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Moral Judgment and Professional Legitimation

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MORAL JUDGMENT AND PROFESSIONAL LEGITIMATION

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I. INTRODUCTION

In this essay I would like to consider the nature of the role of lawyers from the point of view of both jurisprudence and the sociology of professions. From this perspective it is apparent that the judgment characteristic of lawyers' expertise is not primarily the exercise of ethical discretion. Rather, it is the application of legal norms, which may incorporate moral principles by reference, but which are analytically distinct from morality. Much of the concern about lawyers "imposing their values" on clients, usurping clients' decision-making authority, or acting as unelected priests of virtue seems to boil down to a deep-seated skepticism about the superior capacity of lawyers to make moral judgments, as compared with their clients. Nevertheless, many legal ethics scholars maintain that "real" ethics, in the sense of a normative theory of the lawyer's role apart from merely complying with the law governing lawyers,[1] is primarily a matter of responding appropriately to the same sort of moral considerations that figure into the practical reasoning of

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1. A short aside on terminology: Many lawyers use the term "legal ethics" to refer to the disciplinary rules adopted by the highest court of a state and enforced through grievance procedures (often administered by bar associations exercising delegated powers). Thus, in common parlance lawyers say something is unethical when it violates a disciplinary rule or that they have an ethical obligation to do such-and-such when it is required by a rule. The disciplinary rules are part of the broader subject of the law governing lawyers, which also includes the law of agency, torts, contracts, procedure, crimes, and specialized areas such as tax and securities law, as they apply to the activities of lawyers. The teaching of law school professional responsibility courses has increasingly emphasized the overlapping sources of regulation to which lawyers are subject, and the leading casebooks and treatises now deal with much more than just the American Bar Association's (ABA) Model Rules of Professional Conduct (upon which the disciplinary rules of most states are based). The usage of the word "ethics" to refer to the disciplinary rules creates unnecessary confusion with the notion of ethics as a theoretical inquiry into how one ought to live one's life. In particular, the philosophical discipline of normative ethics asks what kinds of actions are right or wrong, and what kind of a life should one lead. *See* David Copp, *Introduction: Normative Ethics and Metaethics*, *in* THE OXFORD HANDBOOK OF ETHICAL THEORY 3, 19 (2006). When I talk about ethical obligations, values, principles, etc., I will always be referring to philosophical ethics, not the disciplinary rules.

agents in ordinary life. David Luban and Deborah Rhode, for example, have argued that lawyers ought to accept personal moral responsibility for their actions, even when acting in a representative capacity.[2] If they are correct about this, the task of legal education, and specifically of legal ethics education, might include training lawyers to be better at making moral judgments. In fact, there has been a fairly persistent (if minority) view that law schools should assume some responsibility for improving the ethical decision-making capacities of students.[3] On this view, the interesting pedagogical question is how this should best be accomplished, with advocates tending to favor "experiential" learning environments such as simulations, live-client clinics, and pro bono representation.[4] The traditional doctrinal law school course, complete with casebooks and Socratic questioning, certainly does not appear to have much to recommend, from the point of view of training better moral decision-makers.

2. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 160–74 (1988); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 17 (2000) (arguing that lawyers should take "personal moral responsibility for the consequences of their professional acts"); David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1005 (1990) ("Morally activist lawyers hold themselves morally accountable for the means they employ and the ends they pursue on behalf of clients.").

3. *See, e.g.*, Tom C. Clark, *Teaching Professional Ethics*, 12 SAN DIEGO L. REV. 249 (1975); Thomas L. Shaffer, *On Teaching Legal Ethics in the Law Office*, 71 NOTRE DAME L. REV. 605 (1996); *see also* AM. BAR ASS'N, SECTION ON LEGAL EDUCATION AND ADMISSION TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 203, Skill § 10 (1992) (known as the MacCrate Report; recognizing ethical dilemmas is one skill that a competent lawyer must possess). The treatment of ethics by the MacCrate Report is disappointing, because it never resolves the ambiguity between ethics in the sense of the disciplinary rules and ethics as moral decision-making. For example, Skill § 10.1(b)(i)–(ii) talks about familiarity with primary sources of "ethical rules," including the disciplinary rules and other sources of the law governing lawyers, while Skill § 10.1(b)(v)–(vi) refers to "[a]spects of ethical philosophy bearing upon the propriety of particular practices or conduct" as well as "[a] lawyer's personal sense of morality." *Id*. at 203–05.

4. *See, e.g.*, Robert P. Burns, *Legal Ethics in Preparation for Law Practice*, 75 NEB. L. REV. 684, 695–96 (1996); Jill Chaifetz, *The Value of Public Service: A Model for Instilling a Pro Bono Ethic in Law School*, 45 STAN. L. REV. 1695 (1993); Robert Condlin, *The Moral Failure of Clinical Legal Education*, *in* THE GOOD LAWYER 317 (David Luban ed., 1984); Stephen Gillers, *Getting Personal*, 58 LAW & CONTEMP. PROBS. 61 (1995); Carol Bensinger Liebman, *The Profession of Law: Columbia Law School's Use of Experiential Learning Techniques to Teach Professional Responsibility*, 58 LAW & CONTEMP. PROBS. 73 (1995); James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71 (1996); Shaffer, *supra* note 3, at 608–09.

As strange as it may sound to tell future lawyers that they should not act on the basis of their principled moral convictions,[5] I believe that lawyers in fact should refrain from exercising moral judgment on the basis of non-legal values. Legal ethics differs in kind from ordinary ethics because the social function of the law is to settle normative disagreement procedurally and to adopt a provisional social settlement of moral conflict that precludes acting on the basis of ordinary first-order moral reasons. Because lawyers acting in a representative capacity are agents for their clients, they can have no rights greater than those provided by their clients' legal entitlements and those rights conferred by agency law. Agency law vests the authority in the client to determine the objectives of the representation and, implicitly, to judge the moral worth of her own project. If the lawyer has agreed to represent a client, the lawyer's moral qualms about the client's goals are simply irrelevant to the lawyer's professionally prescribed duties of assisting the client in carrying them out using lawful means. In my view, even the decision whether to represent a particular client, which in American law is almost entirely discretionary with the lawyer, should be made with due recognition of the importance of the social value of legality, and should not be influenced by the lawyer's moral disagreement with the client, except in unusual circumstances.[6] This conclusion is supported not only by the conceptual argument just suggested, relying on the social function of law, but also by the implicit contract between the legal profession and society as a whole. This tacit agreement establishes certain privileges for the legal profession, including a valuable monopoly over the provision of what are deemed to be "legal" services, in exchange for an undertaking by the profession to use its expertise for the benefit of society. Notwithstanding occasional rhetorical flourishes by leaders of the organized bar, the legal profession has never seriously claimed that its members should be regarded as moral experts.

Other than the clergy, no profession in modern society makes the claim to be better at making moral decisions than its clients (and of course even the clergy's claim is bitterly contested). Although law is a richly normative domain, full of value-laden concepts like fairness, loyalty, dignity, autonomy, well-being, reasonable care, and good faith, lawyers understand these concepts to have specific legal meanings, as terms of art. Karl Llewellyn may have

5. *Cf.* RHODE, *supra* note 2, at 58 (arguing that lawyers should "act on the basis of their principled convictions, even when they recognize that others could in good faith hold different views").

6. *See* W. Bradley Wendel, *Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection*, 34 HOFSTRA L. REV. 987 (2006). At several points in this essay I cite papers I have written, not because I believe my own work to be authoritative as such, but as a way of referring to lengthier arguments in support of some of the points made here. My views on teaching legal ethics depend on my position on the nature of the subject itself, which can only be briefly summarized here.

poured it on a bit thick when he said, in a lecture to beginning law students that the job of the first year of law school is "to knock your ethics into temporary anesthesia. . . . along with woozy thinking," but he was making an important conceptual point, that law school aims to teach how to "work within a body of materials that is given."[7] Ethics and law are "given" in a different way, and the working material of lawyers is that which is deemed relevant by the professional community to the process of legal interpretation.[8] Other ethical values are familiar in legal reasoning in the guise of rationales for judicial decisions or the policies underlying legal norms, which help give content to the norms and guide their application. Even if they have analogues in ordinary moral life, however, these legal policy/moral concepts and values take on a specific meaning in legal contexts, which is all that lawyers are professionally concerned with. Of course lawyers remain moral agents even when acting in a professional capacity, but their non-legal moral beliefs should not be permitted to influence their interpretation and application of legal norms.

The following section sets out briefly the sociological and jurisprudential arguments for constructing a technical domain of professional expertise for lawyers, separate from the practices of ordinary moral reasoning. If that argument is successful, then the implication for the teaching of legal ethics is that a law school legal ethics course should focus on the values of lawyering that are imminent within the law governing lawyers—values such as fiduciary obligation and candor to third parties—and not purport to address the way people make moral judgments in ordinary life. Consideration of ethics in this way would be no different than talking about the value of efficiency in a torts class or the duty of loyalty in corporate law. These are no less "values" for being incorporated into legal reasoning, but they are not distinctive as part of some special domain of "ethics" either. Classroom teachers in law schools can handle legal ethics in the same way as they treat any other policy discussion. In my view, the discipline of legal ethics has suffered from self-imposed mystification that relies upon an implicit belief that ethical reasoning for lawyers is a skill that cannot be taught in traditional law school courses. Perhaps ethical reasoning in general cannot be taught—I am actually agnostic on whether this is so—but for the purposes of training lawyers, ordinary classroom faculty are perfectly competent to handle the task.

7. K. N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 116 (Oceana Publ'ns 1996) (1930).

8. *See* W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167 (2005).

II. THE EXPERTISE OF LAWYERS

One of the central issues in the theory of professions is the nature of legitimation. Professions claim privileges vis-à-vis the state and other social institutions—they define the nature of their work, restrict entry, regulate themselves, and enlist the assistance of the state to limit competition from other service providers.[9] As a consequence, professions are relatively insulated from both political pressure (through regulation by politically responsive branches) and market forces. These prerogatives, which have usefully been labeled "guild power,"[10] obviously require some sort of justification in terms of values that have some currency in the broader society in which the profession is embedded. The standard justification of the professional monopoly has several independent branches.[11] The first is pragmatic: Self-regulation is a consequence of the difficulty in evaluating the performance of professionals—if a great deal of training and experience is required to discern problems requiring the application of professional judgment and to judge the best way to solve them, then only other professionals are competent to evaluate the performance of tasks within the professional domain. The second branch is more explicitly normative: Professions claim that the ends served by a profession are socially valuable.[12] Health in the case of medicine, justice in the case of law, spiritual guidance in the case of the clergy, and so on, are the sorts of goods that a society would like to see produced. The pragmatic and normative branches are then melded in the argument that insulation from competitive and regulatory pressures is necessary in order to create the conditions under which these valuable ends will be served.[13]

I am interested in a variation on this pattern of legitimation, associated with the Weberian tradition in sociology, in which professions claim rational,

9. *See* RICHARD L. ABEL, ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM 471 (2003).

10. ELLIOTT A. KRAUSE, DEATH OF THE GUILDS: PROFESSIONS, STATES, AND THE ADVANCE OF CAPITALISM, 1930 TO THE PRESENT *passim* (1996).

11. *See* Eliot Friedson, *Professionalism as Model and Ideology*, *in* LAWYERS' IDEALS / LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 215 (Robert L. Nelson et al. eds., 1992).

12. *See, e.g.*, ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR 184–86 (1988).

13. *See, e.g.*, TERENCE C. HALLIDAY, BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT 34 (1987) ("When each profession is pressed back to the bedrock of its authority, when its legitimacy is questioned at the most generic level, at that point professions retreat ultimately to the distinctive means by which their knowledge is created and the distinctive class of statements produced by that means."); MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 23 (1977) ("[O]nly in a quasi-monopolistic situation can the producers be supervised and a minimum of 'professional' competence obtained.").

value-free, "scientific" competence over some domain of technical problems.[14] The Weberian conception of expertise insists that the application of professional skill be value-free, neutral, and objective.[15] Claiming that professional knowledge is neutral and scientific connects the profession with highly culturally salient values of technical expertise and objectivity.[16] To modern American ears, the equation of law with science sounds anachronistic, associated as it is with Langdell's pedagogical innovations and a long-discredited view of adjudication as the mechanical application of formal norms. The vast majority of the world's lawyers, however, work within the civil law tradition in which the logical, formal, scientific rationality of law is taken as given, at least in the rhetoric of legal education and legal scholarship.[17] And even within the American profession there are vestiges of the Weberian idea that legal professionalism is primarily a matter of neutral technical expertise. A study conducted by several prominent legal sociologists for the American Bar Association (ABA) Section on Litigation revealed a pervasive attitude among large-firm litigators that moral dialogue with clients and making moral judgments in connection with representation were simply not a feature of the professional role.[18] In response to interviews based on hypothetical scenarios (including the well known *Fisons* discovery abuse case), partners and associates interviewed made comments such as:

> I personally would have a problem even conveying my own view of the morality of the situation to a client. I think morality is a very slippery concept, primarily in the eye of the beholder.
>
> I don't think there's really a market at this point for being an incredibly ethical lawyer.
>
> [The client] can go [to] his minister if he wants moral advice. That's not why he's coming to you.

14. *See, e.g.*, Richard L. Abel & Philip S.C. Lewis, *Putting Law Back into the Sociology of Lawyers*, *in* 3 LAWYERS IN SOCIETY: COMPARATIVE THEORIES 478, 502–04 (Richard L. Abel & Philip S.C. Lewis eds., 1989); Robert Granfield, *Lawyers and Power: Reproduction and Resistance in the Legal Profession*, 30 LAW & SOC'Y REV. 205, 207–08 (1996) (reviewing RONAN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL (1995)).

15. *See* Granfield, *supra* note 14, at 207.

16. ABBOTT, *supra* note 12, at 53–54; LARSON, *supra* note 13, at 22, 40–42.

17. *See, e.g.*, JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 61–67 (2d ed. 1985).

18. *See* Douglas N. Frenkel et al., Introduction, *Bringing Legal Realism to the Study of Ethics and Professionalism*, 67 FORDHAM L. REV. 697 (1998).

> What you are really talking around here is in fact a fundamental precept of the profession, . . . that clients . . . are entitled to representation by trained and skilled individuals who operate within the system.[19]

Although big-firm lawyers probably like to affect an attitude of world-weary cynicism, these comments do reflect a sense that their job is too highly complex, technical, and value-free, and that the moral issues raised by their work are simply someone else's problem.[20] If the work of lawyers was inextricably bound up with contestable moral and political values, however, one might be concerned that the profession was acting as a kind of anti-democratic elite, either by restricting access to its services to those clients deemed "worthy"[21] or by manipulating the legal process to favor the interests of the powerful.[22] In other words, the equation of legal judgment with neutral, technical expertise buttresses the case for the professional monopoly, because lawyers are not claiming the authority to perform tasks (e.g., exercise moral judgment) that ordinary people are able to do for themselves.

All of this is familiar, even banal. Despite the pervasiveness among practicing lawyers of this Weberian stance toward their work, it is now taken for granted among most professional responsibility teachers that the role of a lawyer requires the exercise of moral discretion. In fact, a common line of criticism leveled against the standard professional responsibility curriculum, consisting of the ABA's Model Rules and cases applying them, is that it

19. Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors That Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 FORDHAM L. REV. 773, 778–80 (1998).

20. *See* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 8 (1975). Wasserstrom described, but did not endorse the received view among lawyers that

> [t]he job of the lawyer . . . is not to approve or disapprove of the character of his or her client, the cause for which the client seeks the lawyer's assistance, or the avenues provided by the law to achieve that which the client wants to accomplish. The lawyer's task is, instead, to provide that competence which the client lacks and the lawyer, as professional, possesses.

Id. For a strong statement of the view Wasserstrom describes, see Lee Modjeska, *On Teaching Morality to Law Students*, 41 J. LEGAL EDUC. 71, 73 (1991) (disapproving, in hindsight, his own moral advice to a client not to throw employees out of work on Christmas Eve, and stating that his own professional competence was questionable since he dared suggest that the client's business plan might be morally problematic). Modjeska's self-flagellation is unwarranted, because the lawyer's role clearly permits advising clients on the basis of non-legal considerations "such as moral, economic, social and political factors." MODEL RULES OF PROF'L CONDUCT R. 2.1 (2007).

21. *See* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617 (expressing concern about rule by an "oligarchy of lawyers").

22. *See, e.g.*, RICHARD L. ABEL, AMERICAN LAWYERS 19 (1989) ("Despite the efforts of lawyers to portray law as a logically deductive system, the public clearly sees it as a human construct and thus a reflection of political power.").

squeezes the ethics out of what should be a rich normative domain.[23] (Teachers who are criticized for teaching primarily the law of lawyering may be reacting to the implicit hierarchy of the curriculum constructed by law students, who consider doctrinal courses more "real" or legitimate than interdisciplinary offerings.[24]) By beginning with the problem of professional legitimation, however, we can ask why this must be so, and further we can look more closely at the jurisprudential basis for the belief that teaching lawyers involves teaching something about the making of moral judgments. My claim is, perhaps surprisingly, a variation on the idea that professional expertise is primarily technical, gaining its legitimacy from its neutrality and objectivity. By this I do not mean that legal norms are devoid of moral content, only that moral principles must be incorporated into legal norms somehow in order to be the sort of things that lawyers are permitted to consider when acting in a representative capacity.[25] Nor does this mean that lawyers cannot engage their clients in a moral dialogue; counseling on non-legal matters is permitted by the law of lawyering as well as long professional tradition.[26] In my view, however, the authority of law is dependent on its capacity to supersede moral controversy and establish a relatively stable basis for peaceful coexistence and cooperative activity among people who disagree profoundly at the level of first-order ethical principles.[27] It follows that the role of lawyers is twofold: to enable citizens to coordinate their activities with others using an orderly framework, and to maintain the legal system in a healthy, functioning state and not undermine the settlement achieved by the law through evasion or manipulation.

The alternative to this conception of lawyering, which would require lawyers to make moral judgments, would have to build in ethical discretion at

23. *See, e.g.*, Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247 (1978); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987); William H. Simon, *The Trouble with Legal Ethics*, 41 J. LEG. EDUC. 65 (1991).

24. *See, e.g.*, Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 AM. B. FOUND. RES. J. 247.

25. *See* W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005).

26. *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 (2007). I have referred to this as "freestanding moral advice." *See* Wendel, *supra* note 25, at 110–12. Regarding professional tradition, here is the place for the obligatory cite to the quote from *Elihu Root*, that "half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop." *See* PHILIP C. JESSUP, ELIHU ROOT 133 (1938); *see also* Amy Gutmann, *Can Virtue Be Taught to Lawyers?*, 45 STAN. L. REV. 1759 (1993) (recommending that lawyers be prepared to deliberate with their clients about what is right, rather than either refusing to do wrong or attempting to manipulate the client into doing the right thing); Pepper, *supra* note 21, at 630–32 (encouraging lawyers to engage clients in moral dialogue).

27. *See* W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363 (2004).

either of two points. Either (1) the client has a legal entitlement but it is morally problematic, or (2) the existence of the client's legal entitlement depends on a moral judgment. The first alternative undermines the profession's claimed basis of legitimacy, while the second raises serious jurisprudential problems. Regarding (1), there are undoubtedly many legal entitlements which legally permit a person to do something that is morally wrong.[28] The proverbial case of throwing workers out of a job on Christmas Eve is such an example.[29] There seems to be no harm in permitting lawyers—or anyone, for that matter—to try to argue another person out of a morally wrongful course of action. As noted above, the law governing lawyers expressly permits lawyers to seek to persuade their clients to modify their actions in light of moral concerns.[30] However, it is not necessarily an implication of the permissibility of offering moral advice that lawyers ought to conceive moral advising as a significant aspect of their role, nor that legal educators should be concerned with training lawyers to be better moral decision-makers.

The spheres of authority of professionals can be divided into technical authority and normative domains, differentiating for example between how best to build a road (a question within the technical authority of engineers) and whether a particular road should be built (a policy question perhaps within the moral authority of policy and planning experts).[31] For any given profession, there is accordingly a jurisdictional question concerning the scope of its authority, the answer to which "rests significantly on [its] epistemological foundations."[32] Having secure epistemological foundations for expertise is a function both of the subject itself and the ability to train people to use that knowledge. If most moral decision-making by lawyers related to category (1), legal but immoral acts by clients, lawyers should be expected to demonstrate both a sufficiently objective moral epistemology and their superior capacity for making moral judgments. Otherwise these judgments should not be committed to professionals, but should be reserved to the clients themselves, because lawyers act as agents of clients and their legal authority is derivative of the legal entitlements of clients. And indeed as a matter of agency law, the normative domain of authority is regarded as the client's alone, leaving the lawyer with authority over technical matters.[33] If a client wishes to do

28. *See* Jeremy Waldron, *A Right to Do Wrong*, 92 ETHICS 21 (1981).

29. *See* Modjeska, *supra* note 20, at 73.

30. *See supra* note 27 and accompanying text.

31. *See, e.g.*, HALLIDAY, *supra* note 13, at 38–39. I use the term normative instead of Halliday's term "moral," because many non-technical judgments made by experts rely on non-moral norms such as efficiency.

32. *Id.* at 40.

33. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21(3) & cmts. d & e (2000).

something legal but immoral, the lawyer's role is arguably only to provide the means for accomplishing the client's goal, at least after attempts at counseling and persuasion have failed.[34] In other words, the normative question—analogous to "Should this road be built?"—is one on which we do not believe lawyers have comparatively greater expertise.[35]

As a theoretical matter, this allocation of authority presupposes certain assumptions about ethical reasoning and the nature of objectivity in ethics, and the nature of the expertise of lawyers. In particular, it assumes that lawyers do not have special competence at discovering ethical truths.[36] The situation would be different if Kant's dream were realized, in which reason itself demanded obedience to certain moral principles, the content of which was apparent to all rational beings.[37] However, common experience leads us to question whether Kant's dream will ever be anything other than an ideal at which philosophical ethics may aim. For any interesting moral issue—say, capital punishment, abortion, stem-cell research, affirmative action, racial profiling, or the permissibility of coercive interrogation techniques—people appear to continue to disagree in good faith about what morality permits or requires. Disagreement alone does not necessarily imply anything about the nature of ethical reasoning, but it would be surprising if there were a reliable moral epistemology for discovering and verifying the existence of moral facts,

34. I say "arguably" because lawyers have discretion not to represent particular clients. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 571, § 10.2.2 (1986). Once the representation has begun, a lawyer also has discretion to withdraw from representing a client if the lawyer finds the client's goals repugnant. *See also* MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2007). As I have argued elsewhere, however, the law of lawyering contains an implicit cab-rank principle that morally motivated refusals to represent clients (or to withdraw from representation) should be reserved only for extreme cases in which the lawyer's disagreement with the client's goals is so fundamental that the lawyer is in effect rendered incompetent to provide effective representation. *See* Wendel, *supra* note 6, at 998–1000.

35. *Cf.* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1080 (1976) ("In a democratic society, justice has no anointed priests. Every citizen has the same duty to work for the establishment of just institutions, and the lawyer has no special moral responsibilities in that regard.").

36. William Simon performs a nice theoretical reversal on defenders of the standard libertarian view of legal ethics by conceding that lawyers do not necessarily have greater expertise in moral reasoning as compared with their clients, but then locating the relevant ethical values within the domain of law, in which lawyers do have comparatively greater expertise. *See* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1113–14 (1988). Simon is also correct that distinctions between spheres of technical and normative authority "depend on important issues of legal theory that all lawyers need to resolve." *Id.* at 1114. A great deal of my own recent work is aimed at understanding the legal theoretic questions raised by the distinction between moral and legal obligation.

37. *See* SIMON BLACKBURN, RULING PASSIONS: A THEORY OF PRACTICAL REASONING 214–16 (1998) (using the metaphor of Kant's dream to describe the ideal of ethics as stating authoritative, compulsory principles that are binding on all rational beings in virtue of their rationality).

yet we have not yet seen the effects of its use. The hypothesis more consistent with the evidence seems to be that even if there are facts about the world that warrant the truth of propositions of ethics, "there is no privileged, easy, or uncontroversial access to them; there is certainly no mode of belief which is straightforwardly and indubitably reflective of the facts' solidity."[38] Moreover, even if Kant's dream came true for all rational beings, there would be no reason to commit ethical decision-making to lawyers, unless legal education somehow made lawyers better at engaging in the reasoning process that led to the discovery of ethical truths.

There is much more that can be said here, apropos of the nature of ethical reasoning, and particularly the case for pluralism as opposed to skepticism or relativism. However, there is room here only to summarize briefly. In my view, the persistence of moral controversy is not the result of any dysfunction in ethical reasoning, but of the structure of value itself, with its diversity of authentically valuable human goods and forms of life. This is a well known position in political theory, and it is making inroads in the theory of legal ethics.[39] What may not be fully appreciated, however, is the *necessity* of the connection between some degree of value pluralism and the arguments that are often given in support of the technocratic, value-neutral, Weberian conception of lawyering expertise we are considering here. The familiar libertarian defense of this conception, offered by Stephen Pepper, Monroe Freedman, and others, is that clients should have the autonomy to arrange their affairs and dealings with others in any way they see fit, subject only to the constraints of positive law, enacted through legitimate processes.[40] This argument is subject to a number of familiar objections: clients are entitled only to a just measure of autonomy, autonomously chosen ends are valuable only if the ends themselves are valuable, and even if autonomy has some positive value, helping someone exercise autonomy to do something bad is not turned into a morally

38. JEREMY WALDRON, LAW AND DISAGREEMENT 175 (1999).

39. *See* AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 21–26 (1996); STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE 30–33 (1989); CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY (1987); ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 6–11 (2d ed. 1984); JOHN RAWLS, POLITICAL LIBERALISM 54–58 (1993); JOSEPH RAZ, THE MORALITY OF FREEDOM 322–66 (1986); Isaiah Berlin, *The Pursuit of the Ideal*, *in* THE CROOKED TIMBER OF HUMANITY 1–2 (Henry Hardy ed., 1991); THOMAS NAGEL, *The Fragmentation of Value*, *in* MORTAL QUESTIONS 128–41 (1979). For other scholars considering the implications of value pluralism in legal ethics, see, for example, Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389 (2005); Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralist Society*, 63 GEO. WASH. L. REV. 984 (1995).

40. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS § 1.05 (2d ed. 2002); Pepper, *supra* note 21, at 616–17.

praiseworthy act by the presence of the positive value of autonomy.[41] I think a stronger case can be made, however, if autonomy is understood as a consequence of the plurality of worthwhile forms of life and conceptions of the good. As Joseph Raz has pointed out, "Autonomy requires that many morally acceptable options be available to a person."[42] In addition, there must be some reason to choose among these various options—being able to choose between two identical things is not autonomy.[43] This means that autonomy necessarily involves tradeoffs between things that have value, which is to say choices that different people might make differently, even if both were deliberating carefully and acting in good faith.

The implication for legal ethics is when lawyers are acting in a representative capacity, where legal entitlements to morally wrongful conduct are concerned, they must be careful not to interfere with their clients' autonomy to do things that they would regard as wrongful, from the point of view of their own value commitments and form of life. A lawyer's moral integrity, in the sense of her own ideals and ambitions that constitute the form of life she aims to live by,[44] is not the source of value in the lawyer-client relationship. Rather, the moral worth of the relationship is based on the legitimacy of the law from the point of view of citizens. The law establishes at least a provisional settlement of normative conflict that is sufficiently stable and clear that it provides the basis for coordinated action despite what would otherwise be interminable moral conflict. For example, citizens and government officials may disagree in good faith about what sorts of interrogation techniques are permissible when dealing with members of a group that pose a serious threat to national security.[45] Is it permissible to force prisoners to stand in uncomfortable positions, bombard them with sound and light, or trick them into believing that they have been handed over to foreign security forces who are known for their ruthlessness? In a situation like this, it is apparent that even sincere, well-meaning people deliberating in good faith are unlikely to reach agreement at the level of specificity that is needed. (It is not enough to say that interrogations must respect the human rights of detainees—what those rights require is exactly what interrogators want to

41. *See, e.g.*, DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 166–69 (1988); WILLIAM SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 26–52 (1998); 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); David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637 (1986).

42. RAZ, *supra* note 39, at 378.

43. *Id.* at 398.

44. *See* Daniel Markovits, *Legal Ethics from the Lawyer's Point of View*, 15 YALE J.L. & HUMAN. 209, 238–39 (2003).

45. For this example, see Wendel, *supra* note 25, at 93–98.

know.) In addition, it is apparent that something must be done, and if there is no agreement on what ought to be done, then interrogators will be acting without guidance. Despite the lack of agreement on substance, it may be possible to reach agreement on a fair procedure that can be used to construct a normative framework for action, which is good enough, for now, to accomplish the goal that everyone shares—namely, of defending national security while respecting the human rights of detainees.

A significant implication of this proceduralist view of legal legitimacy is that the moral beliefs of lawyers, or any citizens for that matter, are treated as a contribution to a conversation or positions in a debate, but are never allowed to conclusively resolve the disagreement. Resolution falls to procedures adopted in the name of society as a whole, designed to reach a provisional settlement. After that settlement has been reached, lawyers as interpreters and implementers of law have an obligation not to "unsettle the settlement" by re-introducing contested moral beliefs into the process of interpretation. This raises the second possibility, considered above, namely whether moral judgment may be necessary to determine whether a client has a legal entitlement.[46] If the law is to fulfill its role of settling moral conflict and providing a stable basis for cooperative activity, it must be possible to identify the law without reference to contested moral issues.[47] This does not mean that moral values can never be incorporated into law.[48] In fact, moral concepts like reasonable care, good faith and fair dealing, and loyalty to shareholders are perfectly familiar to lawyers. Significantly, however, they are familiar as *legal* concepts. Failing to exercise reasonable care for the purposes of tort liability may be different from the kind of failure of caring that would make a person morally blameworthy. (A clear illustration of this distinction is the lack of a

46. For more on the relationship between moral reasons and legal entitlements, see *id.* at 100–09.

47. *See, e.g.*, ROGER SHINER, NORM AND NATURE: THE MOVEMENTS OF LEGAL THOUGHT 53 (1992).

48. Raz insists that moral values are not incorporated into law merely because decision-makers take them into account; human decision-makers must take moral reasons into account in any case. *See* Joseph Raz, *Incorporation By Law*, 10 LEGAL THEORY 1 (2004). This may be true in the first instance of would-be incorporation, but once a moral reason is given in justification of a legal judgment, it becomes relevant to ascertaining the law in future cases. In common law reasoning, determining the holding of a case requires understanding the reasons behind the judgment, which may be pragmatic (as in concerns about the administrability of a rule), hermeneutic (as where the interpretation of a precedent was an issue in the case), or moral. All of these styles of reasoning have analogues in ordinary practical and moral life, but when employed by judges they have a distinctively legal form. In the end I do not think anything of importance turns on the term "incorporation," as long as we recognize that the law makes use of concepts that have exact equivalents or at least analogues in ordinary moral reasoning, but that legal interpretation takes them into account only insofar as they feature in the practice of justifying legal judgments.

legal duty to rescue someone in peril, which may be morally required in many circumstances.)[49] The concept of taking care may develop different contours in law and morality, and require different conduct from those subject to legal and moral duties. Another example of this distinction between moral and legal obligation is the legal ethics classic *Zabella v. Pakel*,[50] in which a wealthy man asserted the statute of limitations to avoid paying a debt he clearly (morally, justly) owed to a less fortunate plaintiff.[51]

Even if moral principles and legal principles require identical actions in a given case, the nature and source of the duties are still analytically distinct.[52] The most important difference is that if a moral principle is incorporated into law, it is not necessary to ascertain the truth of the principle to determine whether one has a (legal) obligation to act. So, if a court permits recovery of damages for emotional distress on the grounds that the defendant's conduct was "extreme and outrageous,"[53] a lawyer interpreting that case does not ask whether the defendant's conduct was *really* extreme and outrageous. In the same vein, if a citizen sincerely believes, on the basis of moral reflection, that the conduct was not extreme and outrageous, she is not thereby legally entitled to engage in it. Obligation, for both citizens and lawyers, is not a result of the direct impact of morality, but of morality filtered through law—with a certain legal "pedigree," as Dworkin would put it.[54] To put it extremely, simply, and schematically, outrageousness as a moral concept (call it O_M) creates moral obligations not to do certain things, while outrageousness as a legal concept (call it O_L), which may overlap to a greater or lesser extent with O_M, creates legal obligations not to do other things. The recognition that something is outrageous creates an obligation not to inflict mental suffering and humiliation on another person, but there are different obligations in virtue of the legal and moral values of outrageousness. If O_M and O_L both require something—say, employers to refrain from using racial epithets to describe employees[55]—then a citizen has a moral and legal obligation not to use racial epithets. On the other hand, there may be cases in which O_M forbids something that O_L permits, such as the use of racial epithets in non-employment contexts.[56] Although there is

49. *See, e.g.*, Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1981).

50. 242 F.2d 452 (7th Cir. 1957).

51. *Id.* at 455.

52. For contrasting theories both accepting the analytic separability of law and morality—i.e., the claim of legal *positivism*—see JULES COLEMAN, *Negative and Positive Positivism*, *in* MARKETS, MORALS AND THE LAW 3–27 (1988); JOSEPH RAZ, *The Problem About the Nature of Law*, *in* ETHICS IN THE PUBLIC DOMAIN 194–221 (1994).

53. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965).

54. *See* RONALD DWORKIN, *The Model of Rules I*, *in* TAKING RIGHTS SERIOUSLY 14–23 (1977).

55. *See, e.g.*, Taylor v. Metzger, 706 A.2d 685 (N.J. 1998).

56. *See, e.g.*, Irving v. J.L. Marsh, Inc., 360 N.E.2d 983 (Ill. App. Ct. 1977).

probably little moral disagreement that the use of racial epithets is wrong, the law of torts has for various reasons (including the difficulty of drawing bright lines in this area and a general aversion to the litigation of non-physical harms) declined to impose legal liability on people who engage in this conduct. Thus, on the fanciful assumption that a client has come to a lawyer to find out whether it is legally permissible to use a particular term (perhaps in a public performance or a newspaper article), the answer would depend on whether the proposed course of action was outrageous in the sense of exhibiting O_L. The lawyer may also offer freestanding moral advice, based on the lawyer's best understanding of O_M, but this would be irrelevant to the client's question regarding legal permission.[57] The client may appreciate the freestanding moral advice or may resent it, but in any event the legal profession does not seek to justify its monopoly over the provision of certain kinds of services, namely giving legal advice, with reference to the expertise of lawyers in making moral judgments.

I do not deny the possibility that a lawyer may sincerely believe that assisting her client in realizing her legal entitlements may implicate the lawyer in moral wrongdoing by the client.[58] As a matter of practical reasoning, the lawyer should regard the law as an authoritative source of obligations, except in the most extreme cases of grossly immoral laws. Agency law, which creates the lawyers' obligation to carry out the client's lawful instructions, together with the client's legal entitlement, creates a duty to participate in conduct that is legal but morally wrong from the lawyer's point of view. However, as a matter of theoretical reasoning, a lawyer may continue to believe that the action, though obligatory, is wrong. The possibility of viewing an act from multiple perspectives—required by practical reasoning but viewed to be wrong from the theoretical point of view—may strike some as incoherent, but I believe it is one way of recognizing the weight and persistence of moral values that arise from social roles and ordinary pre-social morality. Although I have argued that, as a matter of practical reasoning, the authority of law operates as an exclusionary reason vis-à-vis ordinary morality,[59] that does not mean that ordinary moral reasons just vanish into the ether. As Gerald Postema states:

> [I]t is not enough for one to work out the correct course of action and pursue it. It is also important that one appreciate the moral costs of that course of action.

57. As I have argued elsewhere, the law can create legal obligations where moral obligations are absent, and even where most people making "all-things-considered" moral judgments would agree that a person has no such moral obligation. *See* W. Bradley Wendel, *Lawyers, Citizens, and the Internal Point of View*, 75 FORDHAM L. REV. 1473 (2006) (discussing hypothetical from Frederick Schauer, *Critical Notice*, 24 CAN. J. PHIL. 495, 499–501 (1994)).

58. The discussion in this paragraph is drawn from Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980).

59. *See* Wendel, *supra* note 27.

> This appreciation will be expressed in a genuine reluctance to bring about the injury, and a sense of the accompanying loss or sacrifice.[60]

The law and traditions governing the attorney-client relationship do permit the lawyer to discuss these "moral costs" with the client, but to emphasize, if the client instructs the lawyer to assist the client in a lawful course of action, the lawyer must comply. But the lawyer may do so with an accompanying feeling of regret, as a moral sentiment appropriate to having participated in justified wrongdoing. Indeed, we may judge a lawyer who does not experience the appropriate sentiment as being somehow deficient in character.

Postema worries that a lawyer will be less skillful *as a lawyer* if she becomes accustomed to making judgments that are detached from their sources in ordinary moral experience, beliefs, and attitudes.[61] In his view, lawyers are often called upon to use their moral faculties, deliberate, reason, and argue about matters related to justice. Thus, he rejects conceiving of legal ethics as "the artificial reason of professional morality, which rests on claims of specialized knowledge and specialize analytical technique."[62] In other words, he resists the Weberian conception I have been defending. It is true that lawyers make arguments in the public sphere on matters concerning morals and justice. But I am willing to bite the bullet and say that these arguments do pertain to an artificial kind of justice—the justice which represents the agreed-up provisional settlement of normative conflict.[63] We cannot build up professional ethics on a foundation of "real" justice, because it is too contestable. Lawyers could never facilitate the effective functioning of a large-scale cooperative scheme if professional ethics were completely transparent, as it were, to ordinary moral scrutiny, so that professional obligations were genuinely binding only and to the extent that they overlapped with ordinary moral duties. As for the argument that this artificial morality cuts lawyers off from resources they need to fashion arguments regarding client rights and duties,[64] it is actually an important part of the professional judgment of lawyers to be able to distinguish between ordinary moral notions (justice, reasonable care, etc.) and legal concepts. Lawyers who participate in the argumentative practices of this artificial universe may lose sensitivity to the costs of their actions in ordinary moral terms. That is a serious problem for professional ethics, but it does not threaten the competence of lawyers as lawyers; rather, it makes it essential for lawyers to continue to engage in theoretical as well as practical reasoning about moral problems.

60. Postema, *supra* note 58, at 70.

61. *Id.* at 75–76, 79.

62. *Id.* at 76.

63. *Cf.* Fried, *supra* note 35, at 1084 ("[O]ne must not transfer uncritically the whole range of personal moral scruples into the arena of [the attorney-client relationship.]").

64. Postema, *supra* note 58, at 79.

III. RECONSTRUCTING LEGAL ETHICS

The Weberian conception of professional expertise defended in Part II does not incorporate moral judgment as a significant component of the structure of the lawyer-client relationship. As I have argued elsewhere, there is a difference between justifying institutions and practices as a whole, and justifying actions falling within those practices.[65] If there are good moral reasons for citizens and lawyers to respect the settlement achieved by the law, which permits coordinated action despite moral disagreement, then citizens and lawyers have a moral obligation to do what is legally required in a given case, even if they believe this requirement does not overlap with the requirements of ordinary morality. Judgments that look moral (e.g., "the directors violated their duty of loyalty to shareholders") are actually legal judgments when the relevant moral norms are incorporated into the law. Therefore, when acting in a representative capacity, a lawyer is not engaged in making ordinary moral judgments, except in highly unusual circumstances.[66]

That does not mean, however, that there is no such thing as legal ethics, apart from the disciplinary rules and the broader law governing lawyers. The function of law creates a strong obligation, as part of the role of a lawyer, to treat the law as a social achievement worthy of respect and fidelity, not merely an inconvenient obstacle to be planned around in pursuit of the client's ends. I have argued that in several recent high-profile legal ethics scandals—including the Enron collapse, the marketing of fraudulent tax shelter opinions, and the approval by government lawyers of the use of torture in the interrogation of detainees—the principal ethical dereliction was the failure of lawyers to interpret legal norms in good faith, with due respect for the meaning of the law, considered from a relatively objective and impartial point of view.[67] That is the violation of an ethical obligation, but not one that arises from ordinary moral values. Rather, the duty arises from the recognition of the shared value of a settlement of normative controversy that enables people who profoundly disagree to cooperate toward the realization of common projects, such as efficient financial markets and national security. When lawyers make frivolous statutory interpretation arguments in order to narrow the definition of the term "torture" to exclude a variety of techniques that would be deemed

65. *See* Wendel, *supra* note 6, at 989 (discussing Rawls's practical theory of rules in John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955)).

66. Any theory of obedience to law, however strong, has to have a "safety valve" for legal requirements that are so obviously immoral that they cannot represent the resolution of issues on which it is possible for people to disagree in good faith. In my view, it is important to set the threshold for opting out of professional obligations at a high level; otherwise all the moral disagreement that the law supersedes would be reintroduced as lawyers referred back to ordinary moral values to justify their decision not to represent particular clients, or not to take certain legal actions on behalf of clients. *See* Wendel, *supra* note 27, at 417 n.190.

67. *See* Wendel, *supra* note 8, at 1210–32.

torture under a good faith interpretation of applicable domestic and international law,[68] or when they approve structured-finance transactions that comply in a superficial way with accounting rules but plainly are not the sorts of transactions for which the rules were intended,[69] they are treating the law with a disrespectful instrumental attitude, not acting as trustees of the law. Lawyers may not have greater expertise than their clients or regulators in working out, through a process of moral reasoning, the circumstances under which it might be permissible to deprive a detainee of sleep in order to obtain information that could be used to unwind a terrorist plot. They do, however, have a considerable comparative advantage in understanding the relevant legal norms. Failing to treat these norms as legitimate sources of reasons that their clients must take into account is an *ethical* failing, with respect to the *law*. This is the sense in which the role of lawyers incorporates both law and ethics.

The disrespect for the law displayed by the lawyers in the Enron, tax shelter, and torture memo cases do not appear out of nowhere. As legal educators, we should ask whether law school somehow creates an attitude of "anti-ethics" characterized by "numbness to ethical difficulties of practice, and, far worse, a cavalier attitude toward the responsibilities lawyers have to clients and the public."[70] Unfortunately, anecdotal evidence suggests that some law schools do tend to encourage this stance, either through overt disparagement of legal ethics or, more commonly, through more subtle signals of the marginality of these issues. Professional responsibility teachers often quote the observation of David Luban and Michael Millemann, that their subject is "the dog of the curriculum, despised by students, taught by overworked deans or underpaid adjuncts and generally disregarded by the faculty at large."[71] Students may come to regard the subject as a "dog" long before they enter a professional responsibility classroom if they are attentive to the tacit norms of the legal academy, which valorizes a certain attitude toward the law, particularly "an instrumental approach to law and lawyering [and] a 'tough-minded' and analytical attitude toward legal tasks and professional rules."[72] Whether they intend to send this message or not, all law teachers, not just those who regard themselves as formally teaching professional responsibility, convey implicit messages about the way lawyers should interpret and apply the

68. *See* Wendel, *supra* note 25, at 80–85.

69. *See* Wendel, *supra* note 8, at 1221–24.

70. Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 154 (1996).

71. David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 37–38 (1995).

72. *See* Cramton, *supra* note 23, at 248.

law to their clients' situations.[73] These signals may be deeply embedded in the structure of the law school curriculum, which emphasizes hard cases, the indeterminacy of law, and the political basis for judicial decisions.[74] Or they may be conveyed more overtly, by teachers who adopt the "tough-minded" stance of an unreasonably stripped-down rational choice approach.[75]

If we hope to counteract the instrumentalist attitude toward the law that characterizes the recent legal ethics debacles, professional responsibility scholars have to engage with the broader academic and professional communities. My own work in the theory of legal ethics is motivated by the conviction that the practice of moral judgment *for lawyers acting in a representative capacity* is categorically different from ordinary moral reasoning. Although I know a bit about philosophical ethical theory, I do not claim to be any better at moral reasoning than the average person; I suspect most law teachers would feel the same way. But as lawyers and legal scholars, we do have considerable expertise at addressing the technical questions presented by our clients legal problems. To extend the theme of this essay, we should not misconceive the nature of the expertise of the subdiscipline of professional responsibility teaching. The aim of professional responsibility courses should not be to enhance students' capacity to exercise reflective moral judgment.[76] Not only is it difficult to fit all of the complexities of the law governing lawyers into a three-hour course, but more to the point, the real problem of legal ethics is how to get lawyers to take the law seriously. Anything a professional responsibility teacher says in his or her own course may be undermined by an implicit message that the law is only instrumentally significant, and can be planned around and nullified by a sufficiently clever lawyer. If my colleagues teaching securities law tell students that the lawyers representing Enron in its structured-finance deals did nothing wrong, the students would take that as a credible statement about what the law allows, and the burden would then be upon me as a professional responsibility teacher to convince them that they should not assist their client in obtaining a legal entitlement. If my argument were, in effect, that it's a rotten thing to do, the students would justifiably feel that I have no greater expertise than they do with respect to figuring out what is a morally rotten thing to do. If, on the other hand, the message is conveyed that the legal arguments employed by the

73. Susan P. Koniak & Geoffrey C. Hazard, Jr., *Paying Attention to the Signs*, 58 LAW & CONTEMP. PROBS. 117, 118–19 (1995) (arguing that whether law schools acknowledge it or not, they teach ethics "pervasively" whenever professors talk about what a lawyer should do).

74. *See* Cramton, *supra* note 23, at 254–55.

75. *See* W. Bradley Wendel, *Symposium Introduction: Economic Rationality vs. Ethical Reasonableness: The Relevance of Law and Economics for Legal Ethics*, 8 LEGAL ETHICS 107 (2005) (discussing a review symposium on RANDAL GRAHAM, LEGAL ETHICS (2004)).

76. *Cf.* Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 42–43, 51 (1992).

Enron lawyers are lousy legal arguments, we as legal educators are acting within the domain of our expertise.

The arguments presented here may also support expanding efforts to incorporate professional responsibility education into clinical settings, where students deal simultaneously with the law governing their clients' problems and the law governing their own conduct as lawyers. It may even be the case that the only "real" ethical education occurs in conjunction with students imaginatively or actually entering the role of lawyers for real or hypothetical clients. Having said this, however, I do not want to suggest that there is no role for the traditional three-credit professional responsibility course. I only insist that we not confuse the role of that course with teaching ethics. The law governing lawyers is an important and interesting subject in its own right, and students should not graduate from law school without being able to deal with fairly complex conflict of interest, attorney-client privilege, or client-wrongdoing problems. As that body of law has grown and matured over the last few decades, many law schools have found it helpful to hire specialists in the law governing lawyers to teach the required professional responsibility course. This seems like a positive development, and not only because it provides job security for a whole cadre of law teachers. But the law governing lawyers is not ethics, and we as legal scholars are right to continue to question how ethics is taught. My goal in this essay is to establish the way in which law and ethics interact, and thus to point the way toward a more comprehensive approach to teaching professional responsibility.