

Introduction

In the United States it is hard to commit large-scale wrongs without the involvement of lawyers. Sure, you can rob a bank or shoot someone, but the really big stuff—accounting gimmickry leading to the collapse of Fortune 50 companies, fraudulent schemes to defraud the Treasury out of billions of dollars in tax revenue, and the defiance of human rights exhibited by the United States in the aftermath of the September 11th attacks—almost always occurs with either the active involvement or the acquiescence of intelligent, sophisticated, elite lawyers. When these scandals become publicly known, commentators on newspaper op-ed pages, television news programs, and weblogs ask with genuine or mock surprise: “Where were the lawyers?”¹ The answer is of course that they were right in the thick of things, so the next question that inevitably follows is, “What is wrong with lawyers’ ethics?” A tacit assumption often underlying this question is that lawyers’ ethics is a branch of ordinary, common, everyday morality—ethics for people *as people*, not as occupants of defined social roles. Occasionally defenders of lawyers do try to argue that the ethics of lawyers is different, but this has a way of coming off as elitist, as if the bar is demanding special privileges to violate the rights of others without coming in for moral criticism as a result. When two law professors defended the advice given by executive branch lawyers on the treatment of detainees, which apparently had the effect of permitting torture in some circumstances, they called the memos outlining the legal case for torture “standard fare, routine lawyerly stuff.”² Not surprisingly, this did not sit well with people who believed that lawyers’ ethics ought to closely track ordinary-person ethics. Since we know, as regular decent folks, that torture is a grave moral evil, surely there must be something terribly wrong with a system of professional ethics that regards advising on the permissibility of torture as routine.

One way to reach this conclusion is to rely on the horribleness of torture, in the same moral terms that any sensible human being would recognize. If it is a moral failure of the highest order to inflict suffering on a helpless person, then it is at least a serious secondary wrong to provide legal advice to a government that is contemplating the use of torture. Lawyers can be faulted for advising their clients that torture is legally permissible, without attempting to dissuade them on moral grounds. Alternatively, they may be faulted for concluding that anything so plainly a violation of moral norms could ever be legally permitted. Similar arguments could be raised against lawyers who

INTRODUCTION

helped Enron structure transactions that concealed the true financial condition of the company, leading to its collapse and the losses of thousand of jobs and hundreds of millions of dollars of investors' wealth. For any high-profile legal ethics scandal, there seems to be a way to describe the lawyers' conduct straightforwardly in moral terms, leading ineluctably to the conclusion that lawyers deserve the labels of liars, cheats, and even torturers. Having worked within a professional role is no excuse—lawyers can be blamed for the harm they assist in because they remain persons, bound by ordinary morality, even when acting in a professional capacity. Critics of the legal profession thus urge lawyers to take personal moral responsibility for their actions, or to aim directly at achieving justice, when they represent clients, either in litigation or in transactional or advising matters.³

This book approaches this problem in a very different way. It is about political legitimacy, not justice or ordinary morality. Political legitimacy is the property that political arrangements have when they deserve the respect and allegiance of citizens, even if citizens disagree with particular laws or regard them as unjust. Legitimacy is a normative notion, having to do with the relationship between state power and citizens. The aim of this book is to ground the duties of lawyers on considerations relating to democratic law-making and the rule of law, so that the ethical value of lawyering is located in the domain of politics, not ordinary morality. This book defends an ethical position that should be familiar to practicing lawyers, with one important difference. Practicing lawyers, and many legal scholars claim there are good moral reasons why a lawyer is justified in acting on the lawful interests of her client, notwithstanding the interests of nonclients that would otherwise give someone a reason for acting in another way. The theory of legal ethics I will set out here places fidelity to law, not pursuit of clients' interests, at the center of lawyers' obligations. Law deserves respect because of its capacity to underwrite a distinction between raw power and lawful power, so that it becomes possible for the proverbial little guy to stand up to the big guy, and say, "Hey—you can't do that to me!" Law enables a particular kind of reason-giving, one that is independent of power or preferences. Citizens can appeal to legal entitlements, which are different from mere interests or desires, because they have been conferred by the society as a whole in some fair manner, collectively, in the name of the political community. This is an appeal to the political legitimacy of entitlements, and only indirectly to morality, because citizens accept for moral reasons the legitimacy of laws enacted through fair procedures. Unlike the dominant tradition in academic legal ethics, it is not an appeal directly to ordinary morality, justice, or the public interest.⁴

INTRODUCTION

Popular discourse about the law includes a significant strand of approval of law-breaking, if done in the service of justice. This is true even of lawyers, who are often portrayed in novels and films as morally bankrupt to the extent they comply formalistically with the law, and heroic to the extent they are willing to bend the rules in pursuit of substantive justice.⁵ Lawyers know that people who deal with the law often experience it as an irritant or an obstacle in the way of something the client would very much like to do. Business lawyers in particular are accustomed to being criticized as deal-breakers, impediments to exploiting some lucrative opportunity. “So what if the law technically says we can’t do such-and-such,” clients sometimes say. “Your job is to figure out ways to do what we want.”⁶ Implicit in this stance is the idea that the law is not entitled to respect *as such*, but has only instrumental value for citizens. If there is some possibility of getting caught and punished, then a prudent person will follow the law, but if clever lawyers can figure out a way to escape detection, gum up the enforcement process, or otherwise avoid legal penalties, then legality alone does not supply a sufficient reason not to engage in this evasion.

A similar attitude toward lawyers and legality has been evident in the defense of the Bush Administration’s conduct of the so-called war on terror by lawyers accused of wrongdoing. When one of the principal legal architects of the Administration’s response, John Yoo, said that the U.S. Supreme Court’s *Hamdan* decision “made the legal system part of the problem, rather than part of the solution to the challenges of the war on terrorism,”⁷ he was reflecting the attitude that the law is only instrumentally valuable, and if it stands in the way of accomplishing some important policy goal, then it should be nullified. Yoo is actually quite candid about this, saying that “law is not the end of a matter; indeed, it is often the beginning.”⁸ In his view, lawyers should be blamed for making a fetish of legality—“look[ing] to the law as if it were a religion or a fully articulated ethical code . . . relieving us of the difficult job of making a choice.”⁹

Although it is true that law does not end debate in moral terms about a matter, and people may engage in public criticism, protests, civil disobedience, and other acts designed to change the law, Yoo’s stance cannot be the ethics of *lawyers*. If the concept of legality means anything, it is that there is a difference between the law and what someone—a citizen, judge, or lawyer—thinks ought to be done about something, as a matter of policy, morality, prudence, or common sense. While citizens may resent the law and resist its application in some cases, lawyers are charged with an obligation to treat the law with respect, not merely as an inconvenient obstacle to be planned around. The observation that one can make a fetish of legality tends to resonate because

INTRODUCTION

it may appear that in calling upon lawyers to respect the law, I am defending an ethical system suitable only for sheep, not autonomous moral agents who are expected to take responsibility for their actions. In a reasonably well-functioning democratic political order, however, the law is not the imposition of some alien power, but a collective achievement by people who share an interest in living alongside one another in conditions of relative peace and stability. It is the product of procedures that enable citizens to resolve disagreements that otherwise would remain intractable, making it impossible to work together on common projects. To use John Yoo's example, the September 11th terrorist attacks created a host of major policy-making challenges, such as: how privacy concerns should be weighed against the need for law enforcement officials to acquire information (reflected in the Patriot Act and the NSA's warrantless wiretapping program); whether detainees alleged to have been associates of al Qaeda should be treated as prisoners of war for the purposes of applying the Geneva Conventions; and what kinds of interrogation techniques could be used by the military, the CIA, and law enforcement personnel, particularly where there was some possibility of learning information that could prevent future terrorist attacks. The important thing, as I will argue, is that these questions be resolved through public, reasonably accessible procedures that enable citizens to reach a provisional settlement of these controversies, to enable cooperative action in response to some collective need.* Relying on autonomous moral reasoning and deliberation will only perpetuate an intractable debate. This claim stands in contrast with the assumption (sometimes explicit, sometimes unstated) that a theory of lawyers' ethics must be based on an obligation to pursue substantive justice. One of the aims of this book is to rehabilitate the idea of legitimacy as a normative ideal for lawyers, and to direct lawyers to work within a system that is designed, to a large extent, to supersede disagreements over what substantive justice requires.

The effect of shifting the evaluative frame of reference from ordinary morality and justice to considerations of political legitimacy is to change the terms of the normative criticism of lawyers. In the case of lawyers advising on the

* Settlement of society-wide or relatively more local normative controversy is not the same thing as the resolution of litigated disputes, whether by trial or agreement of the parties (which, somewhat confusingly, American lawyers refer to as "settlement" of the litigation). One of the functions of law is to resolve particular controversies between specific parties through judicial or administrative proceedings. Two citizens may disagree over whether a contract for the delivery of chicken refers to broiling chickens or stewing chickens, whether a barge company was at fault in an accident for not employing additional crew members, or whether an employer's conduct constitutes sexual harassment. The settlement function I appeal to here is a larger-scale phenomenon. It supersedes diffuse disagreement over normative issues by replacing the contested individual moral and political beliefs of citizens with a shared social position.

INTRODUCTION

law regulating torture, the perspective shifts from that of ordinary morality, in which the grave evil of torture is the primary consideration, to a political perspective in which we can understand the applicable law as an attempt by domestic and international lawmakers to balance competing interests in humanitarian values and the need for national security. The criticism of Bush administration lawyers who advised on the permissibility of torture is therefore not that they are accomplices to the moral wrong of torture, but that they are primarily liable for unethical conduct as abusers of the law. This would be a hollow criticism if there were no moral reasons to respect the institutions, procedures, and professional roles that constitute the legal system. One of the central tasks of this book is therefore to establish that the legal system is worthy of our respect.¹⁰

The strategy for doing so is to rely on political normative considerations relating to the ethics of citizenship in a liberal democracy. At its foundation, the argument rests on what John Rawls calls the burdens of judgment—that is, the indeterminacy in practice of our evaluative concepts, due to empirical uncertainty and moral pluralism.¹¹ Recognition of the burdens of judgment is long overdue in legal ethics, which has tended to assume unwarranted clarity in moral reasoning and to avoid facing up to the problems of pluralism and disagreement.

Ethical pluralism is not the same thing as skepticism or relativism; rather, it is a claim about what is objectively true, concerning the structure of value.¹² Ethical reasons are not arbitrary or subjective. They are related to the sorts of interests, capacities, and needs that people have, the bad consequences they try to avoid, and the ends they seek.¹³ These interests, capacities, and ends are diverse, and not susceptible of being reduced to some kind of overarching master-value that specifies what it means to lead a fulfilling, ethical life. Value conflicts may occur within a single conception of the good life or they may represent opposition between rival visions of human flourishing. Entire cultures may be differentiated in part on the basis of how they prioritize competing values.¹⁴ These different rankings of value are one of the things that sets cultures apart, even though they may be concerned with the same sorts of normative considerations at a high level of abstraction, such as life, health, honest, loyalty, and so on. (Note, too, that diverse cultures can coexist within a single polity, as in the contemporary United States.) In a society characterized by value pluralism, reasonable citizens in a democracy must be prepared to propose and accept fair terms of cooperation, but they may have deep and intractable disagreements at the level of comprehensive moral doctrines. One may hope, as Rawls does, for an overlapping consensus on certain public reasons,¹⁵ but one of the principal arguments offered here is that we

INTRODUCTION

can depend on very little consensus, beyond agreeing that certain lawmaking and law-applying procedures are tolerably fair and therefore legitimate. Still, governance through fair democratic procedures is something worth respecting, and lawyers do something valuable by working within a system that maintains legitimate procedures for establishing a stable basis for coexistence and cooperation.

The aim of this book is to provide moral and political arguments for a version of what is generally called the Standard Conception of legal ethics.¹⁶ As we will see, the version defended here may differ sufficiently from the Standard Conception to represent a kind of third way between that conception and its competitors.* The Standard Conception consists of two principles that guide the actions of lawyers, and a third principle that is supposed to inform the normative evaluation of the actions of lawyers.

1. *Principle of Partisanship*: The lawyer should seek to advance the interests of her client within the bounds of the law.
2. *Principle of Neutrality*: The lawyer should not consider the morality of the client's cause, nor the morality of particular actions taken to advance the client's cause, as long as both are lawful.
3. *Principle of Nonaccountability*: If a lawyer adheres to the first two principles, neither third-party observers nor the lawyer herself should regard the lawyer as a wrongdoer, in moral terms.

The difference between the Standard Conception, as usually understood, and the position defended in this book is that I argue that lawyers should act to protect the legal *entitlements* of clients, not advance their interests. The law does not merely set boundaries on what lawyers permissibly may do on behalf of clients; rather, it is what empowers lawyers to do anything at all for clients. The law creates the attorney–client relationship that gives lawyers certain powers to act for others, and also sets limitations on the lawful use of those powers. For example, lawyers *as lawyers* can bind their clients to contracts, must keep their clients' confidences, and must not advise them to violate the law. Ordinary persons—say, friends or family members—have neither these powers nor these restrictions to the same extent. As a descriptive matter, however, the question still remains: Why does the legal system, and the lawyer–client relationship within it, give reasons for lawyers to do something that may

* I am not committed to a name for the position defended here, or even to the notion that a label is required, but since fidelity to law, not client interests, is a principal difference between this view and the Standard Conception, the position here might be referred to as the fidelity to law conception, the entitlement view, or something similar.

INTRODUCTION

be contrary to ordinary morality? The argument given here must therefore show why the legal system deserves the allegiance of citizens, so that lawyers will be seen to play a justified role in society.

The book is an exercise in applied moral and political philosophy, but my hope is that it will also speak in terms that make sense of the way practicing lawyers conceive of the ethical value of their profession. The chapters that follow elaborate on these points; they are organized roughly around the three principles that make up the Standard Conception and the modifications I believe are necessary to defend a philosophically sound theory of legal ethics, in which fidelity to law is the central obligation of lawyers.

Chapter 1 is a critical overview of the state of play in the academic legal ethics debate. The central question addressed in this book is often framed in terms of role-differentiated morality—that is, the claim that occupying a social role provides an institutional excuse for what would otherwise be wrongdoing, as considered by the standards of ordinary morality. The problem with this way of looking at things is that it assumes it is possible to construct a baseline case that is similar in all morally relevant ways, but for the presence of a social role. The notion of ordinary morality and its relation to political institutions and roles turns out to be harder to pin down than is generally believed, because obligations in ordinary morality are sensitive to context, and one contextual factor may be acting in a professional role. It may therefore seem that roles, including professional roles, are illusory, or that at most they serve as a shorthand way of summarizing a cluster of ordinary moral rights and obligations. One of the principal arguments of this book is to the contrary, that roles do real normative work by excluding consideration of reasons that someone outside the role would have to take into account. This does not mean that acting in a role is “amoral ethics,” as it has sometimes been called.¹⁷ Lawyers work within a set of institutional roles and practices that requires moral justification, but at a higher level of generality. Ethical justification for lawyers is not case-by-case, but systemic and institutional in nature.

More broadly, the argument here is that the ethics of the lawyer’s role requires respect for a distinctive set of values—those that are an aspect of citizenship in a complex pluralistic society, in which the lives of individuals are comprehensively regulated by political institutions, and for good reason. Lawyers are people, too, but in their professional capacity they are best understood as playing a small but significant part in the maintenance of these institutions in good working order. This chapter frames the overall argument of the book, that the norms associated with the lawyering role have significant moral weight, which are derived from a freestanding morality of public life.¹⁸ Theoretical legal ethics has made a conceptual wrong turn by trying to use the toolkit of

INTRODUCTION

ordinary ethics to address the problems of lawyers, who are better analogized to political officials than to ordinary moral agents. A regime of public ethics, including the ethics of lawyers, cannot simply begin with ordinary moral values such as autonomy or human dignity, and proceed straightforwardly to the derivation of duties based on these values. Instead, the ethical considerations that inform lawyers acting in a representative capacity are, at root, a function of both the reasons why the law is worthy of respect by all citizens, and the special relationship between lawyers and the value of legality.

The Principle of Partisanship is the subject of chapter 2. American lawyers love the Principle of Partisanship. Ask any gathering of lawyers about the ethics of their profession and you will hear all about the obligation of “zealous advocacy.” (Sometimes lawyers will actually complete that little maxim, “. . . within the bounds of the law.” The last bit turns out to matter a great deal.) The principal argument of this chapter is that the law does not merely set the limits on permissible advocacy, but constitutes the lawyer’s role. Whether they are asserting positions in litigation, structuring transactions in light of legal considerations, or advising their clients on compliance with the law, the legal entitlements of clients empower lawyers to do anything at all. A client may have extra-legal interests, but these do not convey authority upon an agent to act in a distinctively legal manner on behalf of the client. By “distinctively legal manner” here I mean that legal entitlements are claims of right, as distinct from assertions of interest and from the ability to obtain something using power, trickery, or influence. The Standard Conception as generally understood does not make this distinction. The lawyer’s job is to zealously protect the client’s interests, using means that are not unlawful, but that is not the same as the directive to protect the client’s legal entitlements.

A wide range of practices familiar to lawyers can be criticized on the entitlements view defended here. In addition to being competent and diligent representatives of client interests, lawyers must also manifest recognition that the law is legitimate—that is, worthy of being taken seriously, interpreted in good faith with due regard to its meaning, and not simply seen as an obstacle standing in the way of the client’s goals. Lawyers wrongly believe that they are permitted or required to exploit legal loopholes, mistakes by opposing lawyers or the court, or other institutional malfunctions. My claim, by contrast, is that lawyers must advise clients on the basis of genuine legal entitlements and assert or rely upon only those entitlements in litigation or transactional representation that are sufficiently well grounded.¹⁹ Naturally, it is difficult in many cases to differentiate between a loophole or malfunction, on the one hand, and a genuine legal entitlement on the other. The aim of this chapter is not to provide definitive answers to the question of what the law permits in

INTRODUCTION

particular cases, although I will consider some classic cases like *Spaulding v. Zimmerman*. Rather, the point is to suggest that this is the debate we should be having. If a lawyer manipulates the law to obtain an unjust result, the proper basis for ethical criticism is the failure to exhibit fidelity to law, not the resulting injustice. It may seem like an odd decision to begin a book about legal ethics with a repudiation of the call for lawyers to assume direct responsibility for justice or the public interest. If legal ethics is best understood in terms of fidelity to law, however, the distinctive professional obligations of lawyers are intimately bound up with the value of respect for the law and the legal system.

In order for this line of criticism to work as an ethical stance, fidelity to law must be an appealing ethical ideal. Law must represent some kind of social achievement to be worthy of the loyalty of citizens and lawyers. Chapter 3 argues that, insofar as it matters to lawyers acting in a representative capacity, the function of the law is to provide a reasoned settlement of empirical uncertainty and normative controversy, and a basis for cooperative activity, in what Jeremy Waldron refers to as the “circumstances of politics.”²⁰ The circumstances of politics are the initial conditions of (1) a shared interest among members of a society or group in establishing a common framework for cooperative action, (2) despite disagreement over what that framework should be, yet (3) with a recognition that any procedures that are used for resolving disagreement must permit the competing positions to be heard and treat participants with as much equality of respect as is compatible with the need to reach at least a moderately stable provisional settlement. Procedures that meet a threshold standard of fairness permit people to reach a reasoned settlement of what would otherwise be intractable disagreement. The law is therefore legitimate to the extent it responds adequately to the needs of citizens in the circumstances of politics.

There still appears to be a gap, however, between legitimacy and authority (i.e., the justified claim to create obligations). Legitimate laws can be unjust. Less dramatically, it is not difficult to think of examples of otherwise legitimate laws that represent nothing more than successful rent-seeking by some powerful lobby, the result of congressional earmarks for some representative’s home district, or a giveaway to a favored industry. Calling for fidelity to something valueless like the Sonny Bono Copyright Extension Term Act,²¹ which retroactively grants heightened intellectual property protection to companies like Disney, who presumably had sufficient *ex ante* incentives to create their works, seems to miss the ethical point entirely. Surely the value of law is instrumental only, and what matters is something else, like the freedom of clients to pursue their projects without interference, or the substantive justice of client ends.

INTRODUCTION

To regard professional duties in this way, as aiming directly at justice or other moral notions such as efficiency or autonomy, would essentially vitiate the capacity of the legal system to supersede disagreements about these values. The point of law is to create a more or less autonomous domain of reasons, rooted in the community's procedures for resolving conflict and settling on a common course of action. In order for the law to function in this way, the obligations of lawyers must be understood as grounded in the "artificial reason of law" and not ordinary moral reasons or considerations of substantive justice. The legal system and the institutional roles and practices associated with it contribute to social solidarity and mutual respect. I am not arguing that the whole of ethical life is constituted by compliance with the law, or even that a society characterized by the rule of law is inevitably better, in moral terms, than one less legalistic. Rather, the point is that, to the extent the law has moral worth, and the value of legality is understood in this way, the role of lawyer is a morally respectable one. Lawyers do something good to the extent they support the functioning of a complex institutional arrangement that makes stability, coexistence, and cooperation possible in a pluralistic society. Legality is not the only good, but it is a good. In order to contribute to the realization of this social good, however, it is necessary that lawyers regard the legal system, and their client's legal entitlements, as creating reasons that override considerations that would otherwise apply to persons not acting in the same professional capacity.

The implications of this position are developed in chapter 4. One is that lawyers should not refer back to ordinary moral considerations when deciding how to act on behalf of a client. Going back to what I take to be an example of a stupid law, the Copyright Term Extension Act, a lawyer representing a client who sought to make use of material under copyright would not be entitled to interpret the Act as a nullity, or something that ought to be planned around and evaded, just because it was a blatant sop to a few powerful companies. Citizens differ over what justice, efficiency, and the public interest require, so permitting or requiring lawyers to take these moral considerations into account would have the effect of undoing the legal settlement, which was necessitated by the existence of this kind of disagreement in the first place. In addition, because it is impossible to design any set of procedures that is immune to capture by some industry group or highly organized minority of the electorate, even laws that are generally regarded as foolish or wasteful are also entitled to respect. If citizens and lawyers could refuse to obey these laws, it would open a whole new arena of disagreement, this time over whether procedures were sufficiently representative, transparent, accessible to all citizens, and so on.

INTRODUCTION

The law in that case has as much claim to the respect of lawyers as a law that was wiser, or struck a fairer balance among competing interests.

This is not to say that lawyers should not be free to challenge unjust, wasteful, or stupid laws using the procedures established by the legal system. The law recognizes civil-rights lawsuits, impact litigation, class actions, constitutional tort claims, lobbying, and many other vehicles for pressing arguments for legal change. Using the legal system to challenge unjust laws is one of the most noble things that lawyers do. There is a significant difference, however, between using legal procedures to challenge unjust laws and subverting them. The obligation of fidelity to law stands in contrast to the position of many legal ethics scholars that ethical lawyers are those who act directly on considerations of morality and justice, rather than the legal entitlements of clients.

Another implication of the obligation of fidelity to law is that the space for the exercise of ordinary moral discretion ought to be understood as somewhat narrow, when a lawyer is acting in a representative capacity. The law governing lawyers permits counseling clients, and even accepting or rejecting clients, on the basis of ordinary moral considerations.²² That does not mean, however, that the lawyer's role should be understood primarily in ordinary moral terms. Lawyers are not best understood as friends or wise counselors to their clients, but as quasi-political actors, who in their professional representative capacity deal with the coercive force of the state. The attorney–client relationship is not best analogized to a friendship or counseling relationship, but should be seen as the way citizens learn about, assert, protect, and structure their affairs around legal entitlements. As a result, the moral discretion that is built into the lawyer's role should be exercised with respect to political and legal values. Some legal ethics scholars worry that this will be alienating or dehumanizing for lawyers, but it is unclear why the lawyer's role should be saddled with the burden of responding to the full range of human problems that clients bring with them. Lawyers contingently may be friends or counselors in addition to serving as expert legal advisors, but those additional roles are optional from the standpoint of the political justification of the lawyer's role. Legality is fundamentally a political value, which depends on a complex institutional system sustained by people acting within prescribed roles. There is moral value in doing one's part to support a socially valuable institution, but it is a distinctive kind of value, not one that can readily be analogized to ordinary moral notions like friendship or loyalty.

There is, accordingly, a potential gap between the things people value in their capacity as moral agents and the political values underpinning the lawyer's role. William Simon begins *The Practice of Justice* with the provocative

INTRODUCTION

claim that “[n]o social role encourages such moral aspirations as the lawyer’s, and no social role so consistently disappoints the aspirations it encourages.”²³ However, the priority of political considerations in the justification of the lawyer’s role does not mean that ordinary morality is effaced entirely. Chapter 5 therefore considers the idea of tragedy—inevitable moral wrongdoing—in legal ethics. This has been called the problem of “dirty hands,” which sounds a bit melodramatic, but the basic idea is that there can be “actions which remain morally disagreeable even when politically justified.”²⁴ A lawyer’s obligation of fidelity to law may, for example, require her to keep information secret which, if disclosed, could avoid harm to another person. Or, she may be required to counsel a client to comply with a law she regards as unjust, or to assist a client in doing something that violates the moral rights of others. In these cases, the lawyer may be faced with what has been termed a *moral remainder*, resulting from the subordinated-but-not-erased claims of ordinary morality.²⁵

The possibility of moral remainders is not a reason to despair, because the remaining claims of morality do not lead only to a crisis of conscience or a lingering sentiment of guilt or shame. Rather, lawyers who feel the pull of ordinary morality, while acting in politically justified roles, may be more likely to deliberate carefully about whether good lawyering really requires some harmful action.²⁶ One might also argue that moral remainders give rise to a retrospective obligation to make atonement in some way,²⁷ perhaps by working against injustice in the system in areas that do not effect the representation of one’s clients. Lawyers who experience a nagging sense that their job lacks a foundation in something meaningful and valuable may seek to orient their professional lives around a value or commitment that is particularly salient to them, personally speaking. In any event, although it is not an endemic feature of the practice of many lawyers, the possibility of dirty hands and moral remainders is an aspect of legal ethics that should be given its due, and must be taken into account if we take seriously the idea of a distinctively political morality of lawyering. It is, I submit, a better candidate for inclusion in a theory of legal ethics than the existing Principle of Nonaccountability, which claims to efface the perspective of ordinary moral agency. The dirty-hands perspective is necessary, on the other hand, to ensure that the response to the persistence of moral agency is not to deny the obligation of fidelity to law, and attempt to replace that duty with a directive to act directly on the grounds of ordinary moral considerations.

The last piece of the substantive argument in the book is found in chapter 6. This chapter takes up a question that hovers in the background of all that has been discussed previously, but eventually has to be faced directly. That issue is how the law can be said to have a determinate meaning in particular

INTRODUCTION

cases. The claim defended here is that lawyers are obligated to counsel clients on their legal entitlements, to take positions in litigation and transactions on the grounds of client entitlement, not interests. Further, this obligation of fidelity to law outweighs ordinary moral considerations, when a lawyer is acting in a representative capacity. Most readers will have an intuition, however, that this is too neat, and that it begs important questions against those who believe that the materials of the law (cases, statutes, regulations, and interpretive conventions) leave a great deal of flexibility, which lawyers may use to advance the interests of their clients without having transgressed the bounds of the law. Indeed, one reason critics of the Standard Conception appeal to ordinary moral considerations may be that they worry that the law may be so manipulable that an obligation of fidelity to law is inherently unworkable. If a sufficiently clever lawyer can interpret all but the clearest law as not applying to her client's (or her own) situation, then the law cannot effectively constrain lawyers in their pursuit of client ends.²⁸ Thus, the critics argue, if ordinary morality is also no constraint, then we are left with nothing but the unbounded pursuit of client interests as the foundation of lawyers' duties.

One response to this problem, discussed throughout the book, is the contextualization of lawyers' duties. This response assumes that the law is moderately indeterminate—that is, that there may be a range of interpretations that will be deemed reasonable, and some that will be regarded as creative, aggressive, or tendentious. What a lawyer may do with this moderate indeterminacy is a function of the setting in which the lawyer is representing the client. Debates in legal ethics often revolve around the resolution of disputes through court trials and pre-trial litigation. Indeed, the usual argument offered by lawyers to deflect moral blame for their actions trades on the adversary system, which is said to provide an institutional excuse for what would otherwise be moral wrongdoing.²⁹ In my view, however, litigation is a special case, because lawyers are permitted to assert the *arguable* legal entitlements of clients, leaving it up to the workings of the adversary system to evaluate whether the lawyer's position is plausible.³⁰ In transactional and advising context, there is no institutional mechanism, comparable to adversary briefing, oral argument, and appeal, to ensure that the lawyer's proposed interpretation of law is the correct one. Thus, lawyers have less latitude to rely on strained or arguable interpretations of the applicable law. The difference between the litigation and counseling contexts is that, in litigation, lawyers share responsibility with other institutional actors for ensuring that the law is not distorted or misapplied. Thus, lawyers have what feels like a heightened obligation of fidelity to law in non-litigation representation, but in reality the obligation is the same—it is just not shared with coordinate institutional actors.

INTRODUCTION

This contextual approach will not be responsive to a critic who thinks the underlying problem is radical indeterminacy in the law. If the law can really be made to say anything at all, then it would be futile to urge lawyers to exhibit fidelity to law. But no one believes that the law is radically indeterminate; at least no sensible participant in the legal system acts as if the law is radically indeterminate.³¹ Lawyers make arguments to courts, criticize judges for making mistakes in their application of law, advise clients about their prospective legal liability, and urge that the law be changed. Judges write dissenting opinions criticizing their colleagues for getting the law wrong, not merely making the wrong call as a matter of policy. Senators grill nominees to the federal bench about their willingness to apply the law “as written” and not impose their own policy preferences. Law professors grade students on their understanding of law, and believe with justification that their exam grades are not arbitrary. All of these practices presuppose that the law can bear some objective meaning, and this can be used as a standpoint from which to criticize an actor for having gotten the law wrong.³²

In other words, there is a craft of making and evaluating legal arguments. This craft is what lawyers learn in law school and continue to refine as they gain experience in practice. While lawyers can give explanations of how it works, if pressed, essentially making and criticizing these sorts of arguments is just what lawyers *do*. If we want to know whether an interpretation is sound, there is really no way to avoid rolling up our sleeves, so to speak, and digging in to the legal reasoning. And while the making and critique of legal arguments will not yield perfect determinacy, and only one right answer in hard cases, they will narrow the range of reasonable interpretations and exclude many would-be readings of the law as distorted, abusive, tendentious, or otherwise not supportable.

To some extent, it is the nature of a craft that it resists being theorized in non-craft terms. Consider a classic example, familiar to all students of Anglo-American jurisprudence, of a municipal ordinance prohibiting “vehicles” in the park. Does it apply to ambulances, bicycles, skateboards, and an Army tank installed as a war memorial?³³ The question “what is a vehicle?” can be answered only if one asks the further question “For what purpose does it matter that we classify something as a vehicle or not?” Resorting to purpose, however, only compounds the ambiguity. Many legal rules and standards serve multiple, sometimes conflicting purposes. The “no vehicles” statute may be aimed at reducing noise, protecting the safety of pedestrians, or preventing pollution. Complicating matters further, purpose is not the only key to a statute’s meaning—the express language of the statute may be in conflict with its purpose, and there may be other indications, such as legislative history and

INTRODUCTION

context, that cut against the interpretation suggested by the apparent purpose, even if there is only one. Analogical reasoning helps if one can argue that the tank is like or unlike a car or truck in relevant respects; however, judgments of relevant similarity are notoriously difficult to formalize, because “the criteria of relevance and closeness of resemblance depend on . . . the aims or purpose which may be attributed to the rule.”³⁴

Nevertheless, I want to argue that ethical lawyering means doing well at exactly this sort of thing. There are better and worse ways to go about interpreting and applying the law. For example, while we may be unsure whether the statute prohibiting vehicles in the park applies to a baby stroller, a jeep on a war memorial, or an ambulance rushing to the aid of a heart attack victim in the park, we do know that if the statute means anything, it means you cannot drive a souped-up sports car through the park. A prominent critic of the Bush administration lawyers who drafted the torture memos argues, similarly, that if the legal prohibitions on torture mean anything, they must apply to prohibit the technique known as waterboarding, in which a detainee is subjected to a horrifying near-death drowning experience.³⁵ Waterboarding is the souped-up sports car of the prohibitions on torture. If one’s legal conclusion is that causing someone to experience the physical sensation of imminent death is not torture, then something in that argument has gone off the rails. It is time to abandon whatever interpretive principles led you to that conclusion, which cannot possibly be the right one, in light of the obvious purpose and overall rationality underlying the prohibition on torture. This approach to ethical criticism takes seriously the internal point of view of a lawyer participating in the craft of making and evaluating legal arguments. It is not an external critique, on the grounds of the wrongfulness of torture in ordinary moral terms. That is the distinctive perspective of the ethics of fidelity to law.

This book aims to bridge the gap between academic philosophy (moral, political, and legal) as it might apply to the ethics of lawyers and the circumstances of actual practicing lawyers. Sophisticated lawyers have long wished for a “jurisprudence of lawyering” which integrates theories of the nature and content of law with legal ethics.³⁶ Methodologically, the argument in this book is an attempt to secure “wide reflective equilibrium” between theoretical considerations and the actual norms followed by conscientious lawyers in their professional lives.³⁷ The method of reflective equilibrium, in general, seeks to provide coherence among people’s considered moral intuitions and a set of moral principles. Simplifying somewhat, *wide* reflective equilibrium begins with the judgments about which a person is relatively confident (i.e., those that are made in a calm reflective frame of mind) and then looks at alternative sets of moral principles that fit with these intuitions, aiming at settling

INTRODUCTION

on the best set of principles as a moral theory, taking into account various background theories (including conceptions of human nature, principles of political justice, etc.) that support these moral principles.³⁸

Most scholarly accounts of legal ethics begin with moral theories, derive principles from these theories, and apply them to the situation of practicing lawyers. Philosophers are understandably frustrated by the rote incantation of “zealous advocacy within the bounds of the law” as an all-purpose justification for what appears to be patently immoral activity. On the top-down analysis of philosophers, lawyers’ role obligations are usually found wanting, from a moral point of view. On the other hand, lawyers begin with the intuition that their role is justified and they have good moral reasons to respect role obligations, such as keeping confidences and vigorously advocating for their clients’ positions. These intuitions tend to be rather durable, and when lawyers learn about theories that seem to imply they are engaging in moral wrongdoing, they generally respond that those theories must be faulty. At the risk of caricaturing the prevailing position in theoretical legal ethics, it sometimes seems as though it is great mystery why society tolerates what is effectively a criminal gang in its midst. The result is an impasse between lawyers who believe they are participants in a practice worthy of respect and theorists who find the practice wanting at a foundational level. The methodology of wide reflective equilibrium attempts to take both points of view seriously.

Autobiographically, I approach this project as a former litigator who found a great deal of value and satisfaction in the job of a practicing lawyer, as well as someone with graduate training in philosophy who now makes a living taking a more detached perspective on legal practice. Some lawyers may see the discussion of political philosophy and jurisprudence as a lot of razzle-dazzle without much relevance to the situation of practicing lawyers. Patient readers might be persuaded that the academic philosophy does matter in the real world, and indeed that theoretical legal ethics scholars and practicing lawyers have something to learn from each other. At the very least, a lawyer who was interested in the deep ethical questions about her profession—the justification for things we do as lawyers, as against the claims of ordinary morality—will likely be led to ask the questions considered here, about the relationship between legality and moral agency. Similarly, philosophically minded readers may come away with some appreciation for the complexity of applying law in practice, which lawyers intuitively perceive to be a central aspect of legal ethics. Only by incorporating both perspectives, the practical and the theoretical, is it possible to understand the distinctive nature of the ethics of the legal profession. From that dual perspective, the aim of what follows is to establish that the basic duty of all lawyers is to act with fidelity to law.