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Should Lawyers Obey the Law?

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At the same time that it denies authority to nonlegal norms, the dominant view of legal ethics (the "Dominant View") insists on deference to legal ones. "Zealous advocacy" stops at the "bounds of the law."[1]

By and large, critics of the Dominant View have not challenged this categorical duty of obedience to law. They typically want to add further public-regarding duties,[2] but they are as insistent on this one as the Dominant View.

Now the idea that lawyers should obey the law seems so obvious that it is rarely examined within the profession. In fact, however, once you start to think about it, the argument for a categorical duty of legal obedience encounters difficulties, and these difficulties have revealing implications for legal ethics generally.

The basic difficulty is that the plausibility of a duty of obedience to law depends on how we define law. If we define law in narrow Positivist terms, then we cannot provide plausible rea-

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* Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford University. I presented an earlier version of this Essay at the conference on teaching legal ethics at the College of William & Mary School of Law on March 23, 1996. The W.M. Keck Foundation sponsored that conference, and it has supported my work-in-progress, *The Practice of Justice: A Theory of Lawyers' Ethics*, of which this Essay is a part. Thanks go to David Wilkins, David Luban, Jim Moliterno, Deborah Rhode, Andy Kauffman, Steve Pepper, Einer Elhauge, and many other colleagues who offered suggestions and encouragement at the William & Mary conference and at faculty workshops at Denver, Harvard, and Stanford.

1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1983). I call the Dominant View the familiar perspective on legal ethics expressed, with qualifications, in both the Model Code of Professional Responsibility and Model Rules of Professional Conduct. The basic idea, of course, is that lawyers should pursue client interests subject only to the clearly defined limits of the "law." For an explication of the view as it appears in the Model Code of Professional Responsibility and Model Rules of Professional Conduct, see DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 393-403 (1988).

2. Especially of candor. *See, e.g.*, Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

sons why someone should obey a norm just because it is "law." In order to give substance to the idea that law entails respect and obligation, we have to resort to broader, more substantive notions of law. These broader notions of law, however, are hostile to both the narrowness and the categorical quality of the Dominant View's idea of legal obligation. I and others have argued elsewhere that these broader notions often require advocacy to stop short of the limits prescribed by the Dominant View.[3] Here I want to consider that they sometimes may warrant the lawyer to go beyond them.

I. LAWYER OBLIGATION IN THE DOMINANT VIEW

Suppose we are in a jurisdiction with an old-fashioned divorce statute that conditions divorce upon proof of one of a small number of grounds, such as adultery or abuse. A childless husband and wife have agreed that they want a divorce and on reasonable arrangements for separating their financial affairs. The lawyer believes that the proposed divorce and financial arrangements are in the interests of each of them. They cannot honestly prove, however, any of the grounds the statute requires. Suppose further, as was true in some of the jurisdictions that used to have such statutes, that it is possible, at little risk to either lawyer or clients, for the lawyer to help the couple get a divorce by coaching and presenting perjured testimony about, say, adultery.[4] The Dominant View forbids the lawyer to help clients in this way, no matter how strongly she believes that the couple is entitled to a divorce. If the lawyer believes the divorce statute is unjust, it says, she should work to induce the legislature to change it. This view condemns coaching and presenting perjury

3. *See* LUBAN, *supra* note 1; William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

4. *See* WALTER GELLHORN, *The Administration of Laws Relating to the Family in the City of New York*, *in* CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY 17, 282-90 (1954). The risk is small because judges, although aware of the practice, accept such testimony passively, and prosecutors and the police devote no resources to uncovering these practices. (Say there is a substantial probability that, if they were confronted with a flagrant case, the authorities might initiate charges of some sort, though even this is not clear. In any event, only the most careless or unlucky lawyer would create a flagrant case.)

as a transgression of the "bounds of the law."[5]

The Dominant View, however, is considerably less clear about lawyer activities that bear a less direct relation to client illegality, in particular, advice that it is likely to encourage or facilitate illegal conduct. Some advice—for example, information about the core terms of a statute—is clearly both a right of the client and a core function of lawyering. Other forms of advice—say, about where to hide from the police or how to build a bomb—clearly represent improper participation in illegal conduct.

However, at least one form of advice that clients often seek is harder to classify. This is advice about the enforcement practices of officials. Suppose I say to a tax client that, while the aggressive position she wants to take is unlikely to survive an audit, less than five percent of returns in her class are in fact audited. Or suppose, knowing my client's expenses are considerably lower than seventy percent of revenues, I tell her that the IRS's practice is not to question returns for businesses like hers unless they show expenses above seventy percent. Such advice is probably not unlawful,[6] but since its only effect is to impede the enforcement process, it is troubling.

The Dominant View has yet to produce a clear answer to the question of whether such advice is improper. It hesitates between, on the one hand, defining it as legal advice and thus categorically appropriate, and on the other hand, defining it as assisting illegal conduct and thus categorically improper.

In fact, neither answer is plausible. The only satisfactory answer calls for contextual judgment. Most lawyers will readily

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5. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-5 (1995) ("A lawyer . . . should refrain from all illegal . . . conduct."); *see also* MODEL RULES OF PROFESSIONAL CONDUCT pmbl. (1995) ("A lawyer's conduct should conform to the requirements of the law. . . ."). Although I will argue in time that because the terms "law" and "illegal" are ambiguous, these precepts need not be read to condemn the proposed conduct in the divorce perjury case. Nevertheless, they invariably are read to do so.

6. If there were an ongoing investigation focused on the client, advice about enforcement practices that might increase the difficulty of discovering evidence of past acts might constitute criminal obstruction of justice.

For an excellent discussion of the enforcement advice issue, see Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995).

concede this in the case of enforcement advice, for this is one area where the commitment of the Dominant View to categorical judgment is out of step with mainstream views and practices. The conclusion may be harder to accept in the case of direct participation, such as the Divorce Perjury story, but the same considerations that support contextual judgment in the indirect cases apply here as well.

II. POSITIVIST VERSUS SUBSTANTIVE CONCEPTIONS OF LAW

Positivism is committed to differentiating legal from nonlegal norms and to doing so by virtue of a norm's pedigree rather than its intrinsic content. A pedigree links a legal norm to a sovereign institution through jurisdictional criteria that specify institutional formalities. An example of such a jurisdictional criterion is Article I, section seven, of the United States Constitution, which says that when each House of Congress overrides a Presidential veto of a bill by a two-thirds vote the bill "shall become a Law."

When legal norms conflict, the Positivist resolves them in terms of jurisdictional criteria that specify which of the institutions to which the norms are traced should prevail. If the conflicting norms emanate from the same institution, then the Positivist applies further jurisdictional criteria—for example, later over earlier or specific over general—to decide which should have priority.

Positivism has a strong affinity with the commitment of the Dominant View to categorical judgment. The Positivist perspective facilitates categorical judgment by banishing a broad range of potentially relevant factors (the putatively nonlegal ones) and by providing for the rigid priority of jurisdictional over substantive norms.

The Dominant View conjoins the Positivist notion of law with a commitment to obedience to law (and only law). The narrow way in which it defines law, however, makes it hard to explain why law should be regarded as binding.[7]

Positivist legal philosophers are not much help here. Their

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7. *See generally* PHILIP SOPER, A THEORY OF LAW (1984) (insisting on the integral connection of the issues of definition and obligation).

concerns are more analytical and descriptive than normative. They are prone to simply take it for granted that people should obey the law or to start out with the observation that, for whatever reasons, people simply do regard the law as binding. The Positivism of the Dominant View thus differs from its jurisprudential analogues in being a *Moralistic Positivism.*

Moralistic Positivism makes three arguments for a categorical duty of legal obedience. First, obedience to law promotes social order; without it, we would have anarchy. Second, obedience promotes fairness; because we get the benefits of other people's obedience, we ought to give them the benefits of our obedience. Third, obedience promotes democracy; the laws are made pursuant to procedures of popular representation and accountability that entitle them to respect.[8]

These arguments might be persuasive against a position asserting that one ought categorically to *disobey* the law, but hardly anyone has ever asserted such a position. Against the various positions of selective disobedience, such as those we shall shortly consider, they are entirely unpersuasive.

The problem with the arguments is that each rests on an appeal to a value that does not consistently track the Positivist's jurisdictional criteria of legality. However the Positivist specifies her criteria, there will always be particular situations in which obedience to what the Positivist's criteria identify as law will not serve social order, fairness, or democracy.

How often such situations arise will depend on how the Positivist defines her jurisdictional criteria. For example, some Positivists are literalists who insist on narrowly construing the norms they identify as laws. Others, however, prescribe that the norms be interpreted in the light of their supposed purposes or relevant social values (perhaps on the theory that the sovereign intends this or has implicitly enacted such purposes or values into law). Of course, the more the Positivist's criteria permit resort to such background norms, the less likely her interpretations are to be in tension with them. However, to insist on some distinction between law and other types of norms is what it

8. For a lucid discussion of the obligation issue with references to the philosophical literature, see LUBAN, *supra* note 1, at 31-49.

means to be a Positivist. So all Positivists will sometimes find themselves in situations of tension between the norms they identify as legal and other norms.

For example, several years ago Raoul Berger decided, on the basis of extensive historical research, that the Reconstruction Congress did not expect the Fourteenth Amendment to ban racial segregation.[9] Under his criteria, the expectations of the Congress determined the correct interpretation of the Amendment, so it did not forbid segregation and *Brown v. Board of Education* was incorrectly decided. Berger became quite exercised about the Warren Court's Fourteenth Amendment cases and condemned them as betrayals of the rule of law.

Berger's argument was controversial. Some people insisted he was wrong about what the expectations of Congress were. Some people thought that congressional expectations were not the critical criterion; they argued either that some other set of expectations—say, those of the members of the ratifying conventions—or something beside expectations—say, the current conventional meaning of the Amendment's language—was the critical criterion.

The most vulnerable part of Berger's argument was the assumption that, if he had been right about what the Fourteenth Amendment provided as law, that law would have deserved any respect. Why should we not simply admire the Warren Court for flouting this unappealing law and lending its efforts to the fight against segregation?

The arguments from social order, fairness, and democracy do not seem powerful here. The Warren Court's decisions may have contributed to social disorder, but anarchy did not ensue, and arguably what Berger thought was the legally correct decision would have caused more disorder. Few people today would regard a ruling against the *Brown* plaintiffs as a contribution to fairness. The balance of burden and benefit in the legal order of the day was not fairly struck for African-Americans; the Warren Court's arguably lawless decision inarguably pushed the balance toward greater fairness. Further, although the United States

9. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 117-33 (1977).

was in some relative sense a democracy, that fact did not cut toward the Berger result, because the country was a highly deficient democracy, and the Warren Court result was plausibly calculated to alleviate those deficiencies.

The Dominant View's arguments for obedience demand that we look at the legal system as a whole, ask if on balance it serves some good, and then if the answer is yes, obey its commands categorically. However, unless we have some reason to think our selective disobedience will trigger some generalized lawlessness, we should not consider our disobedience a threat to the desirable aspects of the legal order. The fact that other people are obeying the law is often a fairness reason why we should, but if the law itself is unfair, the fairness concerns supporting disobedience will usually outweigh those supporting obedience. The fact that the law has been enacted or acquiesced in by a generally democratic political process is a reason for obedience, but not one that should prevail over a discovery that the process has not been democratic in this particular case.

Now turn to a conception of law radically opposed to Positivism. We can call this conception "Substantive," though there are many variations of and names for it. Some people prefer the term "natural law," though that term has connotations too exotic and metaphysical for what, I hope to show, is a familiar, mainstream notion.

The Substantive conception rejects Positivism's core premises—that law is strongly separated from nonlaw and that law is distinguished by jurisdictional criteria. It interprets specific legal norms as expressions of more general principles that are indissolubly legal and moral. It acknowledges the jurisdictional rules that Positivism regards as preeminent, but it regards them differently. First, it does not regard them as independent or ultimate social facts, but as expressions of underlying values, such as order, fairness, and democracy, and it insists on interpreting the rules in the light of these values. Second, it denies that these jurisdictional principles are categorically more important than substantive principles that prescribe, not the allocation of authority for dispute resolution, but the just ordering of the social world.

Consider the case of *Walker v. City of Birmingham*.[10] At the high tide of civil rights activism in the South, Martin Luther King, Jr. and the Southern Christian Leadership Conference planned a march in Birmingham to protest racial practices they believed were unconstitutional. At the behest of the city's white leadership, the local state court issued an injunction forbidding the march. Believing that the injunction was unconstitutional, they marched in defiance of it. The court held the organizers of the march guilty of contempt and jailed them.

When the Supreme Court reviewed the lower court's contempt judgment, it held that whether the protesters were correct in their belief that the injunction was unconstitutional made no difference. The Court decided that, because the lower court had jurisdiction and the protesters had ignored available procedures for appealing the injunction to higher tribunals, respect for law required affirming the punishment.[11]

The *Walker* conclusion is plausible only under a Positivist conception of legality. Under a Substantive conception, a "citizen's allegiance is to the law, not to any particular person's view of what the law is."[12] From this perspective, an officially promulgated norm merits respect only by virtue of its substantive validity, and the *Walker* injunction, as the Supreme Court later recognized,[13] had none. Respect for law required vindication of the protesters' conduct.

If the nightmarish slippery slope of Positivism leads to compliance with jurisdictionally adequate but morally evil laws like the Nazi enactments requiring reporting Jews and dissidents or the antebellum Fugitive Slave Laws, then the nightmarish slippery slope of Substantivism leads to anarchy. We ought to be clear, however, about what anarchy can mean. For the Positivist, anarchy is tantamount to lawlessness, but for the Substantivist (and for most anarchists) that is wrong. For them, anarchy is simply the most decentralized legal system imagin-

10. 388 U.S. 307 (1967).

11. *Id.* at 315, 318-21. The Court expressed no regret for this conclusion when it later held unconstitutional a similar injunction issued under the same statute. Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

12. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 214 (1978).

13. *Shuttlesworth*, 394 U.S. at 150-51.

able. In such a system every citizen is a common law judge of what the law requires.

This is not to say that the citizen has no rights or obligations. On the contrary, she may be subject to an elaborate set of rights and obligations. It is just to say that enforcement takes place through spontaneous citizen action—by "the People Out of Doors" to use the phrase current at the time of the Boston Tea Party, a notable instance of popular law enforcement[14]—rather than formally constituted authority.

The tendency to see all conduct in defiance of constituted authority as normless or unprincipled is a Positivist prejudice. The examples of the Birmingham march and the Boston Tea Party remind us that disobedient conduct can be intensely normative and intensely structured. They also remind us that some of the most radical manifestations of Substantivism have achieved legitimacy in our culture.

In contemporary legal culture, the broadest acknowledgement of the more radical manifestations of Substantivism occurs in discussions of nullification. Nullification is a term most readily associated with the power of the jury to disregard the judge's instructions and acquit even in the face of conclusive proof of what the judge has defined as an offense. This power was secured and legitimated in many nineteenth century state constitutions. These provisions have disappeared over the years in all but two states—Indiana and Maryland—and the practice has been explicitly disapproved in many others.[15]

Nevertheless, nullification has strong defenders, and it continues to lead a "subterranean life" in jury practice.[16] Today, as before, nullification occurs with significant frequency when the jury finds prescribed punishments excessively harsh, especially in cases of victimless crimes. The histories of nullification in the North in Fugitive Slave Law cases and in the South in trials of white killers of blacks and civil rights activists serve as reminders of the noble and ignoble aspects of the dramatic history of

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14. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1783 at 319-28 (1969).

15. IND. CONST. art. 1, § 19; MD. CONST. art. 23; *see* JEFFREY B. ABRAMSON, WE, THE JURY 57-95 (1994).

16. ABRAMSON, *supra* note 15, at 65.

the practice.

Nullification also describes two other important and less controversial practices—the judge's power to declare invalid unconstitutional legislation and the prosecutor's power to decline to enforce legislation when enforcement would not serve the public interest. Prosecutorial nullification is widely considered legitimate in circumstances where the application of a statute produces an especially harsh or anomalous result or where an entire statute, usually an old one, seems out of tune with contemporary sentiment—for example, the laws against fornication.

These nullification practices are never defended as forms of lawlessness, but rather as decentralizations of law application. The power to nullify is not a license to impose one's own views, but a duty to interpret what the law requires.[17] When it was given explicitly, the jury's nullification power was expressed in language making the jurors "judges of the law as well as the facts."[18] The nullifying judgment is a judicial—that is, law interpreting—one. The notion of law assumed is Substantive, that is, a broad one that refuses to privilege jurisdictional norms and makes no rigid distinction between legal and nonlegal norms.

Thus, the jury may interpret the applicable statutes and precedents for itself. It may also decide these statutes are unconstitutional, and it may consider that the statutes and precedents are out of harmony with background social norms, for example, that as applied they are unduly harsh or reflect values that have become outmoded. Though a Positivist might consider these background norms as nonlegal, a Substantivist would disagree. For a Substantivist, these norms are implicitly incorporated in the criminal law in a way analogous to that by which negligence norms incorporate the background standards of social practice. To the extent that we see the jury as revising the law, that power is analogous to the power of a common law judge to rephrase

17. *See, e.g.*, LEONARD D. WHITE, THE FEDERALISTS 204 (Greenwood Press 1978) (1948) ("The extent of the [Secretary of the Treasury's] power of superintendence was challenged by some customs collectors, who alleged that their oath of office required them to follow the law as they understood it, not as it might be explained to them by Alexander Hamilton.").

18. *See* Mark Howe, *Juries As Judges of the Criminal Law*, 52 HARV. L. REV. 586 (1939).

governing norms in the light of new circumstances.

To a radical Substantivist there is no distinction between legal and nonlegal norms. For her it is always the case that, as Justice Cardozo said in the course of interpreting a tax statute, "[l]ife in all its fullness must supply the answer."[19]

Unlike the Positivist, once the Substantivist has defined the law, she does not need to struggle for a further argument as to why it should be obeyed. The duty to obey follows more or less straightforwardly from the definition. Any argument for disobedience to a particular command would also be an argument that the command was an incorrect interpretation of the law.

The Substantivist may well experience conflict between different values—say, between the values of majoritarian democracy that support deference to the legislature and the values of fairness that cut against enforcement of statutes disadvantaging minority groups. Unlike the Positivist, she understands such conflicts as occurring between competing legal values, not between law and nonlaw.

At best, however, explicit, legitimate nullification occupies a marginal and uneasy place in the legal culture. Strong Substantivism threatens anarchy, and lawyers are dispositionally repelled by the prospect of anarchy. No doubt this is partly a matter of occupational self-interest; there is not much role for lawyers in anarchy. Beyond self-interest, it also reflects a plausible belief that anything approaching full-blown anarchy is unlikely to accommodate a high level of justice or welfare.

Thus, neither Positivism nor Substantivism, in their uncompromising, full-strength versions, are plausible. Positivism seems incompatible with any sense of legal obligation. It either disavows normative intentions, or it defends them clumsily and over-inclusively. Substantivism, by incorporating the reasons for obedience directly into its description of law, makes a clear case for obedience, but it tends to erode commitments to a stable institutional structure.

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19. Welch v. Helvering, 290 U.S. 111, 115 (1933).

III. THE PERVASIVENESS OF IMPLICIT NULLIFICATION

Mainstream American legal culture incorporates both Positivist and Substantive perspectives, giving emphasis to one or the other in some areas, while trying awkwardly to synthesize them in others. The working philosophies of individual lawyers vary in the relative emphases they give to the two perspectives, but, outside the realm of legal ethics, rarely embrace either fully.

I do not propose to reconcile the two perspectives here. The contextual approach to lawyer's ethics I argue for is compatible with most variations of the two perspectives except the stronger versions of Positivism.

As we have seen, however, the Dominant View presupposes a strong version of Positivism. A strong Positivist notion of legality underlies the Dominant View's categorical injunction of legal obedience as well as its denial of authority to nonlegal norms.

I am going to offer a series of examples illustrating the pervasiveness of even the more radical Substantive themes—those associated with nullification—in mainstream legal culture. These themes are often implicit and underacknowledged, but they recur in conventional practices and understandings. My purpose is not to deny the presence or partial validity of Positivist themes, but merely to suggest how inadequate the strong Positivist notion of legality is as a basis for a general lawyer's ethic. More specifically, the discussion will show how radically incompatible the idea of a categorical duty of obedience is with the broader legal culture.

A. Constitutional Revolution

Bruce Ackerman has recently emphasized that the major alterations of constitutional arrangements in America have been accomplished in ways that appear to have violated the laws that governed such alterations.[20]

The original Constitution was enacted in defiance of the pre-

20. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989); Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475 (1995).

scriptions of the Articles of Confederation that amendments be initiated by the Congress rather than a Constitutional Convention, that they be accepted unanimously by the states rather than by nine of the thirteen states, and that the states act through their legislatures rather than through conventions. In adopting the Constitution at the Convention, delegates from several states exceeded the authority granted them in their commissions. Although ratification of the federal Constitution entailed amendment of the state constitutions, most state conventions proceeded in defiance of the provisions governing amendments to their constitutions.

The Fourteenth Amendment initially was rejected by nine legislatures of the defeated Southern states, more than enough to defeat it under Article V. These states accepted the Amendment only after Congress and the Army forcibly reconstructed their political processes and then conditioned their further representation in Congress on ratification.

During the New Deal, the President, Congress, and the Supreme Court dramatically restructured the Constitution by adopting a new set of understandings of basic structural issues without any resort to the amendment process.

Ackerman does not believe that the many failures to "play by the old rules" that he documents challenge the legitimacy of these constitutional revisions. To the contrary, he argues that the old rules were "deeply defective" expressions of democratic values and that the actual practices used in the revisions vindicated these underlying values better than rule compliance would have.[21] In each case of revision, the process involved mass deliberation and mobilization in which large majorities of the electorate expressed their support for the new arrangements. In the classic tradition of radical Substantivism, Ackerman shows how conduct that departs from all but the most unconstrained readings of the positive law can nevertheless be intensely normative and structured.

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21. Ackerman & Katyal, *supra* note 20, at 478.

B. Interpretation As Nullification

We earlier noted the basic tension in the legal culture between strict, literalistic interpretation on the one hand and broad, purposive interpretation on the other. To sustain its commitment to segregating law from nonlegal norms, Positivism has to support relatively literalistic modes of interpretation. As interpretation becomes broader, it becomes harder to distinguish from nullification. Yet there is strong support in the culture for broad interpretation.

Consider, for example, Article I, section six of the Constitution, the "Emoluments Clause," which provides, "[n]o Senator or Representative shall . . . be appointed to any civil Office . . . the Emoluments whereof shall have been increased" during his term in Congress. In 1992, President Clinton announced that he intended to nominate Senator Lloyd Bentsen for Secretary of the Treasury. The salary of the Secretary of the Treasury had been increased several times during Bentsen's term as Senator. Congress responded to concerns about the Emoluments Clause by decreasing the Secretary's salary to its level at the beginning of Bentsen's Senate term and then confirmed his nomination.

One might characterize Congress's action as a broad, purposive interpretation of the Emoluments Clause. That is what then-Acting Attorney General Robert Bork did when he said about an earlier and similar nomination: "[t]he purpose of the constitutional provision is clearly met if the salary of an office is lowered after having been raised during the Senator's or Representative's term in office."[22] (The purpose is to insure that legislators will not set executive salaries with an eye toward their own benefit in the event they should themselves be appointed to executive office.)

The objection to Bork's argument is that the prohibition of the Emoluments Clause is specific and categorical. Thus, Michael Paulsen wrote an article deploring Bentsen's confirmation as a flagrant violation of the Constitution. Paulsen also gave several other examples of violations of Constitutional provisions con-

22. *Hearings on S.26733 Before the Senate Comm. on Post Office and Civil Service*, 93d Cong., 1st Sess. 11 (1973) (concerning President Nixon's nomination of Senator William Saxbe as Attorney General).

cerning governmental structure. In each of these instances, Paulsen conceded, the applicable provision was a "nuisance" whose enforcement would serve no purpose. Nevertheless, Paulsen expressed great distress at what he regarded as betrayals of the rule of law.

Paulsen gave no specific reasons for his disapproval. He did not suggest that society's tolerance of this sort of nullification has in any way weakened its ability to enforce constitutional provisions in situations where the stakes are higher. He merely regarded it as self-evidently wrong to fail to comply with a legal rule. At the same time, however, he took note of an interesting fact that seemed to both puzzle and infuriate him: "[n]obody seems to care."[23]

For present purposes, we can take Paulsen's frustrated observation as evidence that there is broad tolerance (and some active support) for the type of broad, purposive constitutional interpretation that shades into nullification.

It is not difficult to find analogous instances concerning the interpretation of statutes. In 1982, Guido Calabresi wrote a book arguing that judges should nullify statutes that, although constitutional, had become obsolete because of social changes following their enactment.[24]

Calabresi claimed that he was simply proposing that judges do openly what sophisticated lawyers knew they routinely did as a matter of "subterfuge" under the guise of constitutional adjudication or broad construction of the statute's language. Judges should not be so bashful about statutory nullification, he argued, because it is not very different from judicial revision of common law rules. As with a common law decision, a decision nullifying an obsolescent statute can be reversed by legislative enactment of a fresh statute. The fact that, unlike a common law rule, a statute was once supported by a legislative majority should have little weight against the practice. A *long-ago* legislative majority is scant evidence of current support.

Ian Ayres has reinterpreted a series of close corporation cases

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23. Michael S. Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907, 907 (1994).

24. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

in the light of Calabresi's proposal.[25] These cases, which appear in every Corporations casebook, consider whether close corporation control agreements that allocate board representation and management responsibility conflict with statutory provisions conferring the managerial power and duty on a board of directors chosen by election. Earlier cases sometimes struck down the provisions as inconsistent with the statutes. The clear trend of the modern cases is to enforce the agreements. Modern lawyers almost unanimously consider it desirable that small business participants be able to contract for the control arrangements they want. The older doctrine that inhibits their ability to do so is simply a "nuisance." Thus cases eroding the doctrine have been applauded.

To my knowledge Ayres was the first to discuss these cases as a form of nullification. He suggested that the older doctrine was strongly supported by statutory language. On the other hand, because the statutes, so interpreted, were out of tune with contemporary policies, they were good candidates for Calebresian nullification. Moreover, he pointed to specific defects in the state legislative process that made it an unreliable safeguard of small business interests. Although states compete with each other to attract public corporations and the fees that come with incorporation, they have a captive market among small businesses for whom out-of-state incorporation is rarely feasible. Thus, he argued that reduced deference to the legislature is appropriate where small business interests are concerned.

Now for our purposes the interesting feature of these arguments is that no commentator ever treated these cases as instances of nullification until one of the most prestigious mainstream legal scholars made a case for the legitimacy of nonconstitutional statutory nullification. Before then, to have treated the cases in terms of nullification would have made them hard to defend. Yet, people approved of them on policy grounds. Thus, they treated them as instances of broad, purposive construction.

It is a familiar trope of legal rhetoric, often found in dissent-

25. Ian Ayres, *Judging Close Corporations in the Age of Statutes*, 70 WASH. U. L.Q. 365 (1992).

ing opinions, to accuse someone whose decision you disagree with of changing or nullifying, rather than interpreting the law. The accusation is usually taken as simply a conclusory assertion of disagreement. The idea that a nonconstitutional statutory decision could be both nullification *and right* was generally banished from polite conversation before Calabresi (and it is still a minority view). In fact, once we acknowledge the creative aspects of interpretation and the principled aspects of nullification, it is often hard to distinguish them. Although the charge of nullification still raises a red flag, the practices associated with it are secure in the mainstream of the culture.

C. Casual Nullification

Many laws are unenforced or underenforced because people disobey them and officials are unable or unwilling to sanction them. With some laws, this fact is a tragedy that reflects the inadequate socialization of the actors and practical difficulties of enforcement. With others, however, it seems a largely desirable mode of accommodating formal law to practical circumstances. In these situations, citizens often violate the laws without any sense of wrongdoing, and their actions are ratified by officials who decline to sanction them even when they have the ability to do so.

This sort of nullification sometimes takes a quasi-Calabresian form involving the disregard of laws that have grown out of touch with mainstream social values. The underenforcement of the laws against fornication and adultery or against marijuana possession are examples.

Another variation is motivated by a desire to avoid the inefficiencies of purposeless formality. In some areas, scrupulous *compliance* with the law is so burdensome and even disruptive that it occurs only as a form of protest. Thus, we get the practice of "working to rule"—or as the French call it, the "strike of zeal"—in which workers bring various enterprises to a halt by refusing to cut the corners necessary for things to function smoothly. Air traffic controllers and airline pilots, for example, are able to disrupt air traffic to the point of collapse by insisting on literalistic compliance with the rules.

Still another type of casual nullification occurs because of the

cost of ascertaining the law. I recall from my childhood in the 1950s an episode of a game show called "People Are Funny" in which a contestant was challenged to go through the week between the current show and the next one without breaking any laws. A detective was to accompany him throughout the week, and there was a big prize for a week of law compliance. Even with these laboratory-like incentives, he was unable to do it. The detective observed him breaking a federal law that he was unaware of making it a crime to open a package of cigarettes without breaking the tax stamp.

An especially interesting realm of casual nullification is highway speed limits. During the era of the fifty-five mile per hour limit, nearly everyone has violated the limit a lot. Many people believe that they are allowed an extra ten miles above the posted limit by customary enforcement practices. One recent study even suggests that, within a broad range, the posted limit has *no effect* on the behavior of most drivers. "Repeatedly traffic studies confirm that 85 percent [of drivers] run at what is called a 'comfortable speed' regardless of the posted limit."[26]

Thus, we have a situation of anarchy in the sense of decentralized norm application, but not in the sense of chaos. Although nullification increased when the speed limits were lowered (because behavior didn't change) safety actually improved, and it is not at all clear that compliance would have improved it more. Many experts think that the dominant practices are optimal, and several jurisdictions have adjusted their rules to bring them more into line with practice.

Ronald Dworkin, in other respects one of the most Substantivist of legal theorists, repeatedly invokes the proposition that "the speed limit in California is 55" as an example of an easy case of uncontroversial legal judgment.[27] In fact, it is an easy case only if we are interested in describing the explicit terms of the legislature's enactment. It is a hard case from the point of view of obligation. Or if it is an easy case, the answer is

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26. Brock Yates, *Speed Doesn't Kill, Bad Drivers Do*, N.Y. TIMES, July 24, 1995, at A13.

27. *E.g.*, RONALD DWORKIN, LAW'S EMPIRE 266 (1986). My comment is independent of the jurisprudentially uninteresting fact that since Dworkin wrote, the specified speed limit has been raised to 65.

the opposite of the one Dworkin assumes. As a native informant, I would say virtually nobody in California feels obliged to go fifty-five, as opposed to fifty-six or fifty-seven, miles per hour. The case becomes hard when we try to draw the line between acceptable and unacceptable speeding.

D. Conscientious Nullification

We have already noted examples of the glorious American tradition of principled disobedience to law in the area of civil rights. Some of these instances are discussed under the rubric of civil disobedience. The difference between nullification and civil disobedience concerns only the degree of success of the activity in question. Nullification refers to a largely successful effort to alter or erase enacted law; civil disobedience refers to an effort of limited or no success. If *Walker v. City of Birmingham* had been decided in favor of the protesters, the march would have been an instance of nullification; given the way the Supreme Court came out, it was an act of civil disobedience.

A striking fact about the American civil rights tradition is how much of it has been animated by Substantivist ideals of legality. The marchers in Birmingham and elsewhere who ignored injunctions and parade ordinances, the boycotters in Montgomery and elsewhere whose conduct was often prohibited by the state common law against trade conspiracies, and the sit-in demonstrators whose conduct was a form of trespass did not see themselves as defying the established legal order. They were inspired in part by their understanding of the values of equality and solidarity codified in the Constitution and other federal laws. In their view, they were disobeying not law, but the lawless commands of local officials and property owners. Moreover, their substantive claims have been largely vindicated within the legal order.

The story of 1950s and 1960s civil rights activism in the South is vivid testimony to the benign possibilities of the kind of anarchy associated with radical Substantivism, just as the longer history of racist lynching and vigilante terrorism testifies to the malign possibilities.

There is a contested but strong tradition of tolerance for civil disobedience in the legal culture. The most strongly supported

instances are those like the Birmingham march in which the ultimate tribunal comes to share the defendant's substantive views. In such cases, the Substantivist denies that there is any strong competing interest in respect for constituted authority independent of the substantive quality of the decisions made by those in authority.

There is also support for the view that open disobedience based on a good faith but wrong interpretation of the law ought to be tolerated if the interpretation is not too unreasonable and the conduct does not impose large costs other than those arising from the defiance of constituted authority. The argument is that such conduct is a potentially valuable form of citizen participation in the process of legal elaboration. Even when ultimately held wrongful, the conduct may have been useful in putting issues on the public agenda and framing them as a specific case in a way that facilitates productive deliberation. A more radical view would protect some range of mistaken good faith *private* disobedience. Such conduct makes no intentional contribution to public deliberation, but it involves a kind of independent moral deliberation that society might want to encourage.[28] Radical Substantivism treats the civilly disobedient citizen somewhat like a lower court judge who has been determined to have made an erroneous ruling.

E. Lawyer Vigilantism in Popular Culture

Although we are primarily interested in the internal professional culture of lawyers, that culture is influenced by the surrounding popular culture. So it is worth noting that, for centuries, the treatment of lawyers in popular culture has been overwhelmingly Substantivist. Popular culture finds lawyers unattractive when they behave as the Dominant View prescribes, when they sacrifice broader notions of justice to narrow

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28. *See* DWORKIN, *supra* note 12, at 206-22; Martha Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723 (1991). For an argument closer to mine, which treats the legitimacy of civil disobedience less as a function of the distinctive virtues of conscientious action and more as a function of the general weakness of the moral claims of Positivistically-defined law, see David Luban, *Conscientious Lawyers for Conscientious Lawbreakers*, 52 U. PITT. L. REV. 793 (1991).

Positivist notions of legality.

Radical Substantivism is especially salient in the theme of lawyer vigilantism that recurs in Hollywood's approving portrayals of lawyers. Robert Post summarizes this theme in terms of the maxim, "the lawyer must be lawless in order to uphold the law."[29]

Consider three examples:

In *The Talk of the Town*,[30] Ronald Coleman portrays a Harvard Law professor nominated to the Supreme Court. In order to save an innocent man who has been framed for arson and is about to be lynched, he kidnaps the person he believes to be the real culprit and then confronts the lynch mob with a pistol (we are not told whether it is licensed), lecturing the mob on the importance of respect for legality.

In *The Man Who Shot Liberty Valance*,[31] James Stewart portrays a tenderfoot lawyer who comes to a rugged Western town to hang out his shingle. When the town is terrorized by a gang of thugs, he challenges its leader to a duel (which is of course a crime). When he amazes everyone by appearing to kill his opponent, the town elects him to office, and he ambivalently rides his reputation as "the man who shot Liberty Valance" to a career in the United States Senate. It turns out that he did not kill Liberty Valance. John Wayne secretly shot Valance from a nearby hiding place. When he tells Stewart the truth, Wayne concludes, "It was cold blooded murder, but I can live with it." Presumably, under the felony murder rule, Stewart shares Wayne's guilt, but Stewart, too, decides he can live with it.

In *The Verdict*,[32] Paul Newman portrays a struggling lone practitioner litigating a wrongful death case against scions of the Boston medical establishment and an army of lawyers from a big corporate firm. The defendants have driven the principal witness to their negligence out-of-town and threaten to destroy her career if she cooperates with the plaintiff. Newman cannot

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29. Robert Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379, 382 (1987). The examples of *The Talk of the Town* and *The Man Who Shot Liberty Valance* were suggested by Post's article.

30. THE TALK OF THE TOWN (Columbia Pictures 1942).

31. THE MAN WHO SHOT LIBERTY VALANCE (Paramount Pictures 1962).

32. THE VERDICT (Twentieth Century-Fox 1982).

locate the witness because the defendants deny they know where she is (probably perjuriously) and have threatened to ruin anyone who cooperates with the plaintiff. With the trial about to begin and no witness, Newman breaks into the mailbox of the witness's best friend on the day after the phone bills are mailed out and steals her bill. He checks the most frequent out-of-town number on the bill, finds the witness, and turns the case around.

In each of these instances, the lawyer's criminal behavior is portrayed as admirable and objections to it as priggish and naïve. *The Verdict* is a cynical work that sees corruption as everywhere and inevitable; it makes the ideal of legal obligation seem hypocritical and fatuous. *The Talk of the Town* and *Liberty Valance*, however, are idealistic works that show great respect for law as they insist on its complexity.

The themes of these latter two films are strikingly similar. At the beginning, the Coleman and Stewart characters each exemplify rigidity associated with limited experience of the world. Each has been formed in the sheltered environment of the Eastern city and the university. Their rigidity takes two forms that the movies treat as analogous. One is sexual; they are awkward with women. The other is intellectual; they are disposed to the kind of categorical normative judgment entailed by Moralistic Positivism. Their reverence for law is sanctimonious and naïve. Each is transformed, first, through love of an extraordinary woman (Jean Arthur, Vera Miles), and second, through participation in a crisis in which his commitment to the broader ideals of justice and legality requires him to violate the positive law. At the end of each film, the hero has acquired the worldliness of capacities for both love and complex normative judgment.

These films contradict a traditional dogma of the bar that popular respect for law requires lawyers to abide rigidly by the letter of the positive law. As the Model Code of Professional Responsibility puts it, "[b]ecause of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession."[33] The implication seems to be that, although lawyers may be capable of more sophisticated

33. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-5 (1995).

understandings of legality, Moralistic Positivism is all that can be expected of the lay public. These three films suggest that the bar has things backward. Popular respect for law may *require* lawyers to violate the positive law.

The understanding of law reflected in these films is a sophisticated one. In effect, the films offer a critique of Moralistic Positivism, which they personify in the early Coleman and Stewart characters. The critique is a psychological one quite similar to Jerome Frank's critique of classical legalism.[34] They see the disposition toward categorical judgment as a form of emotional and intellectual immaturity. In this condition, people deny or shield themselves from the real world because they are afraid of its complexities and contradictions. Maturity involves acknowledging these complexities and contradictions by abandoning categorical normative judgment without becoming cynical.

On the rare occasions when lawyers acknowledge nullification as legitimate, they tend to do so diffidently, focusing on a single type and treating it as distinctive. For example, Bruce Ackerman in his defense of constitutional revolution, Guido Calabresi in his defense of nonconstitutional judicial nullification, and Ronald Dworkin in his defense of civil disobedience each ignore the other types of nullification and take pains to assert the limited and exceptional nature of the practice he defends. When we line these practices up, along with the other forms of nullification that are solidly, if tacitly, grounded in mainstream legal culture, we recognize that they constitute a strong general theme of radical Substantivism.

IV. SOME CLARIFICATION ABOUT NULLIFICATION

My purpose here is less to defend Substantivism than to show that, even in its more radical forms, it pervades the mainstream of the legal culture, albeit sometimes in a low profile way. Because some people tend to misinterpret the doctrine in a way that makes it seem more bizarre than it is, I want to reject some misconceptions about it.

One misconception is that Substantivism is indifferent to

34. *See* JEROME FRANK, LAW AND THE MODERN MIND (1930).

values of effective decision making that sometimes support over- or under-inclusive rules. When the traffic light turns red as I reach the intersection and there are no other cars in the area, I am tempted to say that the purpose of the law requiring that I stop would not be served by my doing so. This would be to construe the purpose too narrowly. The principal purpose is to reduce accidents. While I may think that my proceeding through the red light would not risk an accident, I may not be a good judge of that. Moreover, even if my judgment is excellent, a police officer observing me going through the light has no way of assessing the quality of my judgment. Thus, all things considered, the best rule may be an overbroad one requiring me to stop even if I see no one in the intersection.

There is no reason why the most radical Substantivist could not take into account the social interests that support an overinclusive rule in deciding about compliance in this case. The need to constrain people from acting on potentially impaired judgments that pose risk to others and the need for effective enforcement systems are aspects of the social interest in accident reduction.

Yet, to see what difference a Substantive commitment might make, we can modify the story to add that at the time I approach the intersection I am rushing a desperately wounded person to the hospital, and I plausibly believe that any delay would pose serious risk for her. The red light rule may have an explicit exception for emergencies of this sort, or it and the surrounding law may leave open the possibility of implying such an exception. If it denies such an exception, however, I might as a Substantivist conclude that the denial is simply wrong, perhaps unconstitutional or out of harmony with the surrounding law. In doing so, I would not be denying the social interests that support the general rule, just deciding that they were outweighed by the competing social interest in saving a life.

Similarly, it is incorrect to accuse Subtantivism of ignoring the values of relatively centralized and institutionalized legal decision making. Legislative and judicial decision making, as opposed to the kind of popular decision making involved in nullification, potentially allow better notice of the law, because they occur in public and take the form of promulgated rules. They are

potentially more democratic, because the decision makers are subject to mechanisms of political accountability. Also, the decisions are potentially richer, because they proceed from deliberation and debate.

A Substantivist does not ignore any of these factors. She does differ, however, from the Positivist in the ways she takes account of them. First, she is open to considering that the general association between legislative and judicial processes and the values of notice, democracy, and decisional quality may not hold in the particular case. For example, in the emergency red light scenario, nullification might be more compatible with people's reasonable expectations and hence with the values of notice than the literal terms of the statute (which the typical actor would be unable to consult at the relevant time). Second, the Substantivist is open to considering that these institutional values, even where present, might be outweighed by competing values in the circumstances of the particular case.

V. NULLIFICATION VERSUS REFORM

It is occasionally argued against nullification that it reduces the pressure for the reform of bad laws. The social pain caused by enforcement of bad laws feeds back to the legislative system to hasten efforts at reform. Nullification, by reducing the pain, slows the feedback and hence the process of self-correction. Because nullification is rarely uniform, a lingering bad law continues to have some bad effects, and activity that retards self-correction contributes to perpetuating these effects.

If the factual premise of this argument were true, there is no reason why the Substantivist could not consider it as a reason weighing against nullification in her decision. First, however, the factual premise is not true in any uniform or linear fashion. Sometimes nonenforcement, especially as it becomes more widespread and visible, increases pressures to reform the law to bring it into line with practice. One reason may be that a visibly unenforced law embarrasses the government. The reform of highway speed limits discussed above is an example.

Second, even where nullification does reduce pressure for reform, one still has to consider whether it is fair to the individual involved to force her to submit to a command that is by hypothe-

sis illegitimate simply to make a marginal contribution to some broad social interest. In cases where the law imposes a serious unfair burden or infringes an important liberty, the individual's interest should trump or outweigh the social interest.

A hypothesis relevant to both points is that enforcement against relatively disadvantaged or marginal people is least likely to generate pressures for reform and most likely to be unfair. Thus, where the individual in question is relatively disadvantaged or marginal, that might weigh toward nullification.

VI. PRICE VERSUS COMMAND

In the nullification situation we have been discussing, an official or institution has one interpretation of what the law requires that some other actor declines to comply with on the basis of a better interpretation. In these situations, disobedience or nonenforcement of the inferior interpretation is desirable.

A different type of situation arises in circumstances where some level of enforcement is considered a good thing but we nevertheless excuse or even justify disobedience. We sometimes speak of the actor in this situation as regarding the law as imposing a tax on his activity rather than prohibiting it.

The core example here is breach of contract. People generally feel entitled to breach contracts and pay damages when it is cheaper for them to do so than to perform. Although Holmes explained this in Positivist terms as following from the fact that damages are the only sanction the law provides,[35] it is equally plausible on Substantive terms. Doctrines such as the preclusion of penalties in contract remedies, the duty to mitigate, the bankruptcy discharge, and the prohibition of involuntary servitude all support the idea that fairness and efficiency are best served by a duty to perform that is not absolute.

On the other hand, the fact that we do not regard most criminal and tortious conduct causing serious injury this way can be explained *only* in Substantive terms. It would not be fair or efficient to treat the prohibition of battery or rape as a tax on an acceptable activity, and no lawyer would counsel a client in this

35. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

manner.

Between the realm typified by contract, where duty and penalty seem coextensive, and the realm of serious criminal activity, where duty is broader than penalty, there is a large area of ambiguity and disagreement. This area includes many regulatory and tax laws. Moreover, these areas also involve the question whether, if it is appropriate for the citizen to treat the law as a tax, the relevant tax is the full prescribed penalty, or the penalty discounted by the likelihood of enforcement (which might be quite low and might be lowered further by things the citizen could do).

In many towns, I have a legal duty not to park my car at a metered space, pay for the maximum time, and then return when the time expires to put more coins in the meter. If on occasion I violate this rule, say because my meeting takes longer than I anticipated, and I get caught and ticketed, hardly anyone would think I had been treated unjustly or had any ground for resistance. On the other hand, if I get away with it, few people would condemn me either. There are many situations in which insistence on obedience to law seems sanctimonious or fetishistic. The Dominant View is unable to deal with issues of this sort. For the Positivist criteria of legality it assumes do not distinguish between laws that we appropriately treat as prices (or risks) and those we should treat as commands. These distinctions depend on the sorts of principles that Positivism does not recognize as law and on the sort of complex judgment the Dominant View disclaims.

VII. DETERMINATION VERSUS OBLIGATION

For the Positivist, determining what the law demands on the one hand is relatively easy. That is the point of separating law and morals. On the other hand, figuring out whether the law merits obedience is relatively difficult. At least, Positivism provides no guidance on this subject other than the conclusory exhortations of its Moralistic variation.

There is thus a strong affinity between Positivism and those legal ethicists who portray the core dilemmas of practice as mat-

ters of role morality or conflicts of law and morals.[36] In assuming pervasive tensions between legal commands and individual commitments, these ethicists presuppose, often apparently inadvertently, a Positivist conception of legality.

Such conflicts are less salient for the Substantivist. Indeed for the radical Substantivist, they never arise because the law subsumes all the grounds for commitment. For the Substantivist, the hard question is not whether the law is binding, but what it prescribes. Conflicts that the Positivist defines as law-versus-morality take the form, for the Substantivist, of legal norms in tension with each other.

I have suggested that few lawyers are either radical Positivists or radical Substantivists; most combine both perspectives in their working philosophies. Thus, it is often unclear when an ethical struggle ceases to be an effort to determine what the law prescribes and becomes an effort to decide if the law is morally binding.

Consider the Paul Newman character in *The Verdict* with the modification that he is ethically reflective. Let us assume that he has exhausted all the conventional possibilities for locating the key witness. He has deposed the witness's friend, who denies knowledge of the witness's whereabouts. He has substantial reason to believe she is lying for fear of retaliation by the defendants. He gets the phone bill idea.

He knows that a federal statute makes it a crime to intercept mail addressed to someone else and state statutes make it criminal trespass to enter on someone's property for the purpose of larceny and larceny to take someone's mail from her mailbox (even if you return it). Does he think of the matter now as a conflict between legal and moral duty?

That would be a crude characterization. First, the "moral" side of the issue, his clients' interest in discovering the identity of the witness, is fraught with legal considerations. A major reason that leads him to give weight to this interest is that they are legally *entitled* to this information under the discovery laws, and it is necessary to the proof they have to make for a damage

36. *E.g.*, THOMAS SHAFFER & ROBERT F. COCHRAN, JR., LAW, CLIENTS, AND MORAL RESPONSIBILITY 1 (1994); Luban, *supra* note 28, at 801-09.

award, to which he also believes them legally entitled.

Second, the "law" side of the balance, requires further analysis. Perhaps the relevant jurisdictions have a "necessity" defense to criminal charges, such as the Model Penal Code provision that justifies otherwise criminal conduct "necessary to avoid a harm of evil" when the "harm or evil sought to be avoided . . . is greater than that sought to be prevented by the law defining the offense charged."[37] Even if they do not have such a statute, there might be a reasonable possibility that the courts would imply or recognize one. Even if the court has denied the existence of such a defense or held it inapplicable in circumstances like these (say, where a key factual predicate of the defendant's balancing judgment, such as that the friend is testifying falsely, is not known with certainty), there may be a possibility that the court would change its mind if the issue were presented in a new case. A statute might preclude the defense specifically, but even if the statute is completely unambiguous, there might be a chance that a court would find it unconstitutional or a prosecutor or jury would nullify its application in this case.

Finally, we reach the point where the lawyer is certain that the positive law forbids taking the phone bill. There is no doubt that the prosecutor will prosecute on these facts, that the trial judge will instruct the jury that the facts constitute a crime, that the jury will convict, and that the highest court will affirm. Even at this point, the lawyer may view the matter, not as one in which law conflicts with morality, but in which constituted authority has misinterpreted the law. The lawyer might simply believe that these actors have or will be *wrong* in their judgments that taking the phone bill under these circumstances would be criminal. Of course, believing this, he could still acknowledge reasons why he should defer to them, such as those on which the Supreme Court relied in sustaining the punishment of the petitioners in *Walker v. City of Birmingham*. Even so, he would still think of the conflict as intralegal. The point in the chain at which the lawyer stops thinking of the conflict as intralegal depends on the balance of Positivist and Substantive commitments in his working philosophy.

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37. MODEL PENAL CODE § 3.02(1) (1985).

Frederick Douglass, the antislavery activist, emphasized the psychological importance of the difference between the legal determination and the law-versus-morality perspectives:

> Brought directly, when I escaped from slavery, into contact with abolitionists who regarded the Constitution as a slaveholding instrument, and finding their views supported by the united and entire history of every department of the government, it is not strange that I assumed the Constitution to be just what these friends made it seem to be. . . . But for the responsibility of conducting a public journal in Western New York, and the necessity imposed upon me of meeting opposite views from abolitionists outside of New England, I should in all probability have remained firm in my disunion views. My new circumstances compelled me to re-think the whole subject, and to study with some care not only the just and proper rules of legal interpretation, but the origin, design, nature, rights, powers, and duties of civil governments, and also the relations which human beings sustain to it. By such a course of thought and reading I was conducted to the conclusion that the Constitution of the United States—inaugurated to 'form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, secure the blessings of liberty'—could not well have been designed at the same time to maintain and perpetuate a system of rapine and murder like slavery, especially as not one word can be found in the Constitution to authorize such a belief.[38]

Douglass began by seeing the antislavery crusade as a fight against the constitutional order; when he joined the radical constitutionalists, he saw it as a struggle to redeem it. The consequences of such a change can dramatically affect a person's orientation to his commitments and the rhetoric, strategies, and alliances he pursues. For Douglass, the change was connected to a determination to link the antislavery cause with the cause of preserving the union.

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38. FREDERICK DOUGLASS, THE LIFE AND TIMES OF FREDERICK DOUGLASS 261-62 (R. Logan ed., 1967). For an interesting discussion, see Robert Cover, Nomos *and Narrative*, 97 HARV. L. REV. 4, 35-40 (1983).

The stakes involved in such competing characterizations vary with the context. In contemporary American legal culture, the issue has two significant implications. First, the law-law characterization suggests that the matter is susceptible to resolution in terms of the analytical methods and sources of legal argument. Although these methods and sources are loose, they are typically thought more structured and grounded than popular moral discourse. Second, the law-law characterization suggests that the profession or some subgroup of it might have some collective responsibility for its resolution that might call for disciplinary review or simply critical assessment. Moral considerations, however, are presumptively a matter for the individual decision maker to resolve privately more or less on her own. The resolution of law-law issues is considered relevant to one's professional reputation, while the resolution of moral ones is a matter of one's "personal reputation" in the larger community, which to most lawyers, has considerably less social substance and importance.

The Dominant View's tacit Positivism privileges the law/morals characterization. I suspect that the psychological effect of this privileging is to reinforce lawyers' commitment to conventional responses—client loyalty in all cases where the client's projects are not prohibited by the positive law, obedience to the positive law in all other cases. Typically the conventional response is portrayed as the "legal" one, and the response that either protects third party or public interests or responds to broader Substantive concerns, is portrayed as the "moral" alternative. The rhetoric connotes that the "legal" option is objective and integral to the professional role, while the moral option is subjective and peripheral. Even when the rhetoric expresses respect for the "moral" alternative, it implies that the lawyer who adopts it is on his or her own and vulnerable both intellectually and practically. The usual effect is to make it psychologically harder for lawyers and law students to argue for the "moral" alternative. The effect of showing that in fact both alternatives could be understood as "legal" is thus sometimes to make the public-regarding one seem more grounded and less subjective.

VIII. A PRIMA FACIE OBLIGATION?

Theorists who appreciate the implausibility of a categorical duty of obedience sometimes retreat to a "prima facie" or rebuttable duty.[39] You cannot say this idea is wrong, but it is not especially useful, and it can be misleading. Abstractly stated, it begs the question of what we mean by law. If the phrase refers to a Substantivist conception, then it is tautological. If it refers to a Positivist conception, then it is misleading.

Law is prima facie binding if it is prima facie just (subsuming such values as order, fairness, and democracy under this heading). On a Substantive view, law is prima facie just *by definition*. The Substantivist insists that at least some dimensions of justice be incorporated into law and does so precisely in order to make law binding.[40] So the claim of a prima facie duty adds nothing to the Substantivist definition of the legal enterprise.[41]

Under a Positivist view, where law is not just by definition, a prima facie duty might have two different meanings. First, it might mean that the jurisdictional principles that define the law constitute a process that is intrinsically just, for example, democratic, and therefore entitled to presumptive respect. Or it might mean that as a matter of fact the law that emerges from this process is usually just and there is thus a strong empirical likelihood that any norms it now produces will be just.

Now as long as one remembers to perform the moral and empirical analyses required to sustain such conclusions, there is nothing improper about expressing them as a "prima facie duty to obey the law." Nevertheless the phrase is objectionable to the extent that it suggests that the relevant analyses are more abstract than they should be. Lawyers practice law in discrete localities with discrete institutions (even though they may be dispersed around the country or the world). Thus, presumptions derived from global or national characterizations of law are not helpful. Even a novice lawyer knows too much about the locales

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39. *See* LUBAN, *supra* note 1, at 31-49, and the literature he discusses.

40. *See* DWORKIN, *supra* note 27, at 109-13.

41. Recall, however, that under a radical Substantivist view, law is absolutely, not relatively, binding because law subsumes all other relevant norms and leaves no grounds on which a rebuttal could be based.

where she practices for a global or national presumption to be of use. The important questions for her are whether there is a prima facie obligation to obey the local municipal court or state Appellate Tax Board or the Ministry of Trade and Industry of some foreign country. Perhaps the answer is usually yes, but it will not always be so. It seems unlikely that there was any reason for petitioners in *Walker v. City of Birmingham* to assume they had a prima facie obligation to obey the local courts.

The Positivist's strongest argument for separating law and morals is that, by thus forcing us to confront the issue of legal determination separately from the question of legal obligation, he encourages us to face the latter issue more squarely.[42] But the moralist who seeks to add to the Positivist's constricted notion of law an abstract presumption of obligation, even a rebuttable one, seems to deprive us of this intended benefit. At worst, his rhetoric discourages us from taking full account of the local characteristics of our practices. At best, it merely makes us complacent.

IX. DIVORCE PERJURY AND ENFORCEMENT ADVICE REVISITED

We should now return to the problems of divorce perjury and enforcement advice discussed above as illustrations of the treatment in the Dominant View of direct and indirect participation in illegality.

Begin with the latter problem, because the inadequacy of categorical approaches is most obvious here. In at least some cases, enforcement advice would be unacceptable to nearly everyone. For example, the client is a serial rapist who wants information about the schedules and routes of police patrols in the area where he plans to strike next. Giving such information might constitute unlawful assistance under the criminal law, but that is far from clear. If it is not itself illegal, then it is not unethical under the Dominant View, and that surely is an objection to the Dominant View.

On the other hand, hardly anyone is going to support a categorical ban on such information either. Many feel strongly that

42. H.L.A. HART, THE CONCEPT OF LAW 206-07 (1961).

clients are entitled to know the extent to which the laws against fornication, sodomy, misprision of felony (failing to report someone else's criminal activity), small stakes gambling, marijuana possession, and nonpayment of employment taxes for part-time domestic workers are unenforced or underenforced.

Health and safety and environmental regulatory enforcement also resist categorical treatment. Where evasive behavior threatens serious harm that the regulatory scheme is designed to protect against, advice that facilitates evasion seems wrong. On the other hand, sometimes evasion seems not only not to threaten major harm, but to be acceptable to the enforcement authorities and perhaps even the legislature. Maybe the agency underenforces because it thinks the statutory standards are too strict. Maybe it underenforces because the legislature, divided on the efficacy of the statute, has cut the agency's enforcement budget, intending to limit enforcement.

Of course, there are objections to this type of administrative and legislative behavior. There is no doubt, however, that it occurs, and given that it occurs, it seems both unfair and inefficient to preclude lawyers from providing relevant information about enforcement practices.

Any plausible assessment of the propriety of enforcement advice requires a willingness to distinguish the relative weights of different substantive norms. This requires an at least moderately Substantive approach and contextual judgment.

Some cases are easy. (Although not everyone will have the same list of easy cases, each person will have some list of cases she finds easy, and some cases will appear on most people's lists). Advice that facilitates violence and large-scale property crime will usually seem clearly inappropriate. Advice that facilitates moderate speeding, misprision of felony, and consensual fornication will usually seem proper, or at least tolerable.

Other cases are harder. For example, playing the "tax lottery" by submitting a weakly grounded tax claim, knowing it is unlikely to be audited. The case is potentially hard because of the possibility that, while the claim may be weak in terms of the narrow positive law, it may be stronger when viewed more broadly and substantively. Playing the "tax lottery" might then be viewed as an appropriate form of nullification of a normatively weak posi-

tive law. This may seem unlikely—it does to me—but the point is that a plausible defense of advice that has little function other than to facilitate evasion requires the type of principled Substantive justification associated with nullification.[43]

Although it may seem more radical in the context of direct lawyer illegality, the same analysis applies there. We have already noted the broad variety of circumstances in which the culture accepts, and occasionally exalts, direct violation of the positive law. Most of these examples, however, involve citizens in general rather than lawyers, and some lawyers believe that their duties differ in this regard. These lawyers feel that they have a stronger obligation to the law than lay people because they publicly profess commitment to it, have a strong exemplary influence on the lay public, or acquire special privileges through participation in a regulated monopoly.[44] Thus, a categorical prohibition of direct participation in illegality makes more sense for lawyers than lay people.

Of course, this argument is yet another variation on the jurisprudential mistake we have noted repeatedly. It does not follow from the fact that lawyers have a stronger obligation to the "law" that the type of conduct we are considering is less appro-

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43. Of course, we often will not be able to get anything close to consensus on such judgments. Consider the current situation of organizing rights under the National Labor Relations Act. Because the penalties are so small in relation to the stakes and the enforcement process so cumbersome, many employers have virtually nullified worker's rights to organize unions by treating the statute as a set of bargain prices on union-busting activities. *See* Paul Weiler, *Promises To Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1787 (1983). My argument is that, if such practices are defensible, they are not so as "zealous advocacy within the bounds of the law," but as nullification. Doubtless, however, many management lawyers who accepted this point would argue that nullification is warranted. They believe the statute unfair and coercive, perhaps obsolete and unconstitutional. Union lawyers would passionately disagree.

The dispute raises broad social issues that will not be settled by jurisprudential analysis. Even so, insisting that lawyers integrate substantive concerns into their ethical reflection still has a point. First, from the point of view of the individual lawyer deciding where and how to commit her efforts, it is sufficient that she herself finds convincing substantive reasons, even if others disagree. Second, the debate among competing positions is much richer, the more directly substantive concerns are addressed.

44. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1995); MODEL RULES OF PROFESSIONAL CONDUCT pmbl. (1995).

priate for them. For the conceptions of law most compatible with strong obligations are Substantive, and on a Substantive conception, obligation to "law" may require violation of some legal norms in order to vindicate more basic ones.

The argument comes close to making explicit the effect I noted above regarding the Dominant View's jurisprudential commitments. By adopting a Positivist notion of law, it characterizes the considerations favoring compliance as legal and those weighing against it as nonlegal, perhaps "moral." If we accept the definitional premise, unless we are prepared to reject the appealing proposition that lawyers have an exceptionally strong obligation to law, we will find it very hard to support lawyer noncompliance.

However, there is no reason why we should accept the premise. Many of the most important reasons weighing toward noncompliance can be aptly expressed in legal—especially nullification—terms. For example, perhaps the strongest case for lawyer participation in the Divorce Perjury example would be to portray it as an instance of Calabresian nullification. First, the statute is an old one. Second, it is out of harmony with more recent legal developments that imply that, where there are no children, the social interest in preserving marriage is much weaker and the individual interests in structuring one's own intimate relations are much stronger than the statute presupposes. Third, there are apparent institutional dysfunctions that provide more likely explanations for the failure to repeal the statute than current popular support. Perhaps the statute is supported by only a small minority. This group would not be able to secure the enactment of the statute today, but it can block repeal because it is well-organized; because most who oppose the statute feel less intensely; and because those who are tangibly harmed by the statute, such as the clients in question here, are not able to organize (because their status is hard to anticipate and episodic) and relatively poor (because affluent people can avoid its effects by taking advantage of the more accommodating laws of other states).

Of course, we should consider why, if there is a strong case for nullification, it has to be accomplished by the lawyer rather than, as Calabresi proposed, the court. Why not have the lawyer

bring an action on the true facts urging the court to nullify and grant the divorce? One answer is that most states reject judicial nullification except on constitutional grounds, which might not be available. Even if judges could nullify, they might refuse to do so because, for example, they are unwilling to take the heat from the small but passionate minority that intensely supports the statute. Or perhaps the judges would think that the existence of such a minority would make nullification illegitimate. It might be, however, that the statute is of largely symbolic importance to this group, and it has no stake in low visibility enforcement decisions. Thus, while public judicial nullification would not be feasible, low visibility ad hoc lawyer nullification would be.

X. CONCLUSION

The answer to the question whether lawyers should obey the law turns out to depend on what we mean by law. If we define law in terms of the Positivist's jurisdictional criteria, then lawyers have no strong reason to obey it. If we define law Substantively, we make transparent the obligation that attaches to it, but we also erase the line between law and morals.

I have no general theory about how lawyers should balance Positivist and Substantive considerations, but lawyers probably do not need such a theory. Good lawyers already have their own such theories. These theories are implicit in their approaches to questions of legal judgment throughout their practices.

My complaint has been that the Dominant View presupposes a view of Positivism far stronger than most lawyers accept in their working philosophies outside the realm of legal ethics. If they were to bring their thinking about legal ethics into line with the premises of their more general thinking about law, lawyers would reject the Dominant View in favor of a more Substantive perspective. Having done so, they would find it easier to justify their obedience to law but harder to determine what obedience requires.