considerations in the use of discretion and positing that the problem is not the use of discretion itself but distinguishing between proper and improper uses of discretion). In any event, the realists never maintained that judicial decisions were the result of completely idiosyncratic factors such as what the judge had for breakfast. For a nuanced analysis, see, e.g., Morton J. Horwitz, The Transformation of American Law, 1780–1860 (1977) (tracing effect on the common law of capture of the system of adjudication by mercantile and industrial interests); Duncan Kennedy, A Critique of Adjudication: *Fin de Siècle* (1997).

as bad as its critics make it sound, I propose to avoid the critique entirely by defending the legitimacy of legal directives in rather thin procedural terms.[165] Of course, one could offer a theory of legitimacy that depends upon the substantive fairness of the procedure by which a decision was reached.[166] The problem with this move, however, is that procedural criteria such as fairness and representativeness are contestable as well, and some may even shade into substantive criteria of justice. Who should have the franchise? Should representation in the legislature be allocated on a "first-past-the-post" or proportional basis? Should wealthy individuals and corporations be permitted to donate unlimited sums to political candidates? Should race be a permissible consideration in the drawing of legislative districts? These are all questions that must be answered on the basis of reasons upon which all affected citizens can be expected to agree.[167] Since we do not agree at the level of abstraction that is necessary to resolve these disagreements, we would be locked in the same normative debate over the specification of fair procedures as we would over the substantive moral and political questions that the procedures are designed to resolve.

In order to secure a framework for cooperation given disagreement on the criteria of fairness that might be employed, it is necessary to "thin out" the set of values upon which we must agree as the basis for designing a procedure. The argumentative strategy of moving to a thinner and less contestable domain of values underlies the well-known Rawlsian veil of ignorance, which abstracts away certain characteristics from hypothetical members of a political community who must choose principles of justice to govern their relationships in society.[168] Behind the veil of ignorance are Rawlsian public reasons, which we are all supposed to share, even in a pluralistic society in which there is considerable disagreement over comprehensive doctrines.[169] The principles defended by Rawls have proven to be just as contestable as the comprehensive views of the good that

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165. See, e.g., Stuart Hampshire, Innocence and Experience 72–78 (1989) (arguing that the need for a peaceful and coherent society entails a basic minimum procedural conception of justice).

166. See, e.g., Arthur Isak Applbaum, Law in a Bastard Kingdom (March 27, 2003) (unpublished manuscript, on file with the *Columbia Law Review*).

167. These are criticisms raised against Waldron's theory of authority by Judge Posner in an otherwise quite positive, if unimaginatively titled, review. See Richard A. Posner, Review of Jeremy Waldron, *Law and Disagreement*, 100 Colum. L. Rev. 582, 590 (2000) (book review) (noting that Waldron does not offer a theory that explains what rules and institutions are needed to render the legislative product democratic).

168. Rawls, Theory, supra note 103, at 136–42.

169. "Comprehensive doctrine" is Rawls's term for a religious, moral, or philosophical doctrine that "includes conceptions of what is of value in human life, as well as ideals of personal virtue and character." Rawls, Liberalism, supra note 80, at 13, 174–76. Rawls believes that everyone can agree on the difference principle and the priority of basic liberties; these are justifiable based on what Rawls calls "public reasons" that can be shared by all in a pluralistic society. Id. at 212–40 (discussing public reasons, defined as reasons all citizens may be expected to endorse in light of values they accept as rational).

Rawls identified as the source of social disagreement, so a procedural theory of legitimacy must thin out the set of values even further in order to secure broad agreement.

At some point, if the set of propositions upon which we are seeking agreement is thin enough, one would have to be truly irrational, in the sense of being barking mad, to disagree. The thinnest set of propositions upon which we could seek agreement are mathematical and logical truths—the principle of non-contradiction, 2 + 2 = 4, and so on. But if we thin out the set of reasons to the point that everyone can be expected to share them, they become too thin to actually ground a decision concerning how political institutions ought to be structured.[170] If all we can agree upon is that 2 + 2 = 4, we're not going to get very far in political deliberations. Accordingly, I do not propose to defend our existing political process on a priori truths, but rather on rational acceptance of democracy in the sense that it makes sense for someone to choose it.[171] Notice, too, that it is impossible to submit a disagreement about the design of the democratic process to the dispute-resolution procedures specified by the political system without creating an infinite regress. If affected citizens disagree about the legitimacy of a result produced by a democratic procedure that permits massive "soft money" donations or makes it difficult for third parties to organize, then it is no answer to say that the issue of the legitimacy of those constitutive rules should be submitted to a democratic decision. It is exactly the *way* in which those decisions are made that is the subject of the controversy.

The only basis on which to defend the democratic process without begging all the important questions is on the somewhat pragmatic basis that the process is fair enough at treating opposing views with respect, not suppressing dissent, not being too quick to assume that someone is acting in bad faith or out of pure self interest, and not seeking to "paper over" differences.[172] An empirical question remains whether politics is simply "an unholy scramble for personal advantage" or whether it is better described as "a noisy scenario in which men and women of high spirit argue passionately and vociferously about what rights we have, what justice requires, and what the common good amounts to, motivated in their disagreement not by what's in it for them but by a desire to get it right."[173] Further empirical questions occur at the level of the application of these more abstract standards. For example, even in a legislature characterized by mutual respect and civility, it will occasionally be necessary for a major-

170. See Thomas Nagel, Rawls on Justice, *in* Reading Rawls 1, 7–9 (Norman Daniels ed., 1975).

171. For rationality in this sense, see Allan Gibbard, Wise Choices, Apt Feelings: A Theory of Normative Judgment 49 (1990). Gibbard defines rationality as "what it 'makes sense' to do, to think, and to feel about things." Id.

172. Cf. Waldron, Disagreement, supra note 5, at 304 (noting that participatory democracy takes as a precondition that people act on principle and in good faith).

173. Id. at 304–05.

ity to impose its preferred resolution of a matter on the minority, and it is entitled to do so simply because it is the majority (subject of course to limitations in the Bill of Rights and requirements of procedural due process). If a piece of legislation could be judged illegitimate because the debate and amendment procedures were not maximally respectful of competing points of view, then legislation would not be able to perform its function of enabling coordinated social action in the face of disagreement. Building substantive criteria into a theory of legitimacy invites stasis as we argue endlessly over the fairness of lawmaking procedures.

I do not propose to resolve this matter here, but I would like to suggest that the procedural criteria for legitimacy need only be satisfied, not optimized.[174] The process need not satisfy conditions of "an ideally conducted discussion"[175] in order to be legitimate. Rather, a political order that does *well enough* at permitting affected individuals to influence political decisions that will be binding upon them is legitimate. The Jim Crow regime in the southern states from the period following Reconstruction through the civil rights movement did not satisfy these minimal standards of treating dissenting views with respect and not suppressing disagreement, at least with respect to issues that affected African Americans. It does not follow from this defect of legitimacy, however, that every respect in which the current system falls short of an ideal renders the directives that are its product illegitimate. Moving from satisficing to optimizing criteria of legitimacy would undermine the function of law in securing coordination in the face of disagreement, because there would always be a dispute about whether political procedures were ideally fair. By focusing on whether procedures are fair enough, it is possible to secure agreement over a wider range of cases, which is the law's end.

Finally, in cases in which it is not essential to secure agreement on a contested normative point in order to facilitate coordination, it may be possible to criticize the actions of political actors in moral terms. Indeed, it may be a mistake to think of "politics" in the broad sense as uniquely the province of laywers, although of course lawyers can work for political change.[176] The authority conception applies only to lawyers acting in

174. See generally Michael Byron, Satisficing and Optimality, 109 Ethics 67, 67, 75–76 (1998) (distinguishing between optimizing conceptions of rationality that implement the best means to an end and satisficing conceptions of rationality that implement merely satisfactory means to an end); David Schmidtz, Rationality Within Reason, 89 J. Phil. 445, 446–48 (1992) (same).

175. Rawls, Theory, supra note 103, at 358.

176. See generally Mark Tushnet, Taking the Constitution Away from the Courts 177–94 (1999). Indeed, the authority conception might actually stimulate activity in the political realm, as progressives rely less on litigation to accomplish beneficial social change, understanding that lawyers have an obligation to respect the existing legal settlement. Thanks to Dan Hulsebosch for making this point at the St. Louis University faculty workshop.

their representative capacity on behalf of clients.[177] Nothing in the argument for the authority of law has any direct bearing on the evaluation of lobbyists, donors to political campaigns, and legislators. There may be reasons why certain kinds of lobbying activities, or certain substantive legislative proposals, should be subject to criticism. A participant in the political process may be *aiming at* establishing a settled law, but that does not mean that her actions are not appropriately the object of moral evaluation in the way that acting pursuant to a settled law would be. Achieving agreement on a thin set of reasons for action is the basis for the authority of law, because all affected citizens share the desire for action in the face of disagreement. Once the law is settled, officials and lawyers who apply the law are bound not to reintroduce the moral disagreement that characterized the pre-law situation. But there are better and worse settlements, and the law's authority does not rule out criticism of actors in the pre-law world for trying to achieve a worse settlement than other available options. Similarly, the reasons for treating the law as authoritative while *acting* under law do not preempt moral criticism of the law. The authority conception emphatically does not entail a view of law as apolitical, neutral, logical, deductive, quasi-scientific or mathematic, inexorable, natural, inevitable, or self-contained.[178] The law undeniably adopts a normative position and is the product of value-laden reasoning. The significance of the authority conception is only that those underlying values must be preempted in the reasoning of actors seeking to ascertain what is legally required of them; it does not preclude the evaluation of law in first-order moral terms.

B. *Blind Obedience Is Morally Obtuse*

Another troubling aspect of a strong conception of authority is how little room it leaves for conscientious objection, defined as the morally motivated refusal of a person to obey a law on the basis that it would involve moral wrongdoing.[179] The case for conscientious objection is

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177. This stipulation places a great deal of pressure on the definition of "practicing law on behalf of a client," which has proven to be a surprisingly elusive notion to pin down. An American Bar Association task force charged with defining the practice of law has essentially said that practicing law is whatever lawyers do. See ABA Task Force on the Model Definition of the Practice of Law 4 (2002), available at http://www.abanet.org/cpr/model-def/taskforce_rpt_803.pdf (on file with the *Columbia Law Review*) ("The Task Force determined that the application of legal principles and judgment to the circumstances or objectives of another person or entity is implicit in the giving of legal advice and thus used that expanded notion as the broad basic premise for creating a definition of the practice of law."). The ethical principles derived from the authority conception apply over a narrower scope of activity than what would be deemed the practice of law by the ABA Task Force. Thus, a lawyer-lobbyist may be practicing law but not bound to respect existing law if she is openly lobbying for a legislative change in existing law. The distinction that is important here is between acting under law and seeking to change the law from outside.

178. Cf. Horwitz, supra note 164, at 254–59.

179. For this definition, see Raz, Authority, supra note 6, at 263–64; see also Rawls, Theory, supra note 103, at 368–69 (defining conscientious objection as refusal to allow

generally grounded in the right of individuals to act autonomously and be faithful to their moral commitments. In the realm of politics, however, one's moral projects must yield to a collective decision about how the society as a whole is to proceed. Given the diversity of reasonable moral points of view, it is inevitable that any collective social decision will strike some citizens as at least wrongheaded, but possibly even unjust. How should the law treat an individual's belief that an action required or permitted by law is in fact immoral? If the basis for the authority of law is that it enables collective social action in the face of disagreement, the answer has to be that individual objections are irrelevant. Dissensus is, after all, what produces the "circumstances of politics." If people agreed on the correct resolution of moral debates, there would be no need for law. Thus, citizens cannot use first-order moral reasons to justify piecemeal conscientious objection. To the extent the law succeeds in providing a basis for collective social action in the face of disagreement, it has legitimate authority, and individuals have a conclusive second-order reason to follow the legal directive.

This position invites objections that appeal to the substantive injustice of some laws.[180] What if the legislature voted, using fair and representative procedures, to ban African Americans from places of public accommodation? Or to require American citizens of Arab descent to live in internment camps? What about laws restricting picketing at abortion clinics? Or laws requiring doctors to advise patients about alternatives to obtaining an abortion? It is certainly true that appalling injustices such as slavery, segregation, and the forced relocation of Japanese American citizens have been legal,[181] and no doubt with the perspective of time and distance we will come to recognize some existing laws as immoral. If an injustice is sufficiently egregious, morality demands conscientious objection. Against the argument that the authority of law runs out in cases of egregious injustice, Waldron refuses to concede any role for retail conscientious objection. From the political perspective, the authority of law cannot turn on whether a particular law is just, as that forms the sub-

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direct legal injunction due to personal "principles at variance with the constitutional order"). Not only is the conventional wisdom in political philosophy that individuals must have a right to conscientious objection, but the mainstream view in legal theory is that nonjudicial officials must also be free to act on the basis of their own views of what the Constitution requires. Alexander & Schauer, Extrajudicial Interpretation, supra note 5, at 1360.

180. Alexander and Schauer face this objection squarely, with the question from an imagined interlocutor: "What about *Dred Scott*?" Alexander & Schauer, Extrajudicial Interpretation, supra note 5, at 1382.

181. Robert Cover has written powerfully about the tension felt by antislavery judges in deciding cases under the Fugitive Slave Act. Those tensions forced judges to evaluate whether the benefits from fidelity to the formal legal system outweighed moral values served by antislavery. See Robert M. Cover, Justice Accused: Antislavery and the Judicial Process 197 (1975).

stance of the original disagreement.[182] The only option for conscientious objection is at the wholesale level, when a citizen no longer perceives the need to enter into a cooperative society with others. In a slaveholding society, an individual may feel no need to share a political community with the majority, and will therefore not regard the law as legitimate. But in this instance, the individual regards the entire society as comprehensively unjust and has no desire to coordinate any part of her activities with others in that society. Short of something so dramatic as the desire to opt out of one's political community entirely, however, retail-level conscientious objection is not justified.

I think Waldron's response is too strong, but it is seductive. Any attempt to ground conscientious objection in the substantive injustice of a law will inevitably meet the response, "But don't you see—people disagree with you on the substantive merits of that issue, and if you hope to do anything at all, you must submit that disagreement to a process of resolution through the law and accept the results." On close, highly contested normative issues, Waldron is surely correct that substantive injustice alone is no reason to abandon the project of reaching provisional social agreement on some course of action. Committed pro-choice and pro-life activists may be dissatisfied with the current regime of abortion regulation and both may regard it as morally wrong. Whatever they think, it is clear that as a society we must do something about abortion. The law must either permit it or not, or make its availability subject to certain restrictions or not. There is no way to settle on the appropriate social response simply by considering the arguments of advocates on both sides.[183] We have had these moral arguments about abortion for decades and they appear no closer to resolution. On other issues, there is less room for good-faith disagreement. Surely when presented with a law authorizing slavery or segregation, Waldron would not just say, "Well, your view is that it is evil, but there are others who disagree with you, so we cannot judge the legitimacy of the law on the basis of its morality." The law would be unjust, full stop.

One reason not to look to substantive criteria of legitimacy in cases like this is the fear of a slippery slope. If a law enacting slavery were deemed illegitimate because it was unjust, then what would be the response to a law permitting abortions? There are plenty of American citizens who believe that abortion is an evil on a par with slavery. There are also probably equal numbers of citizens who believe *banning* abortion would be a great moral evil, and some might compare the situation of women who lacked full reproductive freedom with slavery. If a conception of authority permitted a citizen to opt out on a retail level where the egregious injustice of slavery was involved, then people on both sides of

182. Waldron, Disagreement, supra note 5, at 207. See also Alexander & Schauer, Defending, supra note 63, at 457 (positing that nature of legal settlements requires even those who may disagree morally to adhere to the settlement).

183. Waldron, Disagreement, supra note 5, at 12.

the abortion debate would seek to appeal to the "egregious injustice" exception, and the result would be a return to the quagmire of disagreement that the law is supposed to avoid.

There is another difference between the slavery and abortion examples, however, and that is the *procedural* fairness underlying the legal system. The views of both pro-life and pro-choice voters have been adequately represented in the political process. Their contributions to the debate have been a feature of the legislative and litigation battles that have resulted in the existing laws respecting abortion. Whether we regard the laws as an imperfect compromise or as legalized injustice, they are not the product of the systematic exclusion of one point of view from the public forum. By contrast, the legal process in the slaveholding and Jim Crow South was patently unfair with respect to the views of affected African Americans. One might justify the right to conscientious objection to the laws of a racist regime on this procedural basis, not on the grounds of the substantive injustice of the laws.

My own view is that Waldron and Raz need not accept a view of second-order reasons for obeying the law as *exclusionary*, but could instead regard them as quite weighty, but nevertheless overridable reasons.[184] (The discussion of the *Spaulding* case[185] illustrates how second-order reasons can be outweighed in extreme cases.) The important thing here is to ensure that these reasons are overridable only in extraordinary circumstances and that the law is still regarded as authoritative over the vast majority of normative disputes that arise for us. Just as moral philosophy excessively fixates on highly aberrational hypotheticals, such as being stuck in a lifeboat with another person and only enough water for one, legal philosophy can preoccupy itself too much with *Dred Scott*, *Plessy*, and *Korematsu*: "To design a system of authority around *Dred Scott* (or Nuremberg), rather than around the views of contemporary politicians about abortion or school prayer, is to make a decision-theoretic choice that is far from obvious."[186] We can take care of the possibility of another *Dred Scott* by specifying the obligation to act on second-order reasons as contingent on the law not commanding a catastrophic moral evil. On the other hand, if the principle at stake is something about which reasonable people can disagree, then first-order moral reasons cannot override the obli-

184. See Kadish & Kadish, supra note 25, at 27–29 (differentiating between infinite and finite "surcharges" on role reasons that must be overridden in order for a role obligation no longer to be in effect); Joel Feinberg, Rawls and Intuitionism, *in* Reading Rawls 108, 122–24 (Norman Daniels ed., 1975) (suggesting normal duty to uphold legal institutions can be trumped where following such duty would lead to gross perversion of natural justice); Michael S. Moore, Authority, Law, and Razian Reasons, 62 S. Cal. L. Rev. 827, 854–59, 894–96 (1989) (pointing out several ambiguities in Raz's use of exclusionary reasons and arguing that the law creates only new first-order reasons of great weight, not exclusionary reasons).

185. See supra notes 148–150 and accompanying text.

186. Alexander & Schauer, Extrajudicial Interpretation, supra note 5, at 1383.

gation to respect the law, no matter how strongly we feel that we are correct about the resolution of the moral issue.[187]

Of course there are many political issues on which partisans believe the law sanctions a catastrophic moral horror, including abortion, school prayer, assisted suicide, the death penalty, and same-sex marriage. It is also the case that most "reasonable" people at one time thought slavery was perfectly acceptable. These concessions leave us with several alternative responses, in decreasing order of respect for the law:

> (1) Take the position that all disagreements about rights are questions about which reasonable minds could differ and recognize as authoritative any political solution to the problem. Where an individual has a morally motivated disagreement with the law, she must either obey or opt out of coordinated social action entirely. This is Waldron's position.
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> (2) Assume that *most* disagreements about rights are in good faith and grant authority to law over most normative domains, subject to a limited "moral catastrophe" exception. Most morally motivated disagreement with the law does not justify disobedience, but sufficiently serious moral violations may warrant retail conscientious objection. This is the authority conception.
>
> (3) Maintain that one's own moral beliefs are more likely than not correct and therefore, treat the law as having only prima facie authority, which can easily be overridden. Retail conscientious objection is frequently permissible. This is the standard academic approach to legal ethics, which gives a great deal of discretion to the individual lawyer.

Rather than merely asserting that some result is unjust, and conscientious objection by the lawyer is permissible, it is incumbent upon someone who would permit the lawyer to disrespect the law to address how it is that the lawyer came to object to the result mandated by the legal norm. If the divergence between the action commanded by the lawyer's moral beliefs and the applicable legal norms is the result of good faith disagreement, then the lawyer should not privilege her moral beliefs over the settlement created by the law.

There is something important about the process of descent outlined above; as we cede less and less weight to the law's claims to obedience, we are implicitly expressing an attitude of increasing contempt toward our fellow citizens. If we remove certain disputes from the political process by appealing to moral arguments, this move represents

> a combination of self-assurance and mistrust: self-assurance in the proponent's conviction that what he is putting forward really *is* a matter of fundamental right and that he has captured it

187. Waldron, Disagreement, supra note 5, at 196 ("Once one becomes aware that [one's views about justice] are not shared by everyone in society, one acquires a second-order reason not to act peremptorily—at least not in the name of the whole society—on the basis of one's own estimate of those first-order reasons.").

> adequately in the particular formulation he is propounding; and mistrust, implicit in his view that any alternative conception that might be concocted by elected legislatures next year or in ten years' time is so likely to be wrong-headed or ill-motivated that *his own* formulation is to be elevated immediately beyond the reach of ordinary legislative revision.[188]

There is a mixed positive/normative question lurking here, concerning the extent to which most of our fellow citizens are *in fact* decent people who have reached a conclusion with which we disagree, albeit for understandable reasons. If most of the normative disagreement we experience is in good faith, motivated by sincere attempts to get the issue right, then submitting the disagreement to the political resolution provided by law is the best way to show respect for one's fellow citizens. Because of the fairness and respectfulness of the political process, the authority conception does not make a fetish of settlement or elevate it to a position higher than other moral desiderata.[189] It is not settlement per se that is important, but settlement in a manner that is as respectful as possible of competing viewpoints. To put it another way, Saddam Hussein's solutions to coordination problems do not have the same claim to legitimacy as those arrived at through democratic processes, although the Iraqi legal system under Saddam Hussein undoubtedly solved some coordination problems.

Perhaps it is the case that we inhabit a country full of kooks who should not be trusted with the power of the ballot, but it also may be the case that the people with whom we disagree are sincerely motivated to reach the right decisions on matters of public importance. My own view is that Isaiah Berlin was right—there is a diversity of ways to lead a good life and these competing visions of the good engage a wide variety of human values in different ways. Thus, a great deal of disagreement we face is in good faith. If ethical pluralism is true, then to deny the existence of reasonable disagreement is to impute a lack of responsibility and moral agency to others. Similarly, to permit lawyers to engage in conscientious objection or nullification in cases where their own principled convictions are at odds with those of their client, or the moral principles embodied in legal texts, is to disrespect the views of other citizens with whom lawyers disagree. We can therefore acknowledge the reasonableness of disagreement by setting the threshold very high for a "catastrophic moral horror" exception, so that we only rarely conclude that the decisions of a representative deliberative body lack authority. Only in very unusual cases will this substantial burden be overcome and the law

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188. Id. at 221–22.

189. Charles J. Cooper, Stare Decisis: Precedent and Principle in Constitutional Adjudication, 73 Cornell L. Rev. 401, 402 (1988) (describing stare decisis as supported primarily by convenience); cf. Michael Stokes Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of *Roe* and *Casey*?, 109 Yale L.J. 1535, 1548–49 (2000) (explaining that judicial resolutions of constitutional issues are not inherently constitutional, but are treated as precedent because of policy value in consistent adjudication).

fail in its claim to authority on substantive grounds.[190] The implication of this high threshold is that lawyers may be required to participate in actions by their clients which they regard as morally wrong. The role of the lawyer does not afford its occupants the luxury of innocence in all cases.

It is also important to emphasize that the authority conception deals with lawyers only in their capacity as representatives of clients. Lawyers are still free to lobby for changes in the law, work on political campaigns, write op-ed pieces in the newspaper, and otherwise dissent from existing laws. They may use their experience as representatives of clients as a basis for informing the public about injustices they observe, as long as they do not violate obligations of confidentiality owed to particular clients.[191] And, as the following subsection discusses, the lawyer's role contains some built-in space for the exercise of moral discretion, both in the means chosen to represent clients and in the selection of clients to represent. By incorporating moral discretion by reference into the role, the law governing lawyers ensures that acting as a lawyer does not require blind obedience to existing law.

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190. For the obvious historical example of Nazi lawyers, see Robert Aitken, Hans Frank: Hitler's Lawyer, Litigation, Fall 2002, at 53. I am grateful to Kevin Clermont for this reference. A number of readers have pressed me to spell out in more detail what constitutes a catastrophic moral horror. It should be clear that the answer cannot be "something that *is* seriously morally wrong," because in the domain of politics we disagree about what belongs to that set—abortion, homosexuality, the use of race in government decisionmaking, capital punishment, and assisted suicide are some contemporary examples. It is too strong to rely on consensus, so that something will be deemed a catastrophic moral horror only when everyone, or everyone reasoning in good faith, reaches the same conclusion. Slavery and racial segregation were once widely defended, and with the benefit of hindsight we may be amazed that Americans in the twenty-first century actually condoned *X*. (What "*X*" consists of is obviously contested. A friend of mine thinks that we will look back in revulsion on the practice of eating non-human animals.) Surely, it cannot be an implication of the authority conception that a lawyer or judge would have to work on a case arising under the Fugitive Slave Act without considering the substantial injustice in which he would be implicated.

I do not think there is a simple test for a catastrophic moral horror, but I do think the idea of a high threshold is not just a form of words. Rather, it represents a commitment by the professional to the belief not only that some act is wrong, but also that people who disagree are not just wrong, but massively, corruptly, stupidly wrong. To hold this second belief, it is probably necessary to believe further that one's fellow citizens are not just wrong about this one matter, but comprehensively wrong about a great many things. In other words, one would have to consider oneself something of an outsider in the society. Abolitionists certainly felt this way about slaveholding society. I can only speculate about the beliefs of citizens on both sides of, say, the abortion debate, but to the extent that they regard legalized abortion (or the restrictions on the availability of abortion) as only a localized injustice, they cannot opt out under the catastrophic moral horror exception.

191. Cf. Steven H. Shiffrin, Dissent, Injustice, and the Meanings of America 118–20 (1999) ("Encouraging a responsible citizenry prepared to challenge injustice when appropriate, opening channels of communication, and keeping legal sanctions to a minimum should make more information and debate available to the relevant public.").

C. *The Role of Lawyer Allows For Conscientious Objection*

Within a theory of legal ethics, an alternative to precluding conscientious objection is to seek to accommodate it, but keep it confined within certain boundaries. The lawyer's obligation to facilitate the law's function of resolving disagreement may be qualified by a permission to make limited recourse to first-order moral values when acting in a professional capacity.[192] This pattern of incorporating ordinary moral reasons by reference into role obligations is a familiar one,[193] and the law governing lawyers indeed provides several entry points for ordinary moral reasoning into the interpretation of the legal rules defining the role of lawyers. Lawyers are permitted to give moral advice to clients and to persuade them to adopt an alternative course of action based on moral reasons.[194] With limited exceptions, lawyers are not *legally* required to take any particular client.[195] Even if there is a risk of material prejudice to the client's interests, lawyers may withdraw from representation where the lawyer regards the client's action as "repugnant" or where the lawyer has a "fundamental disagreement" with the client's action.[196] Although clients have authority to determine the ends of a professional relationship, lawyers have considerable discretion to choose the means to employ in carrying out their clients' instructions.[197]

Under the authority conception, a lawyer may refer to first-order moral values in making these discretionary decisions, because the law governing the lawyer's obligations expressly permits the exercise of moral judgment. In fact, many of the hard cases of moral disagreement between lawyers and clients may fall within one of these permissible exercises of moral judgment if, for example, the client can be persuaded by the lawyer to do the just thing. It is only outside these zones of permitted discretion that the authority conception demands that lawyers not make reference to first-order moral reasons.

It is worth underscoring that the authority conception does not require a lawyer to roll over and play dead in the face of what appears to be

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192. I am grateful to Charles Wolfram and Roger Cramton for pressing me to take account of the opportunities for moral reasoning within the legally delimited role prescribed for lawyers.

193. See Kadish & Kadish, supra note 25, at 29.

194. Model Rules, supra note 30, R. 2.1.

195. Wolfram, supra note 96, § 10.2.2.

196. Model Rules, supra note 30, R. 1.16(b)(4). Withdrawal from the representation because of a moral disagreement would be the option of "exit" from the attorney-client relationship. See Hirschman, supra note 21, at 21–29. The final alternative in the exit/voice/loyalty trio is nicely described by Bernard Williams as "the classical 'working from within' argument which has kept many queasy people tied to many appalling ventures for remarkably long periods." Williams, supra note 154, at 57.

197. Model Rules, supra note 30, R. 1.2(a) & cmt. 2, R. 1.4(a)(2) & cmt. 3. Regardless of the client's preferences with regard to ends, or the lawyer's preferences with regard to means, a lawyer may not counsel or assist the client in a violation of law. Id. R. 1.2(d).

a settled rule of law.[198] In some areas, such a mandate would entail a complete abdication of the traditional role of counsel as a defender of unpopular clients or a champion of the individual against the power of the state. Lawyers like Andrew Hamilton, who defended John Peter Zenger; Clarence Darrow; Samuel Liebowitz, who defended the Scottboro boys; Thurgood Marshall, Oliver Hill, Spottswood Robinson, and others who fought against segregation; William Kunstler and Leonard Weinglass, who defended antiwar protesters in the 1960s; and Stephen Bright, alongside other anti-death-penalty lawyers all figure prominently in our professional self-understanding, or the justificatory myth that gives shape to our professional ideals.[199] Surely none of these lawyers would have acquiesced in the assertion of authority over the justice of their clients' actions. And surely the reason we admire these lawyers is because they do not believe that the law exhausts the sources of value that give meaning to their lives as lawyers.

Although, the law is authoritative for citizens and lawyers over first-order moral reasons, it does not always speak univocally. A statute or common law decision seemingly prescribing one result may conflict with other legal norms. In particular, the system contains fundamental constitutional guarantees such as counsel for the defense of the accused, due process and equal protection, and the rights to freedom of expression and to petition the government for redress of grievances. Freedman has been making this point for years,[200] and it is one of the virtues of Simon's theory of legal ethics that he insists the lawyer take into account the constitutional rights at stake in any representation. Although Simon occasionally appeals to constitutional rights that are fairly marginal, and although it is possible to oversell the extent to which certain constitutional rights support the dominant view,[201] it is also important not to minimize

198. The obligation to obey the law should not be conflated with the tacit message, which is often associated with classical legal formalism, that "actual power relations in the real world are by definition legitimate." Elizabeth Mensch, The History of Mainstream Legal Thought, *in* The Politics of Law 23, 32 (David Kairys ed., 3d ed. 1998). The authority conception maintains that legal rules are legitimate to the extent they enable coordinated social action, but says nothing whatsoever about the power relationships that lie behind those rules.

199. Cf. Walter Bennett, The Lawyer's Myth: Reviving Ideals in the Legal Profession 28–30, 51–54 (2001) (arguing that stories about heroic lawyers constitute a "professional mythology" that gives normative significance to the relationship between lawyers and their communities).

200. See, e.g., Monroe H. Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469, 1471, 1482 (1966) (arguing that the law does not respect only one value, such as truth, but also requires criminal defense lawyers to take into account constitutional norms such as the presumption of innocence and the requirement of proof beyond a reasonable doubt).

201. See generally Martin H. Redish, The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953–1971, 51 DePaul L. Rev. 359 (2001). Redish defends the conduct of defense lawyers in the civil lawsuits brought against tobacco companies by justifying the adversary system at a high level of abstraction, as part of a theory of democracy. The trouble is that he overgeneralizes from his examples.

the centrality of these legal norms to the authority of law. The Constitution, after all, is the supreme law of the land, and a lawyer who argues that a state Jim Crow statute is invalid because it violates equal protection is acting with a view toward correcting an erroneous interpretation of the law, not disrespecting the law. The authority conception in no way requires deference to either common law or statutes that are arguably unconstitutional.

The problem remains of how broad a net a lawyer may cast, hoping to capture a specifically legal, as opposed to moral, principle from which to argue her client's position. Dworkin argues that judicial interpretation must take account not only of formal legal texts but also of principles of political morality that explain why the law is entitled to respect and authority in a given community. In his favorite example of *Riggs v. Palmer*[202]—the "murdering heir" case—the New York Court of Appeals denied a bequest under a will that satisfied all the statutory standards, reasoning from the principle that no one should profit from his own wrongdoing. Dworkin insists that the decision in *Riggs* was correct as a matter of *legal* interpretation, because it fit coherently with the law as a whole, which elsewhere respects the principle against profiting by one's own wrongdoing.[203] Significantly, the issue for the court in *Riggs* was not whether the judges should follow the law or conscientiously object in the interests of justice; rather, the court was engaged in the process of interpreting what the law *was*.

The authority conception of legal ethics is antithetical to its moralistic competitors, which are essentially natural law theories of lawyering. The moralistic theories are animated by concern for the moral agency of lawyers. If the law is understood as being positivistic and thus conceptually separate from the domain of morality, then there seems to be no inherent moral value in interpreting and applying the law to a client's problems. A lawyer would be on no different moral footing from a person who is an expert Scrabble player or a dedicated Civil War reenactor—a master of a complex system with no intrinsic moral merit. As Raz has argued, however, the "social thesis" that the existence of a law is a matter of social fact does not make the existence of law irrelevant to morality.[204] It is still an open question whether the social facts by which we identify

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For example, he rightly refers to the actions of Freedom Riders in the 1960s as oppositional in light of existing legal and social norms. Id. at 365. This shows that adversarialness is not *necessarily* equivalent to selfishness, but tells us nothing at all about the moral evaluation that should attach to lawyers for clients who act with selfish motives. Redish seeks to support his democratic theory with constitutional principles such as freedom of expression and due process. Id. at 381–92. Although these norms may have some relevance to tobacco lawyers (as in cases where they challenge restrictions on cigarette advertising), they have nothing to say about some of the most egregious misconduct by tobacco lawyers, such as stonewalling discovery.

202. 22 N.E. 188, 191 (N.Y. 1889).

203. Dworkin, supra note 47, at 19–20.

204. Raz, Authority, supra note 6, at 37–39.

law are the basis for an argument that law has moral worth.[205] The argument for authority considered here, based on the law's capacity to enable coordinated social action notwithstanding persistent moral disagreement, provides moral reasons for respecting the law. This is true even though the law can be identified solely with reference to non-moral sources, such as the conventions and practices of a given community of lawyers and judges. These sources include "relevant interpretative materials,"[206] which for statutes include facts about the background of a statute, enactment and amendment history, certain kinds of legislative history documents, and canons of construction; and for cases include the techniques of analogizing and distinguishing precedent that are the staple of common law rhetorical methods. Of course, to the extent these interpretive materials support multiple plausible interpretations, the certainty of meaning attached to any legal text diminishes, and perhaps the ability of the text to facilitate coordinated social action is impaired. But in most cases, there is sufficient objectively determinate meaning in law to enable cooperation and planning. In those settled cases, the Razian argument for the authority of law is clear and the citizen and lawyer are obligated to respect the law.

Returning more directly to the point about zealous advocacy, to borrow from the law of frivolous litigation, the authority conception does not prohibit making an argument for the "extension, modification, or reversal of existing law or the establishment of new law," provided there is a good-faith basis in law and fact for the argument.[207] Most of the heroic lawyers we recall as sources of inspiration were not truly engaged in civil disobedience, but were appealing to legal arguments for a change in law or the establishment of new law. Unlike some versions of the dominant view, the authority conception draws a sharp distinction between advocacy and other practice settings, such as counseling and transactional work, in which there is no neutral party to decide the validity of the claims advanced by the lawyer. Lawyers sometimes overgeneralize from the paradigm of adversarial litigation, and assume that the same norms of zealous advocacy apply in transactional or counseling work as well.[208] The authority of law is not threatened by challenges made to existing legal rules in open forums, where other interested parties have an opportunity to respond. Indeed, lawyers who represent partisan interests in litigation are essential to facilitating the process of public disagreement that eventually results in an authoritative settlement through law. Where leg-

205. Id. at 38–39.

206. Id. at 48.

207. Fed. R. Civ. P. 11(b)(2).

208. See Luban, Lawyers and Justice, supra note 4, at 57–58 ("[L]awyers commonly act as though the standard conception characterizes their relationship with clients even when the representations do not involve the courtroom. Thus, in a wide sense the adversary system is defined by the structure of the lawyer-client relationship rather than by the structure of adjudication.").

islation is involved, putting forward one's views obviously includes voting, but could also take the form of joining interest groups like the Sierra Club or the ACLU, making campaign contributions to candidates, writing letters or signing petitions, or more dramatic acts of political theater. In a democratic system in which courts play a substantial role in making and interpreting the law, there must be a similar method for putting forward one's views. Adversarial litigation serves that function and allows citizens to advance their own beliefs about justice, with a view toward affecting the authoritative settlement of disagreement.

In transactional matters, however, taking a partisan stance toward a particular normative issue cannot be defended as a contribution to a public debate about justice.[209] Thus, lawyers are not justified in treating the law as something to be challenged or distinguished around, as they might be in litigation. In this respect, the authority conception differs from the dominant view, which is more tolerant of manipulation of the formal structure of law. As Simon reconstructs the dominant view, lawyers have a right to advance their clients' interests by any lawful means, and because of the underlying positivism and libertarianism of the dominant view, "[w]here the 'bounds of the law' limit liberty, they must do so unambiguously"[210] with ambiguity resolved in favor of permission to do whatever the client wishes. To the extent this kind of manipulation of formal legal rules undermines the capability of the law to provide authoritative settlements of normative disagreements, however, the authority conception would prohibit a lawyer from engaging in it. The same point could be made about litigation practices, such as playing "hide the ball" in discovery,[211] that interfere with the law's dispute-resolution function. The authority of the discovery rules is based on their utility in bringing relevant information to the attention of the factfinder, while at the same time protecting parties against unfairly burdensome fishing expeditions or the tac-

209. This may not be true in all cases. Some transactions involve efforts to establish a new interpretation of a statute or regulation, perhaps through a request for an agency ruling. The important distinction I wish to capture is not between litigation and transactional practice, but between overt and covert attempts to influence the application of legal rules to one's client. See Gordon, New Role, supra note 11, at 1211–12 (explaining that if a lawyer wishes to advance a position on behalf of a client that is "adventurous, strained, or ingenious, . . . [the lawyer must] do so in a way that flags the contentious nature of what she is proposing and thus permits its adequate testing and evaluation"). Covert manipulation of the law in litigation, such as playing "hide the ball" in discovery, is just as damaging to the rule of law as covert nullification of the law by concealment in transactions. On the other hand, overt attempts to influence the content of the law in transactional practice are no more threatening to the authority of law than arguments made in open court by litigators. Thanks to Sandra Johnson for pressing me to clarify this distinction.

210. Simon, Practice of Justice, supra note 4, at 27.

211. See, e.g., Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054, 1079–80, 1083–84 (Wash. 1993) (stating that a lawyer's obligation of vigorous advocacy is qualified by an obligation to respect the function of the discovery process, which is the exchange of relevant information).

tical misuse of discovery requests as a means of harassing an opponent. Lawyers are justified in requesting discovery or responding to these requests only insofar as their actions tend to promote one of these ends. Any other use of the discovery rules is properly classified as misuse or abuse, and is a basis for judging that the lawyer has acted wrongly, in virtue of the second-order reasons on which the law's legitimate authority is based.

D. *The Authority of Law Runs Out When It Does Not Facilitate Coordination*

Finally, perhaps the argument for the authority of law overgeneralizes from a few special cases in which it is essential to settle on one particular solution to a social coordination problem. Naturally we need to decide—collectively and not as individuals—whether to drive on the right or the left side of the road, but there may be many other cases in which it does not really matter what individuals do, at least vis-à-vis the ability of individuals to cooperate peacefully despite moral disagreement.[212] The law may be agnostic among several competing focal points for coordination. If that is true, then there is nothing wrong, from the standpoint of social coordination, with clients deciding what to do, based on moral reasoning at the level of first-order principles. In this limited sense, the dominant view and the authority conception come together. For dominant view lawyers, the paramount goal is increasing client autonomy. The authority conception would not give client autonomy priority in a lawyer's deliberation where the law, responding to a need for authoritative settlement, has required a particular response by citizens. On the other hand, where the law has created a space for private ordering by empowering citizens to do whatever they wish, subject only to minimal constraints, there is no second-order moral reason for lawyers not to assist clients in doing what they wish.

In a space for private ordering, one might think that the lawyer's full moral agency returns, and she should refuse to assist the client in some project that she deems unjust. Even in cases where the law is silent as to the citizen's obligations, however, it creates an obligation on the part of the lawyer. The lawyer-client relationship is a creature of agency law, and upon accepting a representation, the lawyer becomes subject to common law duties as an agent. One of those duties is to obey the lawful instructions of the principal.[213] The state bar disciplinary rules governing the lawyer-client relationship similarly require the lawyer to "abide by a client's decisions concerning the objectives of representation."[214] The framework of law may not have settled a normative dispute by selecting only one option as authoritative, but that does not mean that the framework ceases to exist. The lawyer still has specific, legally created duties of

212. I am grateful to Bill Simon for raising this objection.

213. William A. Gregory, The Law of Agency and Partnership § 69 (3d ed. 2001).

214. Model Rules, supra note 30, R. 1.2(a).

obedience that preclude her from reasoning as an ordinary moral agent would in an analogous situation. Failure to obey the client's instructions, which would be a violation of agency law and the professional disciplinary rules, would have the impermissible effect of increasing the lawyer's power as a law-interpreter at the expense of the client's autonomy, which is secured by the existence of legal rules with gaps for private ordering.[215]

CONCLUSION

The authority conception assumes that normative disagreement among citizens is a central, rather than a marginal case for legal ethics. Citizens disagree through lawyers, seeking authoritative settlement of their disputes through the medium of law. Lawyers, therefore, have an obligation not to interfere with the process of accomplishing peaceful resolution of moral combat and coordinated social activity. They may not reason through practical dilemmas on the basis of first-order moral principles, as similarly situated non-lawyer agents would be required to do. In the case of a catastrophic moral horror, a lawyer may refuse to give effect to a legal rule, but this exception must be limited in scope to only the worst disasters. Otherwise, lawyers would seek the status of conscientious objectors in cases where the law is most needed, such as disputes pertaining to abortion, capital punishment, and the like. By precluding reasoning from first-order moral principles, the law does not make lawyers into automatons or force them to act in bad faith, because all citizens share the need for coordinated action and the desire to resolve disagreements in a manner that is fair to all affected individuals. Lawyers further share the commitment to making the legal system function as a framework for social activity. Thus, they are not acting amorally, but are acting for the moral reasons that give the law legitimate authority.

Moreover, because lawyers have an obligation to respect the law and maintain its capacity to serve as a framework for coordinated action, the authority conception would be hostile to much of the amoral lawyering that has been the target of many critics of the profession. Legal opinions that give cover to aggressive accounting of transactions with no economic substance, exploitation of the audit lottery, underenforcement of tax and securities regulations, and forensic tactics that detract from the resolution of litigation on the merits are ruled out by the authority conception. This conclusion differs most obviously from the dominant view, which would require the lawyer to assist the client in any autonomy-enhancing activity, as long as the action does not clearly violate a legal rule, taking due account of the likelihood of enforcement. This model of legal ethics parts company from the view of most academic critics, however, by not being based on first-order moral principles, such as justice or the avoidance of harm to third parties.

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215. See Frederick Schauer, Authority and Indeterminacy, *in* Nomos XXIX: Authority Revisited 28, 33–35 (J. Roland Pennock & John W. Chapman eds., 1987).

There are moral costs associated with acting as a lawyer. It is difficult to achieve an ideal of innocence and avoidance of complicity in wrongdoing when the very purpose of one's role is to channel moral disagreement into an authoritative process of resolution. The authority conception requires lawyers to act in some cases in ways that they would condemn if reasoning from the standpoint of an ordinary moral agent. On the other hand, there are moral costs associated with conscientiously objecting to the duty of one's role. The law governing lawyers tries to mitigate these tensions by providing exit and voice options within the lawyer-client relationship, but in cases where neither option is available, loyalty to the system of law, rather than loyalty to the client, may be required. Thus, respecting the law is not an abdication of moral agency, but rather the appropriate exercise of agency, necessary for the function of the legal system and the role of lawyers within this system. This is a demanding conclusion, but the result is enhanced respect for the law as the source of moral guidance for lawyers.