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## Government Lawyers in the Liberal State

W. Bradley Wendel<sup>1</sup>

### I. Introduction: Getting the Clichés Out of the Way.

What does it mean for a government actor to lack the quality of independence? Specifically, in connection with government lawyers, how should we understand core evaluative notions like the distinction between neutrality and partisanship? These terms are used casually as epithets — the Bush Justice Department’s independence was “shattered,” says one former government lawyer<sup>2</sup> and the Department’s process of vetting job candidates was widely decried as “politicized” or “ideological.”<sup>3</sup> Naturally the other side uses the same terms of abuse. The 2000 Republican Party platform complained bitterly that, “An administration that lives by evasion, coverup, stonewalling, and duplicity has given us a totally discredited Department of Justice . . . [and] the unprecedented politicization of decisions regarding both personnel and investigations.”<sup>4</sup> This sort of distinction, between politicization and impartiality, is not only

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<sup>1</sup> Professor of Law, Cornell University. Thanks to the participants in the Yale Legal Theory Workshop, workshops at the Queen’s University Faculty of Law and Dalhousie Law School, and the Cornell Law School faculty retreat, for their helpful comments and criticism. For feedback above and beyond the call of duty, I am grateful to Tsvi Kahana, Jeff Rachlinski, Mark Suchman, and Alice Woolley.

<sup>2</sup> See Tony Mauro, *Justice Department’s Independence Shattered, Says Former DOJ Attorney*, LEGAL TIMES (Apr. 16, 2007).

<sup>3</sup> For a typical attack on the George W. Bush Administration, see John S. Koppel, *Bush Justice is a National Disgrace*, DENVER POST (July 9, 2007) (op-ed piece by DOJ civil appellate attorney lambasting episodes of “politicization” including the pardon of Scooter Libby, the abuse of warrantless surveillance, and the firing of U.S. Attorneys).

<sup>4</sup> Republican Party Platform of 2000, <<http://www.presidency.ucsb.edu/ws/index.php?pid=25849>> (last visited 12/11/07). Ted Olsen — who was then former Reagan Administration OLC head, and subsequently would serve as Bush [43]’s Solicitor General — also excoriated the politicization of Clinton DOJ, including the FBI investigation of the White House travel office and alleged interference with the investigation of the death of Vince Foster. See Theodore B. Olson, *Politicizing the Justice Department*, in THE RULE OF LAW IN THE WAKE OF CLINTON 151 (Roger Pilon, ed., 2000).

familiar in contemporary rhetoric, but has a long historical pedigree. George Washington is reported to have said he was seeking a “neutral expounder of the law rather than a political advisor” when he selected the nation’s first Attorney General.<sup>5</sup> In the wake of the Watergate scandal, Gerald Ford similarly lamented that “the Justice Department had become increasingly politicized for a quarter of a century. But the problem had reached crisis proportions by the time I became President.”<sup>6</sup>

Although the rhetorical power of this distinction is apparent, one does not have to push the analysis very far before the line between impartial decision-making and bias becomes uncertain. The reason for this is the fairly banal point that all government policies discriminate in some way, and many discriminate on the basis of contestable values. It cannot be the case that government decision-making has been impermissibly politicized just because the basis for the decision happens to line up with the policy preferences of the incumbent President. In fact, considerations of democratic accountability would seem to favor this outcome. Not only do government policies discriminate, but government decision-makers act on the basis of reasons that may also overlap with the preferences of one side or the other of a political divide. If it is “partisanship” to base a decision on grounds that are congenial to Republicans and not to Democrats, or vice-versa, then it would appear that most decisions made by government officials are partisan. Therefore, there would seem to be no way to criticize coherently a government actor for lacking the virtue of neutrality. Unsurprisingly, terms like neutrality, independence, politicization, and partisanship are woefully undertheorized in the literature on government

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<sup>5</sup> See Griffin B. Bell, *Office of Attorney General’s Client Relationship*, 36 BUS. LAW. 791, 791 (1981).

<sup>6</sup> See Gerald R. Ford, *In Memoriam: Edward H. Levi*, 67 U. CHI. L. REV. 975, 975 (2000).

lawyers' ethics.<sup>7</sup>

The basic problem of the ethical responsibilities of government lawyers is easy to state, and generally well understood: The President has an agenda.<sup>8</sup> People vote for presidential candidates in part on the basis of ideology. Historically, and very roughly, if you want a President who's tough on crime, favors small government and limited spending, and believes in a robust role for the military in foreign policy, you vote Republican; if, on the other hand, you favor government intervention to ameliorate social problems, don't mind redistributive taxation, and prefer a more "humanitarian" foreign policy, you vote Democrat. The winner of the election justifiably believes that he (maybe now she) has a mandate from voters to pursue a particular political agenda. The President accordingly selects executive branch officials on basis of their fealty to this agenda — again, not just because it is the President's agenda, but because the content of the agenda has been set by a democratically legitimate process. The responsibility of these officials is, in part, to serve as agents of the President, faithfully executing the President's

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<sup>7</sup> I do not mean that we cannot identify blatant examples of political inference with the what should be an impartial process of decision-making. For example, Col. Morris Davis, the former chief prosecutor in the military commissions at Guantánamo Bay, resigned after being placed under the command of William J. Haynes, the civilian general counsel of the Department of Defense, who had previously indicated that acquittals in the commission hearings would be intolerable. When Col. Davis noted there had been acquittals at Nuremberg, Haynes responded: "If we've been holding these guys for so long, how can we explain letting them get off? We can't have acquittals. We've got to have convictions." See Ross Tuttle, *Rigged Trials at Gitmo*, NATION (Feb. 20, 2008); see also William Glaberson, *Former Prosecutor to Testify for Detainee*, N.Y. TIMES (Feb. 28, 2008); Morris D. Davis, *AWOL Military Justice*, L.A. TIMES (Dec. 10, 2007). If the concept of politicized decision-making means anything, this must be an instance of it. The problem I want to pursue in this paper is that in *interesting* cases, not involving the exercise of raw coercive power and obvious rigging of procedures, we do not have a promising way to theorize the notion of politicization.

<sup>8</sup> See, e.g., Stephen G. Calabresi, *The President, the Supreme Court, and the Constitution: A Brief Positive Account of the Role of Government Lawyers in the Development of Constitutional Law*, 61 LAW & CONTEMP. PROBS. 61, 66 (1998) ("American Presidents must, as a practical matter, have some kind of program for the Supreme Court and for the legal system as a whole. . . . [A]ll Presidents must, as a political matter, have some goals in mind while staffing the legal positions in their administrations.").

agenda.<sup>9</sup> At the same time, however, all government officials have an obligation of fidelity to the Constitution and the laws of the United States. The President takes an constitutionally-specified oath to “preserve, protect, and defend the Constitution of the United States.”<sup>10</sup> Executive branch officials similarly are required to swear to support the Constitution.<sup>11</sup> Lawyers advise all of these executive branch officials on how to act in compliance with the law. In a certain sense, to be explored in depth in this paper, federal government lawyers have an duty of impartiality or neutrality with respect to Constitution and the framework of laws enacted by Congress pursuant to its constitutional authority.<sup>12</sup> Government lawyers who deviate too much from their obligation of fidelity to the law are criticized for “politicizing” their conduct, implying that it is possible to construct standards of impartiality that may be used as normative benchmarks.

One place to turn for these benchmarks would be to the law itself. Consider how this would work, with reference to a simple hypothetical: Suppose environmental protection statutes provide that a species must be listed as endangered if it satisfies certain criteria; a certain species of fish does in fact satisfy those criteria; the government official in charge of making the determination that a species is endangered nevertheless refuses to list the fish as endangered, because of an ideological commitment to deregulation and scaling back environmental protection

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<sup>9</sup> See, e.g., Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1194-95 (2006) (“[P]olitics has an entirely appropriate role in the executive branch. By this I mean discretionary considerations of policy and even ideology, as opposed to the mandatory . . . constraints of legal rules.”)

<sup>10</sup> U.S. CONST., art. II, sec. 1.

<sup>11</sup> *Id.*, art. VI.

<sup>12</sup> I am talking about federal government officials here, and will analyze issues of federal government lawyers’ ethics throughout this paper, but the same analysis applies at the state level as well.

laws; and agency lawyers advising that official conclude that the decision is legally permissible, again because the lawyer has an ideological preference for deregulation that causes the lawyer to read the governing law tendentiously.<sup>13</sup> We would, in this simple hypothetical case, be justified in criticizing the lawyer for partisanship, politicized judgment, lack of independence and impartiality, and the other ethical failings we sometimes attribute to government lawyers. (This is true regardless of whether the lawyer is a political appointee or a “tenured” agency lawyer.<sup>14</sup> Criticism of the partisanship of government lawyers extends to political appointees, implying that there is a degree of partisanship that is intolerable even in non-tenured lawyers.) The problem with this response is that I think we — that is, members of the legal academy, as a profession — have lost faith in the belief that the law is determinate enough to serve as a benchmark in this way. We doubt the part of the specification of the example which says, “The statutes provide such-and-such.” Maybe there is a way to read the statutes to avoid the conclusion that the fish must be listed as endangered. In addition to doubting the determinacy of the law, and despite all the talk about the death of critical legal studies, we also remain unsettled by the critical legal studies “critique of neutrality.” We accept, even if only tacitly, the CLS contention that law is merely politics by other means. Thus, if the law is sufficiently indeterminate that it can be manipulated to mean anything the client wants it to mean,<sup>15</sup> there

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<sup>13</sup> This example is drawn loosely from a controversy involving Vice President Dick Cheney’s intervention in a water dispute in the western United States. See Jo Becker & Barton Gellman, *Leaving No Tracks*, WASH. POST (June 27, 2007), at A01.

<sup>14</sup> See Thomas W. Merrill, *High-Level, “Tenured” Lawyers*, 61 L. & CONTEMP. PROBS. 83 (1998).

<sup>15</sup> See, e.g., DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION {FIN DE SIÈCLE} 23 (1997) (“Judges, moreover, always claim that they themselves are proceeding according to a discursive procedure that positively excludes ideology . . . Jurisprudence theorizes denial by explaining how adjudication can be nonideological.”); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 242-53 (1987); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985); Elizabeth Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW 13 (David Kairys, ed., rev’d ed. 1990).

would appear to be no good reason why the lawyer should not acquiesce in the demand of politically appointed officials to resist listing the fish as endangered. This is a cynical reaction to the traditional characterization of government lawyers as serving two masters — the President’s political agenda and the law.<sup>16</sup> The latter collapses all too easily into the former, because we no longer accept old verities like “impartial justice,” neutrality, or impartial legal interpretation. There can be no coherent way to criticize government lawyers for politicizing their role if there is such thing as a neutral, apolitical interpretation of law. Worries about the ability to sustain the “politicization” critique in a principled way are therefore a challenge for liberal political theory, as well as the narrower concern of philosophical legal ethics.

The deeper theoretical problem, of which our inability to coherently sustain the “politicization” critique is a part, is the tension between two ideals of self-government — collective self-rule through majoritarian political processes, and the rule of law (or, in the case of public law, constitutionalism).<sup>17</sup> The separation of law and politics is at the heart of the liberal ideal of the rule of law, which emphasizes the constraint on the arbitrary exercise of power by restricting the state to acting through relative stable, determinate rules capable of being ascertained in advance by citizens.<sup>18</sup> The irony, and source of an endlessly fascinating

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<sup>16</sup> See NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL’S OFFICE, 1789-1990* 2-3 (1992) (citing numerous statements from past Attorneys General of the ideal of serving “nonpartisan, evenhanded Justice” while also acting as the political adviser to the President).

<sup>17</sup> See Frank Michelman, *Law’s Republic*, 97 *YALE L.J.* 1493, 1500-01, 1509, 1527 (1988).

<sup>18</sup> See, e.g., Joseph Raz, *The Rule of Law and Its Virtues*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 213 (1979); F.A. HAYEK, *THE ROAD TO SERFDOM* (1944). A few modern critics question this formal conception of the rule of law, and argue that a system of norms must satisfy some substantive criteria, such as adequately protecting human rights, to be worthy of the label “law.” See, e.g., Thomas Bingham (Baron of Cornhill), *The Rule of Law*, 66 *CAMBRIDGE L.J.* 67 (2007); Ronald Dworkin, *Political Judges and the Rule of Law*, in *A MATTER OF PRINCIPLE* 9 (1985).

jurisprudential puzzle, is that this restriction on state power must be given effect by creating some institution, itself part of the apparatus of the state, which acquires power by limiting the power of other institutional actors. The strategy of constitutionalism vests courts with the authority to invalidate the actions of the political branches, on the basis of entrenched rights, the source of which is held to be some founding decision of We The People, embodied in an act of collective self-constitution. It is to be expected, however, that interpretive questions might arise concerning the scope and limits of the entrenched rights against majoritarian actions, that the officials empowered to enforce the terms of the constitution will be making decisions that have a profound impact on the lives of citizens, and that those affected citizens will wonder why they should not have a say in defining the terms of the rights enforced against the institutions that more directly reflect their will.<sup>19</sup> Apart from the problem of justifying the limitation on the aggregated preferences of affected citizens, there is the further question of why any one branch should have interpretive primacy over the others, when the Constitution creates a generally applicable mandate for all government action to be lawful. Executive and legislative actors are therefore no less apt to run across questions demanding the exercise of legal judgment. While the problem of the legitimacy of the power of unelected judges has been endlessly discussed, under the rubric of the countermajoritarian difficulty, and there is a burgeoning literature on executive branch constitutional interpretation,<sup>20</sup> considerably less attention has been paid to how

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<sup>19</sup> See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

<sup>20</sup> See, e.g., Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005); Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 L. & CONTEMP. PROBS. 105 (2004); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to*

the same jurisprudential puzzle arises when thinking about the ethics of lawyers acting as advisors to government officials.<sup>21</sup> Theories of political legitimacy, developed in the context of constitutional law, may have analogues as applied to the rights and obligations of lawyers; there may be important disanalogies, however, turning on differences in the nature of the relationship between citizens and the law, on the one hand, and lawyers and the law on the other.

The aim of this paper is to hold on to the distinction between faithful interpretation of, and advising on, the law, and improper politicization of the role of government lawyer, while acknowledging that considerations of democratic legitimacy require that the President have considerable discretion to establish a substantive, ideologically non-neutral policy agenda. There is a middle ground here, in which government lawyers may be called upon to resist the impermissible influence of politics and ideology, but not because there is an ideologically neutral standpoint from which policies and actions can be evaluated. Rather, as *lawyers*, these government officials can differentiate between permissible and impermissible exercises of state power with respect to the content of the law. There is no claim here that the content of law is

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*Execute the Laws*, 104 YALE L.J. 541 (1994); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Saikrishna B. Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991 (1993); Geoffrey P. Miller, *The Unitary Executive in a Unified Theory of Constitutional Law*, 15 CARDOZO L. REV. 201 (1993); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992). By comparison, less scholarly attention has been devoted to the issue of legislative constitutional interpretation is relatively. For an important recent contribution to this area, see the essays collected in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* (Richard W. Bauman & Tsvi Kahana, eds., 2006).

<sup>21</sup> The relevant lawyers under consideration here are acting in an advisory capacity — rendering legal opinions on the permissibility of government action, or even helping to design and execute government policy. Lawyers acting as counselors are, in effect, law-givers with respect to an action, except in the event the action is made the subject of a litigated dispute. By contrast, government lawyers in litigation contexts have more latitude to urge creative or aggressive interpretations of law.

ideologically neutral; indeed, this is where the CLS critique has led us astray.<sup>22</sup> Instead of seeking a conception of legal legitimacy in which neutrality is central, we can rely on a thinner conception, in which a necessary condition of legal legitimacy is the social source of legal norms — the “pedigree” of law, as Dworkin calls it.<sup>23</sup> This is still a liberal account, in that some considerations are excluded as an acceptable justification for government decision-making. But the exclusion does not work on standard law-politics lines. Some considerations may be “political” in the sense that they form part of a larger ideological project, but are nevertheless considerations that may properly count in favor of a legal judgment. In the endangered-species example, a preference for intrinsic values related to the preservation of species may be part of an ideological agenda, one associated in the United States with the environmental movement, interest groups like the Sierra Club, Al Gore, etc. The law may nevertheless adopt or incorporate these values, and their priority over economic considerations, through legislation and regulation that establishes a side-constraint on government decision-making in favor of protecting endangered species. Just as this law is not neutral between competing values, government lawyers who work to circumvent should not be criticized for politicizing their role simply because they are acting from a partisan, ideological agenda (one associated with Dick Cheney and his preference for economic development over ecological preservation). Instead, the criticism directed at these lawyers should be based on their failure to exhibit fidelity to the existing law, and whatever values it happens to incorporate.

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<sup>22</sup> For claims that the law must be ideologically neutral in order to be legitimate, see, e.g., ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* 66-67 (1975) (criticizing liberalism for being unable to solve the problem of arbitrariness, in the sense that any legal restriction placed on the ability of one person to satisfy her

The target of the arguments in this paper is not just CLS,<sup>24</sup> but any theory of public ethics that relies on a distinction between law and politics that is to be drawn with reference to the content of the values in question, as opposed to the social sources of the norms. So, for example, the basis for this account of government lawyers' ethics will not be the classical *Rechtstaat* ideal "that rulers [should] not direct the exercise of their authority towards private or partisan objectives"<sup>25</sup> It is permissible for state actors to direct their authority towards partisan objectives, but only if those objectives have been embodied in laws permitting or requiring the state to work toward those ends. Protecting endangered fish is no less a "partisan" objective than providing water to farmers and ranchers. Fulmination about the politicization of some aspect of the administration of law may be rhetorically appealing, but it strikes me as hopelessly naive from a theoretical point of view. However, it is still possible to delineate a boundary between permissible and impermissible grounds for government decision-making, by relying on a distinction between law and non-law, with law defined as a legal positivist would, in terms of its social sources.<sup>26</sup> The law may embody contestable policy preferences, but that does not mean it

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desires will necessarily benefit some individuals more than others).

<sup>23</sup> See Ronald Dworkin, *The Model of Rules I*, in *TAKING RIGHTS SERIOUSLY* 14, 40 (1977).

<sup>24</sup> I know it would be quixotic at best to revive an esoteric academic debate that arguably was on its last legs in the late 1980's. The point here is not to reargue the CLS vs. everyone-else debate, but to show how the critique of neutrality never really died out, and how it continues to influence the terms in which we evaluate government officials. For one example among many of the contemporary salience of CLS ideas, consider some on-line debates about the Bush administration's politicization of the Justice Department. Writing on the *Balkinization* blog, Brian Tamanaha ironically noted that he now has some more sympathy for CLS, having seen how easily law can become politics. One commentator then turned the CLS argument back on Tamanaha, noting that "[l]iberals decry the Bush administration's use of politics . . . because liberals have successfully defined the status quo as somehow non-partisan." See Brian Tamanaha, *The Bush Administration Vindicates Critical Legal Studies*, <<http://balkin.blogspot.com/2007/05/bush-administration-vindicates-critical.html>> (last visited 12/4/07).

<sup>25</sup> JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 272 (1980).

<sup>26</sup> See H.L.A. HART, *THE CONCEPT OF LAW* 94-95, 100 (2d. ed. 1994) (defining the rule of recognition as that norm which specifies binding criteria for legal officials to use in deciding whether a given norm is a rule that is part of a legal system); Joseph Raz, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN* 210, 211, 231 (1994) (identifying the law with certain sources, such as cases and statutes, whose content can be determined by social facts alone, without resort to moral argumentation).

is illegitimate. The source of its legitimacy is the process of its enactment, not its content. That is to say, the fundamental commitment here is to a positivist conception of law, in which the legitimacy of law can be traced to the social sources of legal norms. Accordingly, the foundation of a theory of government lawyers' ethics should be the obligation of fidelity to law enacted by tolerably fair procedures, which supersedes the values (call them political, ideological, or whatever) that would ordinarily constitute the ethics of some public role.<sup>27</sup> The inside/outside distinction, between considerations that may properly play a role in the decision-making of government lawyers and those that may not, is given not by notions of neutrality and non-neutrality, but by being part of the material of law, or not. Admittedly, this is a thin conception of the legitimacy of law, particularly as compared with republican, deliberative, or dialogic notions of law-creation through participation or the contestation of legal meanings.<sup>28</sup> As we will see, however, I think there are good reasons to favor thinning out the grounds on which agreement is necessary in order to secure legitimacy. As we will also see, some republican elements will inevitably creep into the theory, under the guise of criteria for determining which of several competing interpretations of the meaning of law is the best justified.

In defending the possibility of this middle-ground position, I will proceed by first arguing against the several dominant theoretical paradigms for theorizing the ethics of government lawyers. The first paradigm is public choice theory, which views the law merely instrumentally, as a potential source of costs that must be balanced against the benefits of some course of action.

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<sup>27</sup> See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 42, 48, 58-61 (1986).

<sup>28</sup> See, e.g., AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); Frank I. Michelman, *The Supreme Court 1985 Term* —

Section II.B will argue against the position that the *interests*, as opposed to the legal entitlements, of clients ought to be centrally important in legal ethics. The second traditional theoretical paradigm is that of government lawyers as servants of the public interest, which is related to the modern revival of the civic republican tradition.<sup>29</sup> As I will argue in Section II.C the persistence of good-faith disagreement precludes the resort to a conception of the public interest, or some notion of civic republican politics, as the foundation for the ethics of government lawyers. Finally, Section II.D considers and rejects reliance on the notion of neutrality in liberal political theory. The trouble with this approach is that neutrality in political philosophy is usually taken to mean something like detachment from the positions of the competing sides in a debate or, more colloquially, treating like cases alike.<sup>30</sup> But as any lawyer knows, the respect in which cases can be said to be alike or unlike is itself one of the contestable features of legal interpretation.

This brings us to the constructive argument of Section III, which is an attempt to defend a conception of government lawyers' ethics which is based primarily on the obligation of fidelity to positive law. Very roughly, that argument will reject the position that (1) the law is sufficiently determinate on its own, so that any interpreter acting in good faith will be able to discern a range of plausible meanings which can then be used as the basis of evaluating a

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*Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

<sup>29</sup> Cf. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

<sup>30</sup> See Jeremy Waldron, *Legislation and Moral Neutrality*, in GOODIN & REEVE, *supra* note \_\_\_\_, 61, 63 (“The concept of neutrality presupposes a *contest* between two or more sides (two or more people, parties, teams, nations, religions, ideals, values) and it focuses attention on a third or additional party whose actions and status are in question and to whom either the term ‘neutral’ or the term ‘non-neutral’ is to be applied.”); RAZ, *supra* note \_\_\_\_, at 113 (“To be neutral . . . is to do one’s best to help or to hinder the various parties concerned in an equal degree.”) (quoting Alan Montefiore).

proposed government action or policy, while also rejecting (2) the claim that the law itself may be susceptible of such a wide range of plausible interpretations that the law is not a meaningful restraint on government actions, but that determinacy can be provided from outside of law itself, by relying on the judgment or character of the lawyers who apply it. The truth of the matter, I think, is that something of both (1) and (2) are correct. That is, it seems to me that a theory of legal interpretation must incorporate, tacitly or expressly, some aspects of a virtue-theoretic approach. In earlier work I have defended an account of legal interpretation that emphasizes acceptability to a professional community.<sup>31</sup> Given the plurality of social sources of law, including texts, principles, and interpretive conventions, the only way the law can have even a moderately stable, recoverable meaning is if there were some extra-legal criteria for what constitutes a plausible interpretation. These criteria are given by the norms of a professional community, but these norms are not the sort of thing that are capable of being reduced to rules.<sup>32</sup> There is an irreducible element of judgment, which is constrained by a professional community in a non-algorithmic way. Although it is impossible to escape talk of judgment, I hope to use the concept of professional judgment in a way that does not beg all the important questions, and does not function as a black box in the theory. Criticizing government lawyers for failures of professional judgment can be just a smokescreen for partisan disagreement, but if the notion of judgment is fleshed out in the right way, it can do some useful analytical work despite ideological differences. One practical upshot is that we may be able to improve the process of decision-making by government lawyers by certain kinds of procedural reforms, emphasizing

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<sup>31</sup> See W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1169 (2005).

<sup>32</sup> At any rate, if they were rules, they would themselves stand in need of further interpretation, as Kripke's version of the rule-following argument shows. See SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE

openness and checking by other institutions.<sup>33</sup>

A final methodological note: This paper is intended as an argument within philosophical legal ethics. It is not intended as an analysis of the existing legal restrictions on partisan political activities by government lawyers, such as the Hatch Act, or administrative agency regulations. It may be that some of the actions described in the case studies below violate existing law. For example, basing hiring decisions at the Justice Department on partisan political affiliation may violate applicable DOJ regulations.<sup>34</sup> Nor is the paper really about legal ethics as lawyers sometimes understand that term, as equivalent to the state bar disciplinary rules. Government lawyers are subject to discipline by the highest court of the state in which the attorney is admitted to practice, as well as the state in which the lawyer's activities occur.<sup>35</sup> For the most part, however, the disciplinary rules, based on the ABA's Model Rules of Professional Conduct, do not differentiate between private and government lawyers. More to the point, they do not prescribe specific duties that are aimed at the recurring problem of partisanship in government lawyering, understood as failure to apply the law faithfully. The target of the argument in this paper is a more subtle kind of politicization, which may escape legal regulation but may nevertheless be normatively undesirable. Finally, although there are aspects of these debates that may bear on the "politicization" critique, this paper is not really about the theory of the unitary

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LANGUAGE (1982).

<sup>33</sup> See, e.g., Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1 (2007); Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115 (Michael W. Dowdle, ed., 2006).

<sup>34</sup> See, e.g., 5 C.F.R. § 4.2.

<sup>35</sup> See the so-called McDade Amendment, 28 U.S.C. § 530B(a).

executive,<sup>36</sup> or the question of the identity of the client of a government lawyer, whether in a specific agency (such as the Office of Legal Counsel or the Solicitor General's office) or within government generally.<sup>37</sup> The case study in the following section should further clarify the nature of the problem.

## II. *The Inadequacy of Three Standard Approaches.*

### A. Interpretive Controversies in the Executive Branch.

To illustrate and help draw contrasts among the three theoretical foundations of a conception of government lawyers' ethics, it will be helpful to refer, as an extended case study, to one of the controversies arising from the Bush Administration's claims of virtually unlimited executive power. To summarize a complicated story, lawyers in the Justice Department's Office of Legal Counsel (OLC) had initially approved a program whereby the National Security Agency (the government service responsible for electronic surveillance, spying, and wiretapping) would be permitted to record telephone conversations without first obtaining a search warrant or court

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<sup>36</sup> See *supra* note \_\_\_\_.

<sup>37</sup> Cf. REBECCA M. SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* (1992); Neal Devins, *Unitariness and Independence: Solicitor General Control Over Independent Agency Litigation*, 82 CAL. L. REV. 255 (1994); Douglas W. Kmiec, *The OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337 (1993); Wade H. McCree, Jr., *The Solicitor General and His Client*, 59 WASH. U. L.Q. 337 (1992); John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799 (1992); Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291 (1991); Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951 (1991); Eric Schnapper, *Becket at the Bar — The Conflicting Obligations of the Solicitor General*, 21 LOY. L.A. L. REV. 1187 (1988); William Josephson & Russell Pearce, *To Whom Does a Government Lawyer Owe the Duty of Loyalty When Clients are in Conflict?*, 29 HOW. L.J. 539 (1986); Erwin N. Griswold, *The Office of the Solicitor General — Representing the Interests of the United States Before the Supreme Court*, 34 MO. L. REV. 527

order.<sup>38</sup> The administration sought this permission despite the existence of a streamlined process for obtaining permission to conduct electronic surveillance for national security purposes, established by a statute called the Foreign Intelligence Surveillance Act (FISA).<sup>39</sup> Administration lawyers considered two legal arguments to justify the President's authority to approve wiretaps without going through the FISA procedures. First, they argued that the Authorization for Use of Military Force, passed by Congress soon after the September 11, 2001, attacks, in effect superseded FISA for any intelligence-gathering activities that could help prevent a terrorist attack.<sup>40</sup> Second, some lawyers within the administration advanced a position

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(1969).

<sup>38</sup> For the background on the warrantless wiretapping program, FISA, and the executive-power controversy, see Barton Gellman & Jo Becker, *Pushing the Envelope on Presidential Power*, WASH. POST (June 25, 2007), at A01; Barton Gellman & Jo Becker, "A Different Understanding With the President", WASH. POST (June 24, 2007), at A01; Michael J. Sniffen, *Ex-Surveillance Judge Criticizes Warrantless Taps*, WASH. POST (June 24, 2007), at A07; Suzanne E. Spaulding, *Power Play: Did Bush Roll Past the Legal Stop Signs?*, WASH. POST (Dec. 25, 2005), at B01; Carol D. Leonning & Dafne Linzer, *Judges on Surveillance Court to Be Briefed on Spy Program*, WASH. POST (Dec. 22, 2005), at A01; James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), at 1.

<sup>39</sup> Pub. L. No. 95-511, 92 Stat. 1783, codified as amended at 50 U.S.C. § 1801, *et seq.*

<sup>40</sup> The Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), provides:

The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

The Justice Department's arguments were summarized in a letter to the ranking majority and minority members of the House and Senate Intelligence Committees, following disclosure of the warrantless wiretapping program by the *New York Times*. The Justice Department also made available a longer "White Paper" containing more detailed versions of the arguments. Both letters provoked responses from a group of legal scholars and former government lawyers, who had served in both Democratic and Republican administrations. The principal criticism of the Justice Department's position can be found in a letter signed by numerous legal scholars and former government officials, published in the *New York Review of Books*. See Curtis Bradley, et al., *On NSA Spying: A Letter to Congress*, N.Y. REV. OF BOOKS (Feb. 9, 2006). All of the relevant letters were published in an issue of the *Indiana Law Journal*, with an introduction by David Cole and Marty Lederman. See David Cole & Martin S. Lederman, *The National Security Agency's Domestic Spying Program: Framing the Debate*, 81 IND. L.J. 1355 (2006). The commentary of several legal scholars, including Marty Lederman, Jack Balkin, and Stephen Griffin, on the *Balkinization* blog were invaluable in summarizing the many complex legal issues involved. These posts are archived at <http://balkin.blogspot.com/2006/12/anti-torture-memos.html#PartIV>.

that, as a matter of constitutional law, the President has the inherent authority as Commander-in-Chief of the armed forces to authorize the collection of signals intelligence on enemy forces, notwithstanding limitations imposed by FISA. The internal debate over the legality of the program came to light in a dramatic fashion several years later, when former Deputy Attorney General James Comey testified before the Senate Judiciary Committee about the refusal of then Attorney General John Ashcroft to certify the legality of the program when it came up for reauthorization in March of 2004.<sup>41</sup> Ashcroft had acted on the advice of Jack Goldsmith, who had reviewed the program when he became the new head of the Office of Legal Counsel.<sup>42</sup> Then White House counsel (later Attorney General) Alberto Gonzales attempted to secure Ashcroft's approval of the program, while Ashcroft was recovering from surgery in a Washington hospital.<sup>43</sup> Debate about the government's electronic surveillance program continued for several years after the disclosure of the Ashcroft-Gonzales confrontation, with the Bush administration insisting on retroactive immunity for telecommunications companies who had cooperated with the government's (illegal) spying efforts.<sup>44</sup>

While it is tempting to be cynical, and to dismiss the OLC lawyers who initially authorized the surveillance as a bunch of partisan hacks, it is fairer (and, in fact, truer to the case)

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<sup>41</sup> The debate had been reported previously — see, e.g., James Risen & Eric Lichtblau, *Justice Deputy Resisted Parts of Spy Program*, N.Y. TIMES (Jan. 1, 2006) — but the story did not really take off until almost 18 months later, when Comey testified about the dramatic attempt at an “end run” around Ashcroft. See Sen. Patrick Leahy, Chairman, Senate Judiciary Committee Hearing (May 15, 2007).

<sup>42</sup> Goldsmith has stated that he is not permitted to discuss the legal basis for the administration's so-called Terrorist Surveillance Program. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 182 (2007).

<sup>43</sup> Dan Eggen and Paul Kane, *Gonzales Hospital Episode Detailed*, WASH. POST (May 16, 2007), at A01.

<sup>44</sup> See, e.g., Dan Eggen & Ellen Nakashima, *Spy Law Lapse Blamed for Lost Information*, WASH. POST (Feb. 23, 2008), at A03.

to assume that these lawyers sincerely believed their view of the law to be sound, even if it had not been generally accepted by courts. They certainly had a coherent, forcefully argued theory of executive power, and were not troubled by taking a position outside the “mainstream,” because they believed they are at the forefront of legal developments in this area.<sup>45</sup> In their view, the September 11th attacks should be regarded as a paradigm-shifting event, which courts will eventually recognize as having fundamentally altered the normative landscape. In the meantime, it is the job of lawyers to push for legal change, either in litigation or by taking creative positions when counseling clients. To my contention that it cannot be the case that the professional responsibility of lawyers is merely to provide a veneer of legality, these lawyers would respond that their advice is not a sham, but is respectful of the law, as long as “the law” is not interpreted in such a static way that it can never respond to pressure for change. Moreover, one must resist the temptation to criticize their approach with reference to subsequent decisions of the Supreme Court which rejected many of the most sweeping claims made by the Vice President and his allies.<sup>46</sup> The plausibility of a legal judgment cannot be judged only in hindsight, but must be evaluated to the extent possible from the *ex ante* point of view. The law can change unexpectedly, and old verities suddenly swept away. Reasonable professional judgment is not the same thing as clairvoyance.<sup>47</sup> The relevant evaluative standpoint for the plausibility of a

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<sup>45</sup> For scholarly support of the strong executive power thesis in foreign affairs, see, e.g., John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002); John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305 (2002); Saikrishna B. Prakash Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231 (2001); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999); Calabresi & Prakash, *supra* note

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<sup>46</sup> See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>47</sup> In fact, allies of Vice President Cheney have raised exactly this argument, claiming that the Supreme Court “decided to change the rules,” as opposed to emphatically restating the existing law that the administration had been ignoring. Barton Gellman & Jo Becker, *Pushing the Envelope on Presidential Power*, WASH. POST (June

judgment is the state of the law at the time the lawyer provided the advice, with allowances made for what a member of the professional community would regard as a reasonable argument for the extension, modification, or reversal of existing law.

Because there is some superficial plausibility to the OLC lawyers' position, it would appear difficult to base an ethical critique of these lawyers on their failure to exhibit fidelity to the law. In particular, these lawyers might respond that there are multiple potentially correct interpretations of the governing law, and all they have done is rely on the interpretation that is the most congenial to their client's ends. What can be wrong with this? As I will discuss in Section III, we need not withhold criticism, on the grounds of disrespect for the law, just because there is a superficially plausible interpretation, as judged by the standards of an apparently legitimate interpretive community. It is possible to deny the legitimacy of the interpretive norms of certain communities, where those norms fail to track the conceptual requirements of legality. However, recognizing the challenge of making this position stick, I will first review some alternative grounds for criticizing or approving of the conduct of these lawyers. These three positions, the subjects of Sections II.B, C, and D, respectively, are that (1) the principal ethical obligation of any lawyers, for a public or private client, is to pursue the client's lawful *interests*, with the "lawful" qualification not imposing much in the way of limitation, because of the indeterminacy of the law; (2) the ethical obligation of government lawyers is to act in the public interest, and in particular to facilitate a process of dialogic engagement between the state and citizens, over the content of the public interest; and (3) the ethics of government lawyers, like the

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25, 2007), at A01 (quoting Timothy Flanigan).

ethics of government officials generally, is primarily constituted by the requirement of neutrality with respect to contested conceptions of the good. I will take up these positions in turn.

B. Public Choice.

The position I am defending here requires lawyers to exhibit fidelity to the law when advising their clients. Lawyers can thus be criticized for politicizing the advice they give to clients if the advice deviates from what the law, impartially interpreted, would permit or require. One who is inclined to reject this conception of ethical government lawyering might fall back on the analytical tools of public choice theory, particularly the emphasis on the interests of various players — government officials, pressure groups and lobbyists, the other branches of government, and lawyers themselves. On the public choice account, the President competes with the other branches of government, and other actors within the executive branch, over the scarce good of determining government policy.<sup>48</sup> A lawyer, as the faithful agent of her client, seeks to advance her client’s interests through any lawful means. From this perspective, the “politicization” critique is literally vacuous, because political actors should not be understood as pursuing the public’s interests, or exhibiting fidelity to the law.<sup>49</sup> Rather, executive branch

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<sup>48</sup> See, e.g., Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671 (1992); Matthew D. McCubbins, et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371 (1983).

<sup>49</sup> See John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 381 (1993) (defining, among three models of executive branch lawyering, a “situational model,” in which “the President simply interprets the law to advance his political objectives, taking into account precedent or legal principles only to the extent that they may create a political obstacle to fulfilling those objectives”).

officials, career bureaucrats, agency lawyers, and citizens should be understood as competing to maximize their share of the scarce good of government policy. Although lawyers may have their own interests, they are required, by contract and agency law, to serve as fiduciaries of their clients. If the client has an agenda, it is the lawyer's job to advance it, as long as the client's preferred course of action does not contravene applicable law. (Or, in a more extreme version, as long as the client is unlikely to be caught and punished for engaging in a course of action.) In the context of government lawyering, the "client" is generally understood to be an executive branch agency, which may have its own agenda and policy differences *vis-à-vis* other government actors.<sup>50</sup> The lawyer's duties therefore must be understood with reference to these interests — a government lawyer, like any lawyer, may offer advice, but beyond that should not interfere with the client's liberty to take any lawful action.<sup>51</sup>

Sophisticated public choice theory can illuminate inter- and intra-branch conflicts, as well as suggest ways that perverse incentives may affect decision-making by government officials and their advisers.<sup>52</sup> It cannot, however, do any *normative* work in a theory of government lawyers' ethics if one believes there really is a distinction between impartial interpretation and execution of the law as it exists, and simply getting away with something.<sup>53</sup> In other words, the public choice alternative is that it cannot account for the distinction between *de facto* power and

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<sup>50</sup> Macey & Miller, *supra* note \_\_\_\_, at 1116.

<sup>51</sup> See Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 449 (1993).

<sup>52</sup> See, e.g., JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997).

<sup>53</sup> Strictly speaking, public choice is a *positive* theory, an attempt at an explanation of behavior, not a normative theory, which is an attempt at a justification. In practice, however, the positive and normative uses of public choice theory are often run together by legal scholars, generally relying on broadly consequentialist axiological assumptions. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW

legitimate authority. “Do *X*” may be the preference of a government official, but “It is legal to do *X*” cannot be restated in public-choice terms in a way that captures the reason-giving force of law. It is central to the concept of legality that it change the normative situation of citizens and government officials.<sup>54</sup> By contrast, public choice theory tacitly presupposes what might be called the Holmesian bad man stance with respect to the law, after the notorious definition of law proposed by Holmes.<sup>55</sup> Holmes equated the content of law with predictions of how legal officials would decide cases, and dramatized this definition by imagining a “bad man” who cared only about avoiding the legal penalties that might be attached to his conduct. On this account, the law does not impose limitations as such on citizens. Instead, knowledge of the law merely enables people — at least lawyers, who are experts in ascertaining the content of the law — to predict when the state will do something unpleasant, like lock people in jail or enforce a monetary judgment. Legal penalties are to be counted as costs like any other, and weighed against the benefits of some course of action.<sup>56</sup> Further, it is an implication of Holmes’ position that the only reason people have for action, namely maximizing the satisfaction of their preferences, is antecedent to and independent of the law. This definition fits nicely with the public choice story, because lawyers can then understand themselves as legitimately pursuing the exogenous ends of their agency “clients,” advising their clients on the potential for legal sanctions, but otherwise not standing in the way of their client agencies’ pursuit of their interests.

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(2005); Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487 (2006).

<sup>54</sup> For further argument on this point see W. Bradley Wendel, *Lawyers, Citizens, and the Internal Point of View*, 75 FORDHAM L. REV. 1473 (2006).

<sup>55</sup> Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459-62 (1897).

<sup>56</sup> See, e.g., Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984); Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155 (1982).

Public choice theory can have no normative role to play in a theory of legal ethics because the Holmesian bad man stance eliminates legality as a conceptual category altogether. Consider a simple example of avoiding penalties: If a gangster bribes corrupt police officers and judges, they will let him run a bookmaking operation, but that does not make the conduct legal. It is no good to respond that the bribe is illegal, because if the gangster manages to bribe or intimidate his way out of the bribery charges, then on the simple realist definition the original bribery was not illegal. As David Luban notes, “[a] closed circle of corruption is, on [this version of] the realist thesis, indistinguishable from the law.”<sup>57</sup> Or, to make the example slightly more relevant to the discussion at hand, if a government lawyer provides top-secret legal advice that something is permissible, but refuses to disclose the reasoning supporting her argument, the advice by itself does not make the conduct legal, even though the fact of a lawyer having said the conduct is permissible makes punishment unlikely; whether the conduct is legal is a function of the content of the legal reasoning provided by the lawyer, not merely the fact that a lawyer said something is okay. In both of these cases, bribery, evasion, and other means of getting away with conduct must be differentiated conceptually from legal compliance with reference to something other than the likelihood of sanctions. Following H.L.A. Hart, my suggestion is that the distinction between a legal right or permission, on the one hand, and getting away with something, on the other, is a matter of regarding the law as intrinsically reason-giving — in Hart’s terms, acknowledging legal obligations from the internal point of view.<sup>58</sup> If a person is concerned merely to act and to avoid sanctions, then she may adopt any attitude whatsoever

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<sup>57</sup> DAVID LUBAN, *LAWYERS AND JUSTICE* 21 (1988).

<sup>58</sup> These arguments are developed in greater detail in W. Bradley Wendel, *Lawyers, Citizens, and the Internal Point of View*, 75 *FORDHAM L. REV.* 1473 (2006).

toward the law, but she cannot claim to have acted lawfully without accepting the law as a reason for action as such. Legality as an explanatory or justificatory concept simply drops out of the picture unless one regards the law as intrinsically reason-giving.<sup>59</sup> From a detached, external point of view, someone may say, “Gee, look at that — I managed to avoid being thrown in jail,” but from that perspective it is incoherent to say, “I acted lawfully.”

Hart was keenly concerned to avoid a definition of law that collapses legal obligation into the threat of sanctions. He vigorously attacked the Austin-Bentham command-sanction conception of law on many grounds, the most significant of which is that reducing all legal commands to threats backed by force fails to account for the possibility of accepting norms from the internal perspective. In addition to Holmesian bad citizens, who obey the law only out of fear of punishment, there may also be “good” citizens, who believe that conduct rules are weighty, or even conclusive of practical reasoning with respect to some matter, regardless of how severe the remedy is which is attached to violation of the conduct rule.<sup>60</sup> The good citizen looks to the law for guidance, and regards legal directives as reasons for action, apart from any consideration of whether he will be punished for failing to comply with the law. The good citizen regards the law as a source of reasons, while the bad citizen’s reasons are essentially unaltered by the law, except insofar as the law is another source of negative consequences like being deprived of liberty or property. The bad citizen regards the law as a something like a force

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<sup>59</sup> See Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1268 (1998); David Luban, *The Lysistratian Prerogative: A Reply to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 648.

<sup>60</sup> Hart uses the term “puzzled man” to describe what I would call the good citizen. In his critique of Holmes, Hart asks “Why should not law be equally if not more concerned with the ‘puzzled man’ or ‘ignorant man’ who is willing to do what is required, if only he can be told what it is?” H.L.A. HART, *THE CONCEPT OF LAW* 40 (2d

of nature, which can be studied and hopefully avoided, but which does not alter the citizen's practical reasoning by providing new reasons for action. The bad citizen is already concerned with avoiding harm, and the law presents merely another kind of harm to be avoided. The practical reasoning of the good citizen, by contrast, is altered in a different way by the law, because she regards it as a reason for action that did not exist independently. From her internal point of view, the good citizen accepts the law as creating new, justified demands.<sup>61</sup>

In Hart's jurisprudence it is conceptually necessary only that judges regard a specific legal norm — namely, the rule of recognition, which differentiates legal from non-legal considerations — from the internal point of view. In his focus on the perspective judges must take toward the law, Hart says relatively little about the perspective citizens must take. Perhaps there can be a society in which there exist some good citizens and some bad ones, in the sense we have been using “good” and “bad,” and the society can still be one that is law-governed, as long as officials adopt the internal point of view when pronouncing on legal norms. It is clear, on Hart's account, that citizens *may* take the internal point of view, but he does not argue that they *must*. Indeed, he admits that “private citizens . . . may obey each ‘for his part only’ and

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ed. 1994).

<sup>61</sup> The external point of view, which is the perspective of an observer concerned only to record behavioral regularities, cannot take into account the situation of one who regards rules as reasons for action. As Hart states: “. . . the observer really keeps austerely to this extreme external point of view and does not give any account of the manner in which members of the group who accept the rules view their own regular behaviour, his description of their life cannot be in terms of rules at all, and so not in the terms of the rule-dependent notions of obligation or duty.” HART, *supra* note \_\_\_\_, at 89. The shared belief of participants in a practice that the regulative standards of a practice are obligatory differentiates mere behavioral regularities from rule-governed (or at least norm-governed) behavior. Deviation from a habit is a matter of indifference, but deviation from a norm is an occasion for criticism that is regarded as justified by other participants in the practice. *Id.* at pp. 55-56, 84. The use of the term “bad” here is almost unavoidable given the prominence of Holmes in these debates, but note that the bad citizen need not be morally vicious. Holmes' notion is perhaps better captured by Fred Schauer's stipulation that the bad citizen is “disinclined to obey stupid laws just because they are the law.” Frederick Schauer, *Critical Notice*, 24 CAN. J. PHIL.

from any motive whatever.”<sup>62</sup> A society in which only judges accepted the law from the internal point of view might be “deplorably sheeplike,”<sup>63</sup> but there is no reason why a society composed predominantly of bad citizens or passive, sheeplike subjects could not be said to have a legal system, as long as judges viewed the law from the internal perspective. Hart’s only explicit argument regarding citizens’ attitudes in *The Concept of Law* is that command-sanction theories of law, as well as American legal realism (represented by Holmes, among others), are theoretically deficient in that they lack the conceptual resources to account for the possibility of citizens taking the internal point of view.<sup>64</sup> It may be the case, however, that Hart stopped short of where his theory logically would end up, and that there are good reasons to require citizens to regard the law from the internal point of view, at least insofar as they seek to act lawfully. That reason is, roughly, that it would be incoherent to claim to act legitimately when one exploits the legal system, by “simultaneously living within its shelter and breaking its restrictions.”<sup>65</sup>

Modestly extending Hart’s position, I believe that the perspective of the good citizen is constitutive of genuine legal compliance. The argument trades on what is necessarily involved in claiming that one is acting lawfully. Anyone who claims to care about having her actions described as lawful, as opposed to “something I got away with,” is thereby committed to viewing the law as creating reasons for actions as such. The linchpin of this expressivist argument is

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494, 500 (1994) (reviewing ROGER SHINER, *NORM AND NATURE* (1992)).

<sup>62</sup> HART, *supra* note \_\_\_\_, at 116.

<sup>63</sup> *Id.* at 117.

<sup>64</sup> *Id.* at 137-38 (“it cannot be doubted that . . . in relation to some spheres of conduct in a modern state individuals do exhibit the whole range of conduct and attitudes which we have called the internal point of view. . . . They . . . look upon [the law] as a legal standard of conduct, refer to it in criticizing others, or in justifying demands, and in admitting criticism and demands made by others.”).

<sup>65</sup> *Id.* at 195.

therefore the purpose for which a citizen engages with the law. She may be interested only in describing and predicting certain patterns of behavior among fellow citizens, in which case it is perfectly appropriate to take an external perspective on the law. If she is interested in acting lawfully, however, her practical reasoning necessarily proceeds from the internal perspective. The internal perspective is mandated by the conjunction of *action*, as opposed to observation (for which an external perspective would be adequate) and the evaluation that an action is *lawful*, as opposed to merely something that one can get away with. If this relationship holds, then acting under law while regarding the law from an external point of view would be on a par, normatively speaking, with robbing a bank and successfully asserting an alibi defense, or bribing a prosecutor to drop charges. The actor would have managed to avoid sanctions, but the evaluation of the action would be that it was wrong from the standpoint of a relevant normative framework, that of legality.

The appeal to the discourse of legality is natural when one wishes to assert not only that one wants something, or has the power to obtain it, but that it is *right* that one have it. For something to be a legal right, it must be an aspect of a legal system, which is necessarily connected with the interests and values of a society, not the individual.<sup>66</sup> Legality is the normative domain in which citizens seek to transform brute demands into assertions of rights.<sup>67</sup> This transformation necessarily commits one to a certain pattern of explanation and justification.

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<sup>66</sup> See FINNIS, *supra* note \_\_\_\_, at 14 (“Hart’s man who is moved by . . . self-interest . . . waters down any concern he may have for the function of law as an answer to real social problems. . . . [H]e dilutes his allegiance to law and his pursuit of legal methods of thought with doses of that very self-interest which it is an elementary function of law (on everybody’s view) to subordinate to social need”).

<sup>67</sup> I owe this useful phraseology to Daniel Markovits. See Daniel Markovits, *Adversary Advocacy and the Authority of Adjudication*, 75 *FORDHAM L. REV.* 1367, 1385 (2006).

This is the case for participants in any practice, whether players in a game, initiates of a religious vocation, political officials or, in this case, citizens who seek the ascription of lawfulness for their actions.<sup>68</sup> Participating in social practices entails accepting the authority of internal, practice-dependent regulative standards as guides to behavior, and accepting the legitimacy of criticism based on those standards. These regulative standards are not arbitrary, but have their origin in some ultimate state of affairs or value that is the aim of the social practice of which they a part.<sup>69</sup> The regulative standards of the practice has authority for a participant because of the participant's voluntary act of "opting in" to the practice.<sup>70</sup> It would be a conceptual error for participants to regard the norms of a practice from an external point of view, because to participate in a practice means to aim at the end for which the practice is constituted, and doing this requires conformity to the internal regulative standards of the practice. Thus, the "bad man" perspective on any practice is ruled out by the act of avowing that one is a participant, rather than an observer.<sup>71</sup>

Applying all of this to public choice theory, it should be apparent that it is insufficient, from a normative point of view, to assert that the duty of a government lawyer is to maximize the likelihood that her "clients" — a particular agency, for example — will prevail in some struggle for control over the policy-making agenda. Descriptively, it may be the case that "Congress, the

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<sup>68</sup> I use the term "practice" here in the sense, developed by Alasdair MacIntyre, of "any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity." ALASDAIR MACINTYRE, *AFTER VIRTUE* 176 (2d ed. 1984).

<sup>69</sup> See John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3 (1955). In the Postscript to the second edition of *The Concept of Law*, Hart explains the internal/external distinction with reference to the practice conception of rules. See HART, *supra* note \_\_\_\_, at 254-55.

<sup>70</sup> MACINTYRE, *supra* note \_\_\_\_, at 190.

federal courts, and other agencies can and should protect their own interests.”<sup>72</sup> This does not mean, however, that ascertaining the interests of one’s political superiors exhaust the practical reasoning of government lawyers, *if* lawyers are concerned to attribute a special legal significance to their advice. It may be that lawyers care only about keeping their political superiors out of trouble, in which case the expressivist argument set out here would not have much bite. It may also be the case that political superiors are concerned to obtain simply a lawyer’s approval, not a lawyer’s evaluation that such-and-such is *lawful*. (David Luban has argued that, with respect to legal advising on the treatment of detainees and permissible interrogation techniques, the Bush Administration desired, and Justice Department lawyers provided, only the pretense of legal advice, in order to provide political cover for doing something that the administration was committed to doing anyway.<sup>73</sup>) To the extent a lawyer’s legal advice is intended in good faith, however, it is simply incoherent to render it without regard to the actual content of the law, as opposed to the likelihood of punishment, the interests of the various parties, and other considerations that may be weighed as costs and benefits.

With respect to the “politicization” critique, it would be a mistake to rely on public choice theory to argue that there is really no such thing as politicized legal advice. An oversimplified public-choice approach to government lawyers’ ethics might be to instruct lawyers simply to pursue the interests of their agency clients — to be “zealous advocates” of these positions when there is some conflict with other branches of government or political

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<sup>71</sup> Rawls, *supra* note \_\_\_\_, at 25-26.

<sup>72</sup> Macey & Miller, *supra* note \_\_\_\_, at 1116.

<sup>73</sup> LUBAN, *supra* note \_\_\_\_, at 163-65.

opponents outside of government. This conception of the duty of government lawyers will not do, because it omits the concept of lawfulness entirely. As lawyers (in both private and government practice) sometimes forget, the little mantra describing their duties is actually “zealous representation *within the bounds of the law*.”<sup>74</sup> That means that the interests of clients — political or otherwise — are not only consideration to be taken into account. Instead, the lawyer’s job is to pursue the interests of the client, but only to the extent it is legally permissible to do so. I do not believe legal permissibility is a matter of making simple, binary judgments that the law either does or does not permit something. The law does not work like that, and there may be a range of reasonable, good faith disagreement over what is legally permitted. The underdetermination of legal judgments by existing legal materials (texts, immanent principles, interpretive methodologies, and so on) creates the possibility that a lawyer’s advice may be deemed mainstream or “creative” by degrees. There is usually a confidence dimension attached to legal advice, so that lawyers’ judgments come in the form of a two-place variable. Lawyers are accustomed to thinking in this way, even if they do not always communicate their doubts to clients, so that the conclusion of legal research and analysis might be, “I’m pretty sure you can do that,” or “You can give it a shot, but I expect it won’t work.” More formally, an interpretive judgment would consist of “ $\phi = (x, y)$ ” where “ $\phi$ ” is the conduct the client wishes to engage in, “ $x$ ” is the lawyer’s judgment about a substantive entitlement, and “ $y$ ” is the confidence dimension.

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<sup>74</sup> The Restatement provides that the lawyer’s basic duty is to “proceed in a manner reasonably calculated to advance a client’s lawful objectives, as defined by the client after consultation.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(1) (2000). The term “zealous advocacy” originally appeared in the disciplinary rules in the ABA’s Model Code, promulgated in 1969. See MODEL CODE OF PROF’L RESPONSIBILITY, Canon 7 (1969) (“a lawyer should represent a client zealously within the bounds of the law”).

The politicization critique can therefore be restated in terms of (1) how much confidence a lawyer must have in an interpretive judgment before advising a client that it can do what it wants to do, and (2) how much “creativity” we are willing to tolerate in legal interpretation before we conclude that a lawyer is not interpreting the law in good faith, but is instead providing “plausible deniability” or a veneer of legality to cover a lawless act by the client. In the context of government lawyering, particularly the opinion function of the Attorney General and the Office of Legal Counsel, there is a well known debate over whether lawyers should be “neutral expositors” of the law, offering the best view of what the law actually is, reasoning from a quasi-judicial point of view, or whether lawyers are permitted to push the envelope, and rely on interpretations that are defensible, but farther from the core of the best available interpretation of the law.<sup>75</sup> To put it another way, must executive branch lawyers faithfully follow existing court decisions, or is their independent opinion function less constrained than a judge’s discretion in a comparable case? No one really questions the principle that executive branch officials must independently make judgments about the legal permissibility of some course of action; the separation of powers doctrine vests each branch with a substantial measure of autonomy, including the responsibility to evaluate the legal basis for their activities. The question, instead, is whether an executive branch official may act on the basis of a judgment that diverges from

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<sup>75</sup> See McGinnis, *supra* note \_\_\_\_; Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 317 (1994); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993); John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371 (1988). For an excellent summary of this debate, see the lengthy post by Marty Lederman at the *Balkinization* weblog. Marty Lederman, *Chalk on the Spikes: What is the Proper Role of Executive Branch Lawyers, Anyway?*, <http://balkin.blogspot.com/2006/07/chalk-on-spikes-what-is-proper-role-of.html> (July 4, 2006) (last visited 1/8/08).

what the judiciary would decide, if it considered the case.

At this point in the argument, critics of the “neutral expositor” model engage in a subtle sleight of hand. John McGinnis’s formulation is typical:

The strongest argument for executive independence with respect to the analytical judgments of the Court rests on the notion that even these judgments need to be subject to challenge by another institution with a *different* perspective. The distinctive institutional perspective of the executive branch, however, rests precisely on the fact that it is closer to the popular will.<sup>76</sup>

The italicized word, “different,” slyly suggests that the executive and judicial branches may simply have a disagreement about the right way to interpret the law, and that is all that can be said about the matter — you say tom-ay-to, I say tom-ah-to. If the disagreement were just a matter of taste or preference, then McGinnis would be correct to favor the interpretation of the branch with a closer connection to the will of the people. But notice how we are supposed to take for granted that all disagreements over legal interpretations come down to questions of taste.

Here again we encounter the tacit reliance on a CLS position — this time, the claim that objectivity in legal interpretation is illusory.<sup>77</sup> It is now fairly well recognized, however, that this particular CLS argument proceeded by holding up as the ideal an implausibly strong conception of objectivity, in which objective judgments are exemplified by findings of the natural sciences.

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<sup>76</sup> McGinnis, *supra* note \_\_\_\_, at 381-82 (emphasis added).

<sup>77</sup> See, e.g., Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); Mark Kelman, *Interpretive Construction in Substantive Criminal Law*, 33 STAN. L. REV. 387 (1981); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). For a response to the indeterminacy critique, see Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing*

But objectivity in law need be only moderately domain-specific, meaning that the characteristics of as an objective judgment in the natural sciences will differ in some respects from that which makes a judgment objective in art criticism, basketball officiating, or faculty hiring decisions.<sup>78</sup> An objective judgment in any endeavor must have certain characteristics: (1) independence from the subjectivity of the judging subject, openness to the subject matter, and willingness to base judgments on the subject itself, not personal idiosyncracies; (2) amenability to evaluation of the correctness of judgments, or standards for assessing judgments; and (3) invariance across judging subjects.<sup>79</sup> I have argued elsewhere that a community of lawyers and judges, relying on largely tacit rules regulating interpretation, can reach a substantial degree of intersubjective agreement on what counts as a plausible legal judgment.<sup>80</sup> Without getting into the particulars of that argument, it is noteworthy that McGinnis's argument implicitly denies that lawyers in the executive branch and judges can reach intersubjective agreement on the correctness of legal judgments, so that disagreements over interpretation is simply a matter of preference, as opposed to one of the interpreters having gotten it wrong. If McGinnis is correct about this, then there really is nothing left of the "politicization" critique.

While I believe this is too strong, and there is a moderate degree of objectivity in legal

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*Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

<sup>78</sup> See Gerald J. Postema, *Objectivity Fit for Law*, in OBJECTIVITY IN LAW AND MORALS 99, 100 (Brian Leiter ed. 2001)

<sup>79</sup> *Id.* at 105-09; see also William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1120 (1988) ("our legal system depends on the possibility of grounded judgments about legality and justice. Such judgments are not subjective in the sense that the choice between vanilla and chocolate ice cream is subjective . . . They often *are* controversial, but controversy does not preclude legitimacy."); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744 (1982) (arguing that objectivity implies that an interpretation can be measured against a set of norms that transcend the judging subject); RAWLS, *supra* note \_\_\_\_, at 110-12.

<sup>80</sup> Wendel, *supra* note \_\_\_\_.

interpretation, the real bite of the public choice critique comes in cases in which reasonable minds can differ over the correct interpretation — not because there is no such thing as objectivity, but because there is genuine (i.e. objective) uncertainty over the best way to interpret existing law. Lawyers commonly give advice of the form, “I’m pretty sure you can do that, but there’s a risk that a court won’t go along,” or, “While I think it’s a bit of a stretch to argue that the AUMF supersedes the warrant requirement in FISA, it’s not a ridiculous argument, so if you’re willing to accept the risk of losing in court, you can go for it.” No one disputes that if a court has rendered a binding judgment, executive branch officials are duty-bound to respect it. There is nevertheless uncertainty over the binding effect of legal principles that have been invoked in support of past judicial decisions.<sup>81</sup> In essence, the “neutral expositor” view instructs executive branch lawyers to consider those principles and other underlying reasons, and render the same decision as an ideal judge, who is concerned to come up with the best interpretation of the law — to show the law in its best light, as Ronald Dworkin puts it.<sup>82</sup> Superficially, at least, this seems odd. Lawyers and judges occupy discrete roles in the legal system, and should be expected to have different responsibilities. The adversary system — to say nothing of the separation of powers doctrine — enacts a normative division of labor among various institutional actors, responding to political needs such as limiting government power and enhancing accountability. Lawyers for private clients, at least in litigation, need not assert only legal positions they believe to be the best view of the law, or even reasonably well founded. As long as a legal argument is not lacking in any foundation whatsoever, it is permissible to urge it to a court.

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<sup>81</sup> See Merrill, *supra* note \_\_\_\_.

I have never understood why this argument from the adversary system is thought to prove anything about legal advising outside the litigation context. The argument proceeds by taking the lawyer's litigation-advocacy role as the baseline, and then demanding a justification for any deviation from that baseline. Regarding executive branch lawyers, the arguments that have been offered, from history, the text of the Constitution (particularly the Take Care Clause and the presidential oath of office), and constitutional structure, are inconclusive.<sup>83</sup> Thus, goes the appeal to the adversary system, we do not have a sufficient reason to deviate from the baseline conception of the lawyer's role. But why should we take the lawyer's litigation-related duties and permissions as the baseline, and not as a special case? In my view, the obligations of lawyers, as agents of clients, have to be understood with reference to the client's legal entitlements. In any principal-agent relationship, including the attorney-client relationship, the agent's rights and obligations are derivative of those of the principal. Someone who retains a broker to sell property empowers the broker to transfer only whatever title the owner has. Similarly, a lawyer's professional role is defined with reference to the rights and duties vested in the client by the law. This principle pervades the law governing lawyers, including specific rules of tort, agency, and constitutional law as they apply to lawyers. For example, as the agent of the client, the lawyer retains inherent authority, which cannot be overridden by agreement with the client, to refuse to perform unlawful acts.<sup>84</sup> Regarding the Sixth Amendment's guarantee of the effective assistance of counsel to criminal defendants, the Supreme Court has held that a criminal

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<sup>82</sup> RONALD DWORKIN, *LAW'S EMPIRE* 225, 256 (1986).

<sup>83</sup> See CLAYTON, *supra* note \_\_\_\_, at 48-80 (considering historical examples of more or less political attorneys general); compare Moss, *supra* note \_\_\_\_, at 1312-14, with Merrill, *supra* note \_\_\_\_, 53-54 (assessing the

defendant cannot complain if his lawyer refuses to permit him to perjure himself at trial, because a lawyer's duty is "limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth."<sup>85</sup> As Justice Blackmun noted in his concurring opinion, the client had no *legitimate* interest that conflicted with his lawyer's obligation not to present perjured testimony.<sup>86</sup> Similarly, the Court in *Strickland v. Washington* said that lawyers are not obligated to exploit "arbitrariness, whimsy, caprice, 'nullification,' and the like."<sup>87</sup> There are numerous, less dramatic cases underscoring the same point. In one legal malpractice case based on the lawyer's failure to use reasonable care in evaluating a settlement offer, the court of appeals affirmed dismissal of the claim against the lawyer because the client's underlying claim was barred by the statute of limitations.<sup>88</sup> Because the client's legal entitlement was time barred, any recovery or settlement the client had obtained from the defendant in the underlying personal-injury action was purely a windfall. The lawyers' negligence in representing the plaintiff in the personal-injury lawsuit did not deprive her of anything to which she was legally entitled, so she could not sue them for malpractice.

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. Even in the litigation context, however, the rights and permissions of lawyers are ultimately grounded on their clients' legal entitlements. Lawyers

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Take Care Clause as the source of the duty to serve as a neutral expositor).

<sup>84</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 23(1) (2000).

<sup>85</sup> *Nix v. Whiteside*, 475 U.S. 157, \_\_\_ (1986).

<sup>86</sup> *Id.*, 475 U.S. at \_\_\_.

<sup>87</sup> *Strickland v. Washington*, 466 U.S. 668, \_\_\_ (1984).

<sup>88</sup> *Slovensky v. Friedman*, 142 Cal. App. 4th 1518, 49 Cal. Rptr. 3d 60 (2006).

may not assert constructions of law that are not adequately grounded, either in existing law or in a good faith argument for the extension, modification, or reversal of existing law.<sup>89</sup> Lawyers have an obligation to disclose controlling legal authority not cited by their adversary, an obligation that does not extend to factual evidence not discovered by opposing counsel.<sup>90</sup> Advocates have been severely sanctioned for stretching legal arguments too far, and not candidly informing the court of the limitations of their position.<sup>91</sup> Even in litigation, fidelity to law is one of the fundamental obligations of the lawyer, along with loyalty to the client. 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. In the counseling 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 what feels like a heightened obligation of fidelity to law, but in reality the obligation is the same ---- it is just not shared with coordinate institutional actors.

To turn the burden-of-proof argument around, one who contends that a government lawyer need provide only a colorable legal basis for a proposed course of action has the burden to explain why a lawyer, seeking to ascertain whether a client has a legal entitlement to do something, should be content to get the answer only approximately right, or should aim for the best answer. Consider a comparable professional principal-agent relationship, such as a patient seeking medical advice. Suppose the doctor could provide a colorable diagnosis or the best

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<sup>89</sup> FED. R. CIV. P. 11; MODEL RULES OF PROF'L CONDUCT, Rule 3.1.

<sup>90</sup> MODEL RULES OF PROF'L CONDUCT, Rule 3.3(a)(2).

<sup>91</sup> See, e.g., *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346 (Fed. Cir. 2003).

diagnosis, with roughly the same investment of time and effort. It is hard to imagine a patient who would be content with anything less than the best diagnosis the doctor was able to provide. In the legal counseling context, the reason clients seek merely colorable advice is that they are interested in getting away with something that is not a genuine legal right. In the FISA example, if it would be a real stretch to believe that the AUMF supersedes the FISA warrant requirement, and the better view of the governing is that it does not, the lawyer would be offering two alternatives — what the client’s right probably is, and what the client’s right likely is not. Granting that the administration’s interest in this case is to avoid the warrant requirement, I do not see how that interest changes the normative situation of the lawyer, whose role is defined by the obligation to ascertain and apply the client’s legal entitlements. Deliberately relying on the less plausible interpretation of the applicable law is nothing but an evasion of the basic responsibility of a lawyer. Again, if a matter is in litigation, we permit lawyers to urge less plausible interpretations of law, because we think the adversary system needs some input of interpretive creativity if it is to remain sufficiently flexible to adapt to changing circumstances. In the counseling context, however, a lawyer’s job is to find the limits of the client’s legal entitlements, because the client is only permitted to act with legal authorization.<sup>92</sup>

In summary, the shortcoming of the public-choice approach to lawyers’ ethics is that it denies that lawyers can have any genuine obligation of fidelity to law. The public choice theorist asserts that we may talk in normative terms, using the language of duties and “oughts,” but all of these would-be obligations are really just roundabout ways of saying that there would be

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<sup>92</sup> See Moss, *supra* note \_\_\_\_, at 1315-16.

negative political repercussions to appearing to act lawlessly. If it is possible to act lawlessly and get away with it, lawyers have no duty to advise their client against that course of action and, indeed, if it is in the client's interests, the lawyer may have a duty to assist the client. On the level of ordinary-language analysis, one might ask the public-choice theorist why she bothers using words like "lawful" and "right" when what she really means is "what my client can get away with." A more natural interpretation of that language is that lawyers and government officials really do mean to avow, when they use the language of obligation and right, that they are acting with reference to some normative considerations that are independent of their interests. Picking up on an observation of Hart's, public choice theory lacks the conceptual resources to account for the evident fact that citizens, government officials, and lawyers explain and justify their actions with reference to genuine obligations, not merely interests.<sup>93</sup>

C. Civic Republicanism and the Public Interest.

A very different fallback position, which would allow one to criticize government lawyers for politicized decision-making, is to appeal to a notion of the public interest. This position is a staple of the self-justifying rhetoric of government lawyers — present or former Attorneys General, or nominees for the office. As President Carter's Attorney General, Griffin Bell, stated in a lecture at Fordham Law School, "Although our client is the government, in the

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<sup>93</sup> See HART, *supra* note \_\_\_\_, at 137-38 ("it cannot be doubted that . . . in relation to some spheres of conduct in a modern state individuals do exhibit the whole range of conduct and attitudes which we have called the internal point of view. . . . They . . . look upon [the law] as a legal standard of conduct, refer to it in criticizing others, or in justifying demands, and in admitting criticism and demands made by others.").

end we serve a more important constituency: the American people.”<sup>94</sup> Courts similarly state that government lawyers have an obligation to see to it that justice is done, not simply to maximize the likelihood that the client’s interests will be achieved.<sup>95</sup> However, this is not just empty rhetoric for graduation speeches. It has been offered in this form as a sophisticated alternative to the view, dominant among practicing lawyers, that the lawyer’s role is primarily to be understood with reference to client interests, with the law understood as nothing more than an obstacle standing in the way of their clients’ ends.<sup>96</sup> In addition, there is a long tradition in political philosophy, associated with the ideal of the rule of law, of understanding the principal obligation of government officials as acting in the public interest.<sup>97</sup>

Significantly, the public interest is not understood in rational-choice terms, as the aggregation of preferences through some procedure of majoritarian decision-making. In civic republican theory, the public interest is expressly contrasted with the will of (perhaps transient) political majorities. Frank Michelman, for example, criticizes the Supreme Court’s *Bowers v. Hardwick* decision for its assumption that “public values meriting enforcement as law are to be

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<sup>94</sup> Griffin B. Bell, *The Attorney General: The Federal Government’s Chief Lawyer and Chief Litigator, or One Among Many*, 46 *FORDHAM L. REV.* 1049, 1069 (1978).

<sup>95</sup> See, e.g., *Freeport-McMoRan Oil and Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992) (chiding attorneys for Federal Energy Regulatory Commission for not taking an opportunity to settle ongoing litigation; noting that “government lawyers have obligations beyond those of private lawyers”).

<sup>96</sup> See, e.g., Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 *CONN. L. REV.* 1185 (2003); Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in *LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 180 (Robert L. Nelson, et al., eds., 1992); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 *GEO. J. LEGAL ETHICS* 242 (1992); Robert W. Gordon, *The Independence of Lawyers*, 68 *B.U. L. REV.* 1 (1988); William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 *STAN. L. REV.* 565 (1985).

<sup>97</sup> See, e.g., FINNIS, *supra* note \_\_\_\_, at 272-73 (arguing that the rule of law is fundamentally about “holding . . . the rulers to their side of a relationship of reciprocity, in which the claims of authority are respected on condition that authority respects the claims of the common good”).

uncritically equated with . . . the formally enacted preferences of a recent legislative or past constitutional majority.”<sup>98</sup> Because it is now accepted wisdom that executive branch officials, not just the courts, have a role in enforcing the law, the implication of Michelman’s critique is that government lawyers, as well as judges, should not concern themselves only with “the formally enacted preferences of a recent legislative . . . majority.” As law constantly re-creates itself in line with the public reasons of citizens, its precise contours remain uncertain, subject to contestation in the dialectic process of politics. In other words, Michelman would instruct government lawyers not to be legal positivists, and not to enforce only those public values that have an appropriate democratic pedigree.

The natural response to this anti-positivist move is to point out that government decisions are supposed to be traceable back to some manifestation of the popular will. When lawyers act on what they take to be the public interest, the usurp power that should belong to the people as a whole.<sup>99</sup> We wouldn’t bother having elections if it were clear what the public interest requires, not only for the epistemological reason that elections provide information on the preferences of citizens, but also for the deeply moral reason that *de facto* power is insufficient to justify the claim by the state to possess authority.<sup>100</sup> Michelman, however, calls this answer “both lazy and presumptuous.”<sup>101</sup> Political freedom means *both* collective self-rule and government by laws.<sup>102</sup>

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<sup>98</sup> Michelman, *supra* note \_\_\_\_, at 1496.

<sup>99</sup> See, e.g., Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987).

<sup>100</sup> See Bernard Williams, *Realism and Moralism in Political Theory*, in *IN THE BEGINNING WAS THE DEED* 1, 5 (Geoffrey Hawthorn, ed., 2005) (defining the Basic Legitimation Demand as a constitutive element of “there being such a thing as politics”).

<sup>101</sup> Michelman, *supra* note \_\_\_\_, at 1498.

<sup>102</sup> *Id.* at 1500-01.

These two conceptions of freedom can be best reconciled by understanding the legitimacy of the product of a political process in terms of shared, collective participation, not merely the aggregation of antecedent preferences. In Robert Cover's term, politics must be *jurisgenerative* — i.e. capable of transforming private persons into public-regarding citizens.<sup>103</sup> The political process must be structured in such a way that it does not simply feed in exogenous preferences as inputs, and produce laws as outputs, according to some aggregation process. Instead, the political process must permit citizens to persuade each other, to alter their pre-existing preferences, and to work together as a community, in the name of the interests of the society as a whole. Citizens must act non-strategically, be open to persuasion, and be committed to acting from a kind of idealized first-person-plural point of view, as opposed to trying to maximize the satisfaction of their preferences.

I tend to regard this whole line of thought as far-fetched, not because it is not appealing to imagine the kind of community it presupposes, but because it is ill-suited to serve as a regulative ideal for a large-scale, decentralized, complex, pluralistic society. There are at least three reasons for this. The first pertains to the motivation to participate in jurisgenerative politics: A sizeable number of would-be citizens are in fact concerned only to maximize the satisfaction of their preferences, and regard politics as a zero-sum game. If it is a necessary condition of political legitimacy that people are open to persuasion, a broad swath of law would have to be regarded as illegitimate. The second is that most people simply are not committed to any point of view with regard to the technical details of government policy, but the function of politics and

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<sup>103</sup> Robert Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV.

law is frequently to settle on those pesky technical details. This is particularly true where there is agreement at a high level of generality but, as the saying goes, the devil is in the details. Even assuming a general consensus that, for example, taxation should be generally (but not too steeply) progressive, there will still be a great deal of disagreement at the level of application, such as how mortgage interest and retirement savings should be treated for tax purposes. A related objection is that the technical details in question may pertain to the procedures used to handle debate and settle on the position that will be adopted in the name of the society.<sup>104</sup> It seems unlikely that deliberation will yield real consensus on important matters (a point elaborated below), so we need some way to reach at least provisional agreement — “an uneasy compromise, subject to constant renegotiation,”<sup>105</sup> which is at least final enough to enable coordinated action for the time being. If deliberative engagement does not produce consensus, some procedure will have to be adopted to resolve the disagreement, but if consensus is required on how these procedures are to be structured, then the result may be an infinite regress of unsettled disagreement. Third, and of the greatest theoretical interest, politics may inevitably involve compromises, and have a zero-sum nature, because many of the issues at stake in politics are not susceptible to rational resolution. This is due to moral pluralism and the incommensurability of conceptions of the good.

Moral pluralism is the claim that human experience, and the goods and values associated with it, is sufficiently complex that it is impossible to reduce all of these goods and values to

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4 (1983).

<sup>104</sup> See Don Herzog, *Some Questions for Republicans*, 14 POL. THEORY 473, 487-88 (1986).

<sup>105</sup> *Id.* at 488.

some higher-order master value that can be used to rank and prioritize competing ethical considerations.<sup>106</sup> Competing values may be *formally* different, in that some pertain to things we have reason to care about from an impersonal perspective (i.e. consequences), while others depend on seeing ourselves as in some way the source of value (agent-relative reasons, such as deontological considerations).<sup>107</sup> These micro-level value conflicts may be conflicts within a single conception of the good life or they may represent conflicts between rival visions of human flourishing. As Isaiah Berlin argued, there are many different ends people may pursue, and still be recognized as fully rational, and fully human; there are multiple *objectively valuable* things that individuals and cultures may regard as fulfilling and worthy objects of attainment.<sup>108</sup> The attainment of one of these ideals often requires the subordination or abandonment of others.<sup>109</sup> There is no possibility of a life which embodies certain goods or virtues without excluding others.

[W]e are faced with choices between ends equally ultimate, and claims equally absolute, the realisation of some of which must inevitably involve the sacrifice of others. . . . [I]t seems to me that the belief that some single formula can in principle be found whereby all the diverse ends of men can be harmoniously realised is demonstrably false. If, as I believe, the ends of men are many, and not all of them are in principle compatible with each other, then the possibility of conflict — and of tragedy — can never be wholly eliminated from human life, either personal or social.<sup>110</sup>

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<sup>106</sup> See, e.g., JEREMY WALDRON, *LAW AND DISAGREEMENT* 112 (1999) (“On any plausible account, human life engages multiple values and it is natural that people will disagree about how to balance or prioritize them.”).

<sup>107</sup> See LARMORE, *supra* note \_\_\_, at 131-34; THOMAS NAGEL, *The Fragmentation of Value*, in *MORTAL QUESTIONS* (1979). David Ross famously listed categories of prima facie moral obligations, arising from different circumstances of human existence, including duties of loyalty, gratitude, beneficence, non-maleficence, and perfectionist duties. See W.D. ROSS, *THE RIGHT AND THE GOOD* 20-21 (1930).

<sup>108</sup> See, e.g., Isaiah Berlin, *The Pursuit of the Ideal*, in *THE CROOKED TIMBER OF HUMANITY* 10-11 (Henry Hardy, ed. 1990).

<sup>109</sup> STUART HAMPSHIRE, *MORALITY AND CONFLICT* 146 (1983).

These “diverse ends of man” are incommensurable in that there is no way that one can rationally judge one way of life to be better than another, or of equal value. For Berlin the primary significance of this observation was political. One of the central themes in his work is that human history teaches us to be extremely wary of any claim to political legitimacy and authority that is founded upon a claim that the rulers have accurately discerned the “true” nature of their subjects.<sup>111</sup> “In the ideal case, liberty coincides with law[;] autonomy with authority,”<sup>112</sup> but this is true only if human beings have only one true purpose, and “the ends of all rational beings must of necessity fit into a single universal, harmonious pattern.”<sup>113</sup> Berlin’s striking observation is that the worst tyrannies and the most utopian hopes for human salvation through government shared the Platonic belief that there is only one rationally appointed order for human life.<sup>114</sup>

It would be a dramatic overstatement to say that directing government officials, and government lawyers, to act directly on their perception of the public interest would lead to tyranny. However, it may nevertheless be the case that government decisions based on an official’s beliefs — even sincere, good faith beliefs — about morality are lacking in legitimacy. This is a position that is, somewhat surprisingly, considered radical or dangerous in political

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<sup>110</sup> Isaiah Berlin, *Two Concepts of Liberty*, in *THE PROPER STUDY OF MANKIND* 239 (Henry Hardy, ed., 1997).

<sup>111</sup> *Id.*, at 218-19.

<sup>112</sup> *Id.* at 220.

<sup>113</sup> *Id.* at 225.

<sup>114</sup> *Id.* at 221-22 (“The sage knows you better than you know yourself, for you are the victim of your passions, a slave living a heteronomous life, purblind, unable to understand your true goals. You wish to be a human being. It is the aim of the State to justify your wish. . . . [H]umanity is the raw material upon which I impose my creative will; even though men suffer and die in the process, they are lifted by it to a height to which they could never have risen without my coercive — but creative — violation of their lives. This is the argument used by every dictator, inquisitor, and bully who seeks some moral, or even aesthetic, justification for his conduct.”).

philosophy. It is certainly at odds with the classical conception of the rule of law, in which the function of the law is seen as “holding . . . the rulers to their side of a relationship of reciprocity, in which the claims of authority are respected on condition that authority respects the claims of the common good.”<sup>115</sup> This way of looking at the rule of law depends on a distinction between the common good and private or partisan interests. But how should this distinction be drawn in specific cases? Here we encounter the problem of normative pluralism and good faith disagreement. Suppose it is self-evidently true that the common good consists of the following things:

- CG<sub>1</sub> = education
- CG<sub>2</sub> = health
- CG<sub>3</sub> = clean air and water
- CG<sub>4</sub> = physical security
- CG<sub>5</sub> = equality

Now we would have to determine whether a state authority is “respecting the common good” when it decides that CG<sub>1</sub> would be best promoted by permitting states to give vouchers to parents who wished to send their children to religious schools; whether CG<sub>2</sub> would be best promoted by vetoing legislation designed to broaden government funding of health care for poor children; whether CG<sub>3</sub> would be best promoted by permitting coal-fired power plants to make modifications without complying with more stringent environmental laws applicable to newly constructed plants; whether CG<sub>4</sub> would be best promoted by criminalizing minor drug possession (on a “broken windows” theory, perhaps); whether CG<sub>5</sub> would best be promoted by opposing affirmative action in higher education; and so on.

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<sup>115</sup> FINNIS, *supra* note \_\_\_\_, at 272-73.

One might respond that deliberative or jurisgenerative politics can exist despite moral pluralism. Michelman himself takes that tack, arguing that it is impossible to understand even a fairly thin conception of democratic legitimacy without positing the “mutual and reciprocal awareness [of citizens] of being co-participants not just in this one debate, but in a more encompassing common life . . .”<sup>116</sup> But he seems to slide a bit too easily from the possibility of participation in a shared experience — “the possibility of cases in which [legal] validation occurs when participants, rather than abandoning their commitments, come to hold the same commitments in a new way”<sup>117</sup> — to a necessary condition of legal validity. A great many laws would appear to fail this test for validity, since many do not arise as the result of any public debate at all, and among those that do, many result from compromises between positions that remain unaltered. In fairness to Michelman, he is talking about constitutional law, not ordinary laws of less moment, but the tenor of much writing on civic republicanism tends to valorize participatory politics and the possibility of the transformation of pre-legal preferences through engagement with one’s fellow citizens.<sup>118</sup> What Michelman objects most strongly to is legal positivism, i.e. “the view that judicial power cannot be legitimate unless its exercise consists, in the final analysis, of the translation of directions uttered in the past by someone else.”<sup>119</sup> If there is anything that unites the disparate varieties of legal positivism it is the commitment to this

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<sup>116</sup> Michelman, *supra* note \_\_\_\_, at 1513.

<sup>117</sup> *Id.*, at 1527 (internal quotation marks and citation omitted).

<sup>118</sup> This is a major theme of the work of Daniel Markovits. See Daniel Markovits, *Adversary Advocacy and the Authority of Adjudication*, 75 *FORDHAM L. REV.* 1367 (2006); Daniel Markovits, *Democratic Disobedience*, 114 *YALE L.J.* 1897 (2004); Daniel Markovits, *Legal Ethics from the Lawyer’s Point of View*, 15 *YALE J. L. & HUMAN.* 209 (2003).

<sup>119</sup> Michelman, *supra* note \_\_\_\_, at 1522.

position, which Joseph Raz refers to as the Sources Thesis.<sup>120</sup> To be a positivist is to accept that the content and validity of any law is fundamentally a matter of social fact, and the relevant social facts are generally the past utterances of institutional actors such as legislators and judges. If this is the case, then it is an empirical matter to discover the content of the law — one simply looks at the relevant sources to determine what judges have relied upon as reasons for their decisions. Metaphorically, one can draw a boundary line separating reasons that are “inside” the law from those that are “outside” the law. Armed with this information, one can then criticize, as failing to respect the obligation of impartiality, government lawyers who make reference to reasons outside the law when justifying a would-be legal interpretation. On the other hand, if some kind of moral or political argument is required to differentiate between law and non-law, it is not simply an empirical matter to draw a boundary separating inside from outside. The distinction between law and non-law would be evaluative and contestable, and would make reference to the very sorts of political, ideological, and policy reasons that may or may not be part of the law.

The claim that the possibility of a value-free, or apolitical distinction between law and non-law is untenable is also at the heart of Ronald Dworkin’s theory of law. Dworkin argues that “judicial decisions in civil cases . . . characteristically are *and should be* generated by principle not policy.”<sup>121</sup> For Dworkin, the distinction between reasons of principle and reasons of policy is that principles can be shown to be consistent with past political decisions made by

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<sup>120</sup> Joseph Raz, *Authority, Law, and Morality*, in ETHICS IN THE PUBLIC DOMAIN 210, 230 (1994); JOSEPH RAZ, THE AUTHORITY OF LAW 37 (1973).

<sup>121</sup> Ronald Dworkin, *Hard Cases*, in TAKING RIGHTS SERIOUSLY 84 (1977).

other officials (judges and legislators) within a general political theory that justifies those decisions.<sup>122</sup> Policy reasons, in contrast with principles, may refer to moral norms but these are not norms that belong to *this particular society's* political morality.<sup>123</sup> Reasons of principle are therefore “inside” a particular society’s law and reasons of policy are “outside” the law of that community, but note that for Dworkin, “the law” must be understood in an idiosyncratic way. Hart claims that for any legal system, there is a master rule for distinguishing law from non-law; this is the rule of recognition.<sup>124</sup> He further insists that the existence and content of the law can be determined without reference to moral criteria.<sup>125</sup> Dworkin challenges both the existence of a rule of recognition and the content-independence of law. He denies that a rule of recognition can ever be formulated because moral argumentation is necessary to establish the existence of legal principles.<sup>126</sup> Reasons of principle are controversial in the sense that they cannot simply be “read off” the law in a straightforward way, without arguing that they are justified on the basis of the normative political theory.<sup>127</sup> There can be no source-based criteria for identifying legal principles. Reasons given by judges in precedent cases must be understood as arguments of political theory about what the law *should* be.<sup>128</sup> The practice of making and justifying legal judgments is therefore normative all the way down.

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<sup>122</sup> *Id.* at 87-88.

<sup>123</sup> *Id.*, pp. 90-92; Ronald Dworkin, *The Model of Rules I*, in DWORKIN, *supra* note \_\_\_\_, at 22.

<sup>124</sup> HART, *supra* note \_\_\_\_, at 100-110.

<sup>125</sup> *Id.* at 269. Hart stressed the content-independence of law in papers written after the first edition of *The Concept of Law*. See H.L.A. Hart, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM* 243 (1982).

<sup>126</sup> Dworkin, *The Model of Rules I*, *supra* note \_\_\_\_, at 40-41, 43; Dworkin, *Hard Cases*, *supra* note \_\_\_\_, at 90.

<sup>127</sup> Ronald Dworkin, “The Model of Rules II,” in DWORKIN, *supra* note \_\_\_\_, at 65-68.

<sup>128</sup> DWORKIN, *LAW’S EMPIRE*, *supra* note \_\_\_\_, at 248 (“he must decide which interpretation shows the legal record to be the best it can be *from the standpoint of substantive political morality*”).

Dworkin's position is a challenge to Hart's view that the authority of law is a function of a convention among judges of making reference to certain considerations when deciding cases.<sup>129</sup> It amounts to a denial of the view that "social facts are what make rule-of-recognition statements true, and therefore social facts are what make it the case that the law is one way rather than another."<sup>130</sup> Thus, determining the inside/outside boundary, and defining fidelity to law in terms of relevant and excluded considerations, are not empirical matters; instead they involve direct engagement by an interpreter (whether a judge or a lawyer) in contestable normative matters. Further, according to Dworkin, we must believe in the existence of legal principles in order to account for what a judge is doing when he or she decides a case in which existing law does not unambiguously determine the result. In Dworkin's view, a judge should never step outside existing law and make new law, for to do so would be to retroactively confer new rights on the parties.<sup>131</sup> But he is able to insist on this stipulation only because "existing law" includes a great deal of political morality, in the form of legal principles.

The question is, therefore, why one should be a positivist and not subscribe to Michelman's view that legal interpretation is not a matter of uncovering what has happened in the past, but is a dynamic process of creating one's normative universe, or Dworkin's view that the law consists in part of principles, which embody the community's political morality. For if Michelman and Dworkin are right, there is a strong case that lawyers in government service out to contribute to the process of jurisgenesis by urging political officials to act on a conception of

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<sup>129</sup> See Scott Shapiro, *The Hart/Dworkin Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN (Arthur Ripstein, ed., 2007).

<sup>130</sup> Benjamin C. Zipursky, *The Model of Social Facts*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT

the public interest, even if it is presently contested. A theory of lawyers' ethics is therefore connected to a theory of law by the question of what sorts of considerations "count" as law, and therefore should be taken into account by lawyers advising their clients on the legality of a proposed course of action. Michelman and Dworkin resist the separation of law and politics by arguing for a conception of law, and a conception of politics, in which law and politics are two sides of the same coin. In response, some legal positivists may rely on conceptual arguments, like Raz's well known argument from authority.<sup>132</sup> Alternatively, positivists may offer normative (or maybe better described as functional) arguments, relying on the point of having law in the first place.<sup>133</sup> Something like the Hart-Dworkin debate cannot be settled solely by conceptual analysis; progress depends, instead, on having some idea of why we care about questions like whether there are legal principles, and how they are different from legal rules and extra-legal "policy" considerations. Michelman appeals to history and political theory, Dworkin to common usage among lawyers and judges. My reliance here on moral pluralism is intended to underwrite a functional claim that the point of having law is to enable citizens to coexist and cooperate on mutually beneficial projects despite persistent disagreement.

Law is "an importantly distinct mode or aspect of governance"<sup>134</sup> precisely because of its independence from contested conceptions of the public good. It provides a framework for coordinated action in the face of dissensus, perhaps at the expense (as Michelman suggests, with

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TO *THE CONCEPT OF LAW* 223 (Jules Coleman, ed., 2001).

<sup>131</sup> Dworkin, *The Model of Rules I*, *supra* note \_\_\_\_, at 30; Dworkin, *Hard Cases*, *supra* note \_\_\_\_, at 81.

<sup>132</sup> Joseph Raz, *Authority, Law and Morality*, in *ETHICS IN THE PUBLIC DOMAIN* 210 (1994).

<sup>133</sup> See, e.g., Jeremy Waldron, *Normative (or Ethical) Positivism*, in *HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* 410 (Jules Coleman, ed., 2001).

<sup>134</sup> *Id.* at 420.

his reference to the legitimacy of *Brown v. Board of Education*) of respect for marginalized groups and the capacity to keep pace with social change.<sup>135</sup>

The claim of the normative positivist is that the values associated with law, legality, and the rule of law — in a fairly rich sense — can best be achieved if the ordinary operation of such a system does not require people to exercise moral judgment in order to find out what the law is.<sup>136</sup>

The value of legality within government can best be achieved by directing government lawyers not to act directly on what they perceive to be the public good, because what the public good requires is contested, in good faith, in most interesting cases. Government through law means, however, that we must eventually move beyond this disagreement and do something about a problem. The law provides a framework for dealing, cooperatively, with these problems by enacting a provisional settlement of normative disagreement. It is therefore incumbent upon lawyers, as an aspect of their obligation of fidelity to law, to respect this settlement and not act directly on what they believe to be the public interest.

#### D. Political Liberalism and Neutrality.

An alternative starting point for a theory of government lawyers' ethics in the liberal state would be to insist on the *neutrality* of the justification of some government action or policy. A major preoccupation of scholars in the Rawlsian tradition is defining a standpoint from which the

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<sup>135</sup> Michelman, *supra* note \_\_\_\_, at 1524 (“Black Americans . . . were not tantamount to ‘the people,’ and there is no telling how long it would have taken for their new foundations to have risen to the level of constitutional significance for a Court following Ackerman’s argument.”).

<sup>136</sup> Waldron, *supra* note \_\_\_\_, at 421.

justice of political arrangements can be evaluated, which is somehow independent of the competing comprehensive doctrines of the good about which individuals disagree. Or, as it is sometimes stated, the aim of liberal theory is to justify the priority of the right over the good.<sup>137</sup> Neutrality is a way of understanding some “distinction within morality between that part called its conceptions of the good, which cannot be pursued politically, and the rest that can.”<sup>138</sup> The requirement of political neutrality can also be viewed as a constraint on the reasons that may be offered in justification of an official state policy or action — for example, rights may be invoked, but not conceptions of the good.<sup>139</sup> (As Bruce Ackerman recognizes, a great deal hinges on how this constraint on reasons that may be offered is formulated.<sup>140</sup>) The exclusion of conceptions of the good is meant to base the justification of political institutions on considerations that all affected citizens can endorse.<sup>141</sup> In light of the diversity of reasonable comprehensive doctrines of the good, it would be hopeless to seek a justification for government policies or actions that is rooted in only one form of ethical life.<sup>142</sup> For example, the familiar communitarian objection to Rawls’s liberal theory of justice is that it (non-neutrally) excludes certain conceptions of the good that can be realized only in the context of cultures that do not recognize the individual as

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<sup>137</sup> See, e.g., Stephen Mulhall & Adam Swift, *Rawls and Communitarianism*, in THE CAMBRIDGE COMPANION TO RAWLS 460, 470-71 (Samuel Freeman, ed., 2003).

<sup>138</sup> JOSEPH RAZ, THE MORALITY OF FREEDOM 135 (1986)

<sup>139</sup> BRIAN BARRY, JUSTICE AS IMPARTIALITY (1995); CHARLES LARMORE, PATTERNS OF MORAL COMPLEXITY 44 (1987) (“[P]olitical neutrality consists in a constraint on what factors can be invoked to justify a political decision.”); RAZ, *supra* note \_\_\_, at 111 (arguing that liberal neutrality is a doctrine of restraint, telling governments not to act on what would otherwise be good reasons).

<sup>140</sup> ACKERMAN, *supra* note \_\_\_, at 8-9.

<sup>141</sup> RAWLS, *supra* note \_\_\_, at 217 (understanding the task of political philosophy as establishing a basis for the exercise of power, “the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.”).

<sup>142</sup> See, e.g., WILLIAM A. GALSTON, LIBERAL PLURALISM 3 (2002) (defining political liberalism as “a robust though rebuttable presumption in favor of individuals and groups leading their lives as they see fit, within a broad range of legitimate variation, in accordance with their own understanding of what gives life meaning and value”).

the paramount source of value.<sup>143</sup> A theory of political legitimacy needs some reason for making these distinctions, which is not itself the sort of reason that is contested within the society.<sup>144</sup>

Not all liberal political philosophers believe that the state should be neutral between competing conceptions of the *good*,<sup>145</sup> but neutrality with respect to something nevertheless remains an important ideal in political theory. It remains open, of course, to ask, neutrality with respect to what? As Thomas Nagel, Joseph Raz, and others have pointed out, however, there is really no way that the basic institutions of a society can be comprehensively neutral among competing ideals.<sup>146</sup> To take an obvious example, the mission of the Justice Department's Civil Rights division cannot be understood as being neutral on, say, whether workplace sexual harassment counts as a violation of federal statutes prohibiting sex discrimination; only one view of the meaning of "civil rights" is consistent with the function of the office. As this simple example shows, any government action is bound to favor or disfavor the interests of some individual or group. Neutrality is a puzzling ideal unless it is defined in terms of some other,

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<sup>143</sup> See, e.g., WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* (1989); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

<sup>144</sup> Cf. Williams, *supra* note \_\_\_, at 5 ("If the power of one lot of people over another is to represent a solution to the first political question, and not itself be part of the problem, *something* has to be said to explain (to the less empowered, to concerned bystanders, to children being educated in this structure, etc.) what the difference is between the solution and the problem, and that cannot simply be an account of successful domination.").

<sup>145</sup> Prominent examples of liberal theorists who reject the ideal of neutrality are Joseph Raz, Isaiah Berlin, and William Galston. See GALSTON, *supra* note \_\_\_, at 23 ("The liberal state cannot be understood as comprehensively neutral."); JOHN GRAY, *ISAIAH BERLIN* 148 (1996) (noting that the priority of the right over the good "is a view that both Berlin and Raz, for whom rights gain determinacy only from their contribution to human interests whose contents are themselves complex and variable and which may encompass conflicts that are not rationally arbitrable, are committed to denying."); RAZ, *supra* note \_\_\_, at 110 (arguing against the anti-perfectionist principle, that "implementation and promotion of ideals of the good life, though worthy in themselves, are not a legitimate matter for government action").

<sup>146</sup> See Thomas Nagel, *Rawls on Justice*, in *READING RAWLS* (Norman Daniels, ed., 1975).

more fundamental political value.<sup>147</sup>

A number of distinctive political values may be protected by the requirement of neutrality. These values include negative liberty, in the sense of “freedom from political tutelage in how to live”; tolerance; and political constitutionalism.<sup>148</sup> Neutrality may also be understood as responding to the fundamental political value of equality. As one influential definition of liberalism stipulates, state officials must make political decisions on grounds that are

independent of any particular conception of the good life, or of what gives value to life. Since the citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or powerful group.<sup>149</sup>

Liberalism is therefore linked tightly with the more fundamental political value of equality, and the entitlement of all citizens to be treated with respect. The relationship between equality and neutrality is that state policies and legal norms must be justified by considerations that are neutral, in the sense that they do not favor or disfavor the interests of any individual or group without an adequate justification. This “adequate justification,” in turn, must be in terms of reasons that are accessible to all citizens, whatever their more comprehensive religious, cultural, or philosophical commitments. According to Rawls, these so-called public reasons can be endorsed from within a variety of comprehensive doctrines, leading to what he calls an

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<sup>147</sup> Cf. Waldron, *supra* note \_\_\_\_, at 65 (“No amount of purely logical analysis can tell us how the concept [of neutrality] is to be deployed to deal with problems like this.”); *id.* at 69 (“Neutrality is not a straightforward concept and we are in no position to say what conception of it we have adopted unless we have some idea already of why neutrality should be thought to matter.”).

<sup>148</sup> FORST, *supra* note \_\_\_\_, at 31-32; GALSTON, *supra* note \_\_\_\_, at 23.

<sup>149</sup> Ronald Dworkin, *Liberalism*, in *A MATTER OF PRINCIPLE* 181, 191 (1985).

overlapping consensus on the values that underpin the political order.<sup>150</sup> The ideal of neutrality is thus best understood in terms of the Rawlsian notion that political power must be justified by public reasons in order to be legitimate.

The outlines of a public-reason-based theory of government lawyers' ethics should be reasonably clear: As state officials, who advise that state actions are consistent with the impartial requirements of law, government lawyers act legitimately only insofar as they can offer a justification that is acceptable to all citizens in light of principles they can reasonably endorse. Notice that this is different from the position that government lawyers must act in the public interest. Despite the similar terminology, a lawyer acting on the basis of public reasons would not be required to determine whether citizens would regard a government act or policy as being consistent with the public interest, because conceptions of the public interest belong to particular comprehensive doctrines. Citizens may differ, on familiar Democrat/Republican lines, in their views about what would be in the public interest, but may nonetheless be prepared to accept that each of two incompatible actions is justifiable on the basis of reasons they both can share. The reason is that, as Rawls emphasizes, the requirement of justification on the basis of public reasons applies only to the basic structure of society — “its main political, social, and economic institutions . . . elaborated in terms of fundamental political ideas viewed as implicit in the public political culture of a democratic society.”<sup>151</sup> This basic structure may have the effect of excluding moral ideals as the basis for government decision-making, because those ideals have been considered, and rejected, in the political process. The trick is, of course, to justify this

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<sup>150</sup> *Id.* at 133-40.

exclusion on a non-circular basis. Political philosophers sometimes talk as though criteria of legitimacy must be based on beliefs and commitments that are so rationally compelling that someone would have to be barking mad to reject them. The thinnest set of proposition upon which we could seek agreement are mathematical and logical truths — the principle of non-contradiction,  $2 + 2 = 4$ , and so on. But if we thin out the set of reasons to the point that everyone can be expected to share them, on the pain of being deemed crazy, they become too thin to actually ground a decision concerning how political institutions ought to be structured.<sup>152</sup> If all we can agree upon are mathematical and logical truths, we are not going to get very far in the justification of political decisions. Something frankly normative is required, but of course the normative argument must be capable of appealing to all affected citizens, despite their commitments to other comprehensive doctrines.

What is required is, therefore, what Rawls would call an overlapping consensus on the justification of a political conception of justice.<sup>153</sup> This consensus is embedded within citizens' comprehensive doctrines, but is not directly dependent upon them; in other words, it is a freestanding political justification.<sup>154</sup> As noted above, within some general constraints on what counts as a consideration relevant to human morality, people can value different things, rank competing values differently, and specify different principles of action on the basis of the same abstract ethical value. The justification for the duty of fidelity to the law, which I have been defending here, is therefore that people disagree in good faith about goods, rights, and justice,

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<sup>151</sup> *Id.*, at 223.

<sup>152</sup> Nagel, *supra* note \_\_\_\_.

<sup>153</sup> RAWLS, *supra* note \_\_\_\_, at 147.

but that they also need to interact with one another on terms that are regulated by fair principles of cooperation, rather than violence or deception. While people may have extra-political attachments to various comprehensive doctrines that inform their views about the good and the right, in politics citizens regard one another as free and equal, and seek a basis for cooperative action. They have a reason to rely on tolerably fair procedures to enact a provisional settlement of disagreement, in a way that is at least minimally respectful of the claims of others to be treated as equals. This is a procedural conception of legitimacy, or what Hart referred to as the “minimum content of natural law” — that is, norms that are necessarily part of any system that claims to serve the purpose of enabling people to coordinate their affairs and live together peaceably.<sup>155</sup> This political conception owes its value to a broadly Kantian moral ideal — the notion that “however much we may disagree with others and repudiate what they stand for, we cannot treat them as merely objects of our will.”<sup>156</sup>

Notice, however, that the frankly normative part of this argument operates at the “wholesale” level. The freestanding political values in question justify the legal system as a whole, but do not come into play in ascertaining the content of particular laws. The Rawlsian idea of an overlapping consensus does not require endorsement on the “retail” level of the values underlying particular legal norms. The justification is for having a legal system that takes a given form, which leaves as an open question the content of any resulting laws. As a result, one may be deemed to have endorsed a law with which one disagrees, because of one’s prior

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<sup>154</sup> See John Rawls, *Reply to Habermas*, in RAWLS, *supra* note \_\_\_\_, at 374, 387.

<sup>155</sup> HART, *supra* note \_\_\_\_, at 193. The minimum content of natural law is “natural” in that it derives from natural facts about human beings. Hart’s assumes that humans are vulnerable, approximately equal, boundedly

endorsement (though generally hypothetical) endorsement of the system as a whole. The upshot is that the normative universe of government lawyers is constituted by a restricted set of values. The ethical obligations of a lawyer are not given by what would ordinarily be the moral values applicable to a similarly situated non-professional, but by the values functionally related to the particular institutional role. In the case of government lawyers, the requirement of neutrality should not be taken to mean that it is impermissible to take sides on contested political matters, *if* the matter has been resolved by law. To return to an earlier example, there may at one time have been good faith disagreement over whether workplace sexual harassment counts as sex discrimination, prohibited by federal statute. One that question was resolved in the affirmative by the Supreme Court,<sup>157</sup> a lawyer working for a federal civil rights agency, such as the Equal Employment Opportunity Commission, is plainly not subject to criticism for “politicized” advising if she gives advice that conforms to the Court’s decision. The overlap between the content of that Court decision and some broader ideological agenda does not mean the lawyer’s work on behalf of the agency’s mission is political. Or, if it is, it is appropriately political, because the political values have been incorporated into the law.<sup>158</sup>

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rational and altruistic, and face the problem of scarcity. *Id.* at 194-98.

<sup>156</sup> LARMORE, *supra* note \_\_\_\_, at 62.

<sup>157</sup> *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

<sup>158</sup> It is important not to be misled by a caricatured picture of legal positivism into thinking that positivism entails some kind of value-free jurisprudence. Positivism is the claim that the existence and content of legal rules can be determined without resort to moral argument — that is, that law and morality are analytically *separable*. *See, e.g.*, Joseph Raz, *The Problem About the Nature of Law*, in *ETHICS IN THE PUBLIC DOMAIN* 195, 205-06 (1994); Jules Coleman, *Negative and Positive Positivism*, in *MARKETS, MORALS AND THE LAW* 3, 5 (1998). However, the separability of law and morals does not mean that moral values can never be incorporated into law. In fact, moral values can become part of law — a “social fact” in jurisprudential terms — to the extent they play a role in the conventional practices of judicial reasoning. *See* Coleman, *supra*, at 12; Kent Greenawalt, *Too Thin and Too Rich: Distinguishing Features of Legal Positivism*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 1, 16-19 (Robert P. George ed. 1996); E. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 *MICH. L. REV.* 473 (1977); David Lyons, *Principles, Positivism, and Legal Theory*, 87 *YALE L.J.* 415 (1977) (book review). Classic examples include the Eighth Amendment’s prohibition on cruel and unusual

In the end, the political ideal of liberal neutrality does not help with the project of theorizing the “politicization” critique, because it leaves open the possibility of a substantial overlap between the content of the law and a substantive ideological agenda. Neutrality is a requirement only of a more general process of justification of the basic structure of society; it does not apply to particular norms generated by that system. Thus, we will have to look elsewhere for criteria that can be used to determine whether government lawyers have impermissibly politicized their role.

### *III. Fidelity in Interpretation as the Foundation of Government Lawyers’ Ethics.*

There must be an alternative to, on the one hand, using terms like “politicization” merely as terms of abuse to signify actions with which one disagrees, and on the other hand capitulating to the view that there is no such thing as a faithful, neutral exposition of law. If the law were perfectly determinate — that is, if there were only one right answer to any given question of law — we could criticize government lawyers for politicizing their advice if it deviated from the right answer in a way that favored the party in power. The basic responsibility of any lawyer — whether in government or private practice — is to order her client’s affairs with respect to the client’s legal entitlements. This basic responsibility can be contextualized, so that a lawyer in

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punishment, the requirement of good faith and fair dealing in contract law, and the reasonableness standard in negligence. These terms all refer to moral values, which have significance apart from law, and can be used to give content to legal norms. But these incorporated moral terms are still separate in an important sense from legal reasons in that it is not necessary to ascertain the *truth* of these moral principles in order to determine whether a proposition of law incorporating them is actually part of the law in a given legal system. Coleman, *supra*, at 4-5, 16; Jules Coleman, *Authority and Reason*, in GEORGE, *supra*, at 287, 292.

litigation may urge that the client's entitlements be interpreted in a way that is the most favorable to the client. In the advising context, the lawyer attempts to ascertain the boundaries of the client's entitlements, and then counsel the client to comply with the law. Even if one accepts this vision of legal ethics in theory, however, a natural objection is that the boundaries of the client's entitlements is unclear; that is, the law is indeterminate to some extent. The evident fact of the *underdetermination* of legal judgments by social sources can sometimes lend unwarranted credence to CLS-style arguments attempting to cast doubt on the capacity of law to establish any provisional settlements of normative controversy. The strong indeterminacy critique can then be combined with the public choice notion that client interests are the most important thing in the lawyer's normative universe, creating an unholy alliance of cynical perspectives on the law. The idea that the fundamental ethical obligation of lawyers is to exhibit fidelity to law thus seems laughable.

I have argued that there is actually a great deal of determinacy in the law, but that lawyers are often looking for it in all the wrong places. Interpretation is, by its nature, a community-bound practice, and the criteria for an acceptable interpretation are the property of interpretive communities, not the thing to be interpreted.<sup>159</sup> The difficulty with this reliance on interpretive

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<sup>159</sup> See, e.g., Fiss, *supra* note \_\_\_\_\_. Owen Fiss refers to the norms of an interpretive community as "disciplining rules," see *id.* at 744-45, but this imprecise use of the term "rules" has created unnecessary confusion, as is evident in Fiss's debate with Stanley Fish. See Stanley Fish, *Fish vs. Fiss*, 36 STAN. L. REV. 1325 (1984). Fish makes an infinite regress argument, noting that if these interpretive norms were indeed rules, they would stand in need of interpretation, requiring further meta-disciplining-rules. See *id.* at 1326, 1334. Instead of rules, Fish believes an interpretive community is constituted by "interpretive assumptions and procedures [that] are so widely shared in a community that the rule appears to all in the same (interpreted) shape." *Id.* at 1327. Fiss's argument, read carefully, is that there are "interpretive assumptions and procedures" that are widely shared within a community. Apparently Fiss actually does not disagree with Fish at all, and Fish has simply seized on Fiss's use of the word "rule" to argue against a position that Fiss does not hold.

communities is that there may be multiple overlapping or competing communities, which may deem acceptable incompatible interpretations of the applicable legal materials. In that case, it seems that one of two things must be true; either: (1) the existence of plural communities means that any legal interpretation supported by a community of more than one lawyer, judge, or scholar is plausibly legitimate; thus, no lawyer following that community's interpretation can be deemed to have impermissibly politicized her advice; or (2) there may be good or bad interpretive communities, as judged with reference to some extra-community standard; thus, a lawyer following the bad community may be deemed to have impermissibly politicized her advice, if one can ascertain, using non-political criteria (such as the public interest), which are the good and bad communities. Not surprisingly, I think (2) represents the right way of looking at things. The idea of an interpretive community is not a jurisprudential primitive, so that there is nothing more that one can say about an interpretation, beyond that it is acceptable to *some* community. Instead, one can always appeal to extra-community standards related to the concept of law as a purposive, reason-giving enterprise.

This discussion of communities may seem premature to someone who believes it is possible to differentiate genuine legal entitlements from would-be rights by showing that a genuine entitlement corresponds with something “out there” in the law somehow, like the text of a statute or the intent of a legislative body.<sup>160</sup> This is a natural tendency, since many people tend

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<sup>160</sup> David Luban also defends a theory of interpretation that depends on acceptability to an interpretive community, and denies that the validity of a legal interpretation is a matter of its correspondence with something. “[I]t makes no sense to suppose that the plausibility of legal arguments could deviate systematically from what the interpretive community thinks about their plausibility. What could it deviate to? In law, by design, there is no hidden there there.” LUBAN, *supra* note \_\_\_\_, at 195. William Eskridge makes a similar argument under the useful heading of “the insufficiency of statutory archaeology.” See WILLIAM ESKRIDGE, DYNAMIC STATUTORY

to have a folk epistemology that relies on some notion of correspondence between factual beliefs and the furniture of the universe. However, there are fatal problems with correspondence theories of truth, with respect both to propositions of law and as well as the most banal-looking statements about the physical world. For example, suppose someone says the cat is on the mat, and we wish to know whether the sentence “the cat is on the mat” is true. The correspondence theory of truth says the statement is true if the proposition  $p$  (“the cat is on the mat”) corresponds to a state of affairs in the world  $W$  (cat on mat), in some kind of appropriate correspondence-relationship  $C$ .<sup>161</sup> Schematically, we can represent this truth condition as  $pCW$ . Now, have we got it right? Does  $p$  correspond to  $W$  in the right way? This is to ask the question whether  $pCW$  itself is true, which suggests there may be some property of the world  $W'$  to which  $pCW$  may or may not correspond. (The inquiry needs to be set up this way to get at the nature of the correspondence relationship,  $C$ . Cats and mats are one thing, and the words “cat” and “mat” are another, so the next “world,”  $W'$ , is needed to represent some notion of correspondence in the right way between “cat” and the cat, “mat” and the mat, and “on” and the relationship of the cat and the mat to each other.) So  $pCW$  is true if  $pCWCW'$ . Then it is open for us to ask whether  $pCWCW'$  is true. We are thus faced with another infinite regress problem, in which there is no foundational fact-and-correspondence relationship about which we cannot in principle ask whether it is true. Something else must serve as criteria of truth, such as correspondence with other beliefs (i.e. a coherence account of truth), or a normative community practice of manifesting agreement with the speaker who utters “there is a cat on the mat” under certain

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INTERPRETATION, Ch. 1 (1994).

<sup>161</sup> This discussion is drawn from SIMON BLACKBURN, SPREADING THE WORD: FOUNDINGS IN THE PHILOSOPHY OF LANGUAGE 224-29 (1984).

conditions. In other words, the correspondence relationship is impossible to pin down *using only the concept of correspondence*.

In legal reasoning, the sentence “the judgment corresponds to the law” is itself contestable, and the attempt to specify truth conditions for that sentence leads us down the same path of infinite regress. One reason for this is that in law, the specification of the relevant “world,” *W*, in the correspondence relationship, *pCW*, includes more than texts. The world with which a proposition of law must correspond also includes non-textual principles, practices, and standards for evaluating legal arguments, such as criteria of relevant similarity in analogical arguments. If the relevant world consisted only of texts, the law would be unacceptably static. It is not difficult — and can be quite amusing — to collect examples of confident predictions by judges and scholars that the law will always including such-and-such a rule, and then show that those judgments were proven spectacularly wrongheaded by subsequent developments. For example, Sanford Levinson quotes this categorical pronouncement by two prominent law professors, made in 1965:

[T]here is no substantial likelihood that any court will act today, as a matter of common law development, to substitute comparative negligence for an existing rule of contributory negligence in the general accident field. Indeed, lawyers will not even consider arguing this possibility to a court.<sup>162</sup>

In less than 20 years, however, the leading torts treatise noted that “[t]he principle of comparative fault apportionment of damages is veritably sweeping the land, gobbling up much

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<sup>162</sup> Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything At All?*, 24 OSGOODE HALL LAW REVIEW 353, 372 (1987) (quoting Paul J. Mishkin and Clarence Morris, *On Law in Courts*).

traditional tort doctrine as it goes.”<sup>163</sup> Similarly, Judge Cardozo’s famous *MacPherson* decision imposed liability on the defendant on the basis of reasoning that in all likelihood would have been deemed a long-shot at best by the lawyer representing the plaintiff.<sup>164</sup> And, of course, at one time it would have been deemed a frivolous argument to contend that the equal protection clause of the U.S. Constitution prohibited “separate but equal” public schooling,<sup>165</sup> or that the dormant commerce clause would prevent states from enacting prohibitions on carrying firearms near public schools,<sup>166</sup> or that the United States Sentencing Guidelines were unconstitutional.<sup>167</sup> That history may be taken wrongly to suggest that there is no such thing as a frivolous argument, but I believe instead that there is an objectively determinate category of frivolous interpretations. What accounts for that? The reason an argument for the adoption of comparative fault would not be frivolous, but it would be frivolous to argue that the federal income tax is unconstitutional because the Sixteenth Amendment was not properly ratified (a favorite argument of kooky tax protesters<sup>168</sup>), is that there were underlying *principles* of tort law that pointed the way toward comparative fault, even while the “black letter” rule in most jurisdictions was contributory negligence. Similarly, the decision in *Brown* was anticipated by other equal protection decisions, based on existing constitutional principles, that showed a developing trend in the law toward the rejection of *Plessy* and the separate-but-equal doctrine.

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<sup>163</sup> W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 479 (5th ed. 1984).

<sup>164</sup> GRANT GILMORE, THE AGES OF AMERICAN LAW 75 & n. 18 (1977) (noting that in *MacPherson*, Judge Cardozo “imposed liability on defendants who would almost certainly . . . not have been held liable if anyone but Cardozo had been stating and analyzing the prior case law which the majority opinion purported to follow.”).

<sup>165</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954), reversing *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>166</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>167</sup> *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005).

<sup>168</sup> See, e.g., *United States v. Thomas*, 788 F.2d 1250 (7th Cir. 1986).

The existence of principles and interpretive conventions not only expands the legal “world,” *W*, but it makes it difficult to formalize the correspondence relationship, *C*. Except in cases where a decision follows from subsuming facts under a clear legal rule, an interpreter justifies a legal judgment by showing that it is coherent with existing law, in the sense that the decision is supportable by the whole body of existing law including, where applicable, cases, statutes, regulations, and the principles that underlie and make sense of those norms.<sup>169</sup> The law sets boundaries on what counts as a legitimate interpretation. A judge could not cite his dyspepsia (perhaps resulting from what he had for breakfast) as a reason for denying bail to a criminal defendant, for the obvious reason that the judge’s bodily health does not count as part of the law. That is obviously an unrealistically easy case, but when we move to the more difficult cases, the analysis is the same — if judges have a practice of treating certain considerations as bearing on the outcome of decisions, then they are part of the law. Even if there is not this kind of uncertainty at the margins, over whether some consideration counts as part of the law, there will often be a plurality of competing legal reasons pointing in different directions. Both parties in a typical dispute can probably cite legal reasons, including principles of various weights and priorities, in support of their position. If this were not the case, the matter probably would have settled, or the lawsuit would not have been brought in the first place. Thus, while the materials of law — the stuff that is “out there” in some sense — sets boundaries on what may be adduced as a reason for or against some interpretation, there is no avoiding the exercise of judgment.

Judgment, in turn, is not some mysterious faculty or a black box in interpretation, out of

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<sup>169</sup> See Neil MacCormick, *Dworkin as Pre-Benthamite*, in RONALD DWORKIN AND CONTEMPORARY

which a result pops as needed. As Anthony Kronman rightly points out, a person characterized by good judgment “is not someone who from time to time merely makes certain strikingly appropriate oracular pronouncements.”<sup>170</sup> Rather, a person of good judgment can, if called upon to do so, provide a reasoned explanation of her decision. The reasoned explanation makes reference to the social sources underlying legal justification, but the social sources do not exhaust the reasoning process. Rather, it is a community-bound enterprise, in which the criteria for reasonable exercise of judgment are elaborated intersubjectively, among members of professional interpretive community.<sup>171</sup> These criteria are available to provide a justification of a decision.<sup>172</sup> This justification is a public phenomenon, in the sense that the interpreter is appealing to shared community standards for evaluating the appropriateness of interpretation. In this way, the interpreter’s discretion is constrained by public norms regulating the understanding of the social sources of law. Of course, the problem of a plurality of social sources of the law, which can be addressed by relying on a community’s norms governing interpretation, is replicated at another level if there is a plurality of interpretive communities, each purporting to aim at ascertaining the content of the law, and which may prioritize and balance the relevant internal legal reasons differently. We would then want to know *which* community’s tacit norms should count, when a lawyer is asking herself whether the judgment is legitimate.

I will argue that there are criteria which may be employed to evaluate a community in terms of its commitment to the value of fidelity to law. The most basic constraint on what counts

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JURISPRUDENCE 189 (Marshall Cohen, ed., 1983).

<sup>170</sup> Anthony T. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 848 (1987).

<sup>171</sup> See Fiss, *supra* note \_\_\_\_.

as a plausible interpretation of law is that law must be viewed as a purposive activity, as having some point or end.<sup>173</sup> One might also say that legal argumentation is a *craft*, which carries with it internal standards of excellence which are related to the ends served by the craft. Ethical lawyering is interpreting the law and applying it in the representation of one's clients, with fidelity to the craft of legal reasoning in a professional community. The normative ideal of a craft, which cuts through the plurality of interpretive communities, depends on the assumption that legal interpretation is a process of *reasoned* elaboration. Fundamentally, in order to represent a legitimate interpretive community, a cluster of would-be legal interpreters must be dedicated to the process of understanding the meaning of legal norms as a reasoned settlement of normative controversy, not simply as positions that can be won or lost in a political contest.

To illustrate this argument, return to the example of the FISA case discussed in Section II.A. One of remarkable aspects of this story is that the President decided to continue with the warrantless wiretapping program, and changed his mind only after Comey, who was serving as Acting Attorney General, threatened to resign, along with then-OLC head Jack Goldsmith, the

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<sup>172</sup> See WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 205 (1973) (discussing Llewellyn's arguments in *The Common Law Tradition*).

<sup>173</sup> HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 143-50 (William N. Eskridge, Jr. and Philip P. Frickey eds. 1994). Hart and Sacks are talking about attributing a single purpose to a piece of legislation, but their legal process materials have come to be understood as embodying the more general point that the law should be understood as a purposive activity. As David Luban shows in an insightful discussion, Lon Fuller is another legal theorist who emphasizes the purposive nature of law. See LUBAN, *supra* note \_\_\_, at 108-09. Outside the specific context of law, Alasdair MacIntyre relies on the concept of a *practice*, as "any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity." ALASDAIR MACINTYRE, AFTER VIRTUE 187 (2d ed. 1984). The theory of interpretation I defend here is indebted substantially to the idea that the purposiveness or goal-directedness of any practice — what it is all about, so to speak — is a non-circular source of obligations internal to the practice, because it would be incoherent to claim to be engaging in any activity without caring about the goods that are internal to that form of activity. *Id.* at 190-91.

director of the FBI, and several top officials at the Justice Department.<sup>174</sup> For the purposes of the discussion of legal interpretation, imagine the *President's* legal decision before the threat of mass resignations. His top legal advisors had concluded that the wiretapping program was illegal. However, the same office had previously concluded that the program was legal, based on former OLC lawyer John Yoo's arguments for virtually limitless presidential power. There were lawyers elsewhere in the executive branch, most notably then-White House Counsel Alberto Gonzales and David Addington, the legal advisor to Vice-President Dick Cheney, who continued to believe that the President had authority to authorize the program.<sup>175</sup> Therefore, from the President's perspective there appeared to be two interpretive communities — the Yoo/Addington camp and the Goldsmith/Ashcroft camp — reaching diametrically opposed interpretations of the governing law. Leaving aside the matter of the competence of a non-legally trained President to evaluate these arguments independently, the central question is whether there is any standard, beyond the existence of an interpretive community, governing the acceptability of an interpretation of law. In this case, it appears to have been sufficient, from the President's point of view, that some group of lawyers, no matter how small or out of the mainstream, was willing to state that his preferred position had legal support. Unless we are willing to endorse the President's decision in this case, and conclude that it is enough that a few lawyers in the Yoo/Addington camp have blessed his preferred interpretation of the governing law, we will be looking for some principled way to conclude that the Yoo/Addington interpretation is not the right one.

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<sup>174</sup> Richard B. Schmitt, *Cheney Reportedly Halted Justice Official's Promotion*, L.A. TIMES (June 7, 2007).

<sup>175</sup> Dan Eggen, *Official: Cheney Urged Wiretaps*, WASH. POST (June 7, 2007), at A03; Dan Eggen & Paul Kane, *Gonzales Hospital Episode Detailed*, WASH. POST (May 16, 2007), at A01; Scott Shane & Eric Lichtblau,

One possibility is that the relevant criteria are quasi-empirical ones. Recall Hart's claim that social practices are at the root of the authority of law. As Hart argued, it is conceptually necessary for there to be a legal *system* (as opposed to a fortuitous convergence of behavior) that judges take a critical reflective attitude toward certain considerations, and regard them as creating genuine obligations. Law is conventional at its root, but it is a particular kind of convention — a discipline of practical reasoning.<sup>176</sup> Legal argumentation is a matter of making reasons intelligible to others, in a context of public justification.<sup>177</sup> The criteria that pick out an interpretation as being part of law, as opposed to politics, morality, or the personal preferences of judges are given by the internal standards of a particular kind of social practice, namely that of legal reasoning.<sup>178</sup> But the demand for a reasoned justification arises from the nature of a legal system, not from any specific role within in. If an interpretive community becomes too small, too isolated, too idiosyncratic, the publicity condition for the systematicity of law no longer holds, and a would-be interpretation of law becomes merely a private view about what the law ought to be. However, this approach must include more than a straightforward comparison of the size of the membership of competing interpretive communities. (That is why I say the question is *quasi*-empirical, rather than empirical-full-stop.) Granting that Addington and Yoo are actually just about the only advocates of the extremely strong vision of executive power

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*Cheney Pushed U.S. to Widen Eavesdropping*, N.Y. TIMES (May 14, 2006).

<sup>176</sup> Gerald J. Postema, *Philosophy of the Common Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND LEGAL PHILOSOPHY 601 (Jules Coleman and Scott J. Shapiro, eds., 2002).

<sup>177</sup> *Id.*, p. 609; HART & SACKS, *supra* note \_\_\_\_, at 143; Owen M. Fiss, *The Supreme Court 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

<sup>178</sup> Hart uses the term “rule of recognition” to describe a criterion differentiating law from non-law, *see* HART, *supra* note \_\_\_\_, at 100, but it may be better to understand Hart's notion not as a *rule*, but as a practice in the Wittgensteinian (and, I would add, MacIntyrean) sense. *See* A.W.B. Simpson, *The Common Law and Legal Theory*,

pursued by the administration, and that in many cases their position was vigorously opposed by conservative lawyers within the administration,<sup>179</sup> a nose-counting strategy apparently runs into the Sorites problem.<sup>180</sup> If we know the Yoo/Addington view is implausible because there are only two lawyers supporting it, how many must we add to the ranks of supporters before the view becomes plausible? To avoid this problem, it may be necessary to specify frankly normative criteria, relating to the nature of legal reasoning as a craft. I will suggest what these normative criteria may be, but in the end will argue for as thin a conception of community legitimacy as possible — that is, one that seeks, to a significant extent, to make the analysis of legitimacy quasi-empirical.

It would obviously be circular to use criteria relating to the meaning of law to define the legitimacy of an interpretive community, since my argument has been that the meaning of law is a function of not only social sources but also of the tacit norms regulating interpretation, which are a property of professional interpretive communities. I have also rejected a straightforward nose-counting strategy, for the reason that there may be an interpretive community that is numerically the minority, but which has done better at interpreting the law. (How do we even know what it means to “do better” if meaning is in part a property of communities? It is easy to fall back into circularity!) The only way to avoid begging all of questions here is to rely on a notion of the law as a practice, and seek to derive from that a set of internal criteria of success or

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in *LEGAL THEORY AND COMMON LAW* 8 (William Twining, ed., 1986).

<sup>179</sup> Barton Gellman and Jo Becker, “Pushing the Envelope on Presidential Power,” *Washington Post* (June 25, 2007), p. A01.

<sup>180</sup> The Sorites Paradox is a classic puzzle showing that it is impossible to differentiate formally between a heap of stones and a non-heap. One stone is not a heap, a thousand stones is a heap, but it is impossible to locating the dividing line at which a heap is created. See TIMOTHY A.O. ENDICOTT, *VAGUENESS IN LAW* 33-36 (2000).

failure in terms of the ends of the practice. David Luban reads Lon Fuller as proposing something along these lines.<sup>181</sup> The distinctive feature of Fuller’s jurisprudence is that he defines law not in terms of existence conditions, but as an activity — “the enterprise of subjecting human conduct to the governance of rules.”<sup>182</sup> As an activity, it can be carried out well or poorly. In Luban’s arresting phrase, “lawyers can sin against the enterprise in which they are engaged.”<sup>183</sup> Marking deviations from a well-performed activity is a matter of grasping the point of the practice, to see what sorts of commitments it entails. Law, in other words, is a *purposive* activity, and we can give a functional argument for the ethical obligations that attach to anyone who participates in it. “[T]o recognize something as a steam engine or a light switch is already to recognize what it ought to do, to recognize a built-in standard of success or failure.”<sup>184</sup> Similarly, understanding the point of some practice carries with it the implicit acceptance of internal regulative standards that enable that practice to aim at its end.

This is a familiar Aristotelian way of thinking, and the objections to it are just as familiar. Functional arguments place a great deal of analytical weight on the function we impute to some object or activity.<sup>185</sup> In a standard example in the philosophy of science, how do we know that the function of the heart is to pump blood, and not to make a thumping sound? One typical

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<sup>181</sup> See David Luban, *Natural Law as Professional Ethics: A Reading of Fuller*, in LUBAN, *supra* note \_\_\_\_, at 99-130.

<sup>182</sup> FULLER, *supra* note \_\_\_\_, at 106.

<sup>183</sup> Luban, *supra* note \_\_\_\_, at 105.

<sup>184</sup> *Id.* at 109. See also ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 204-31 (1995) (arguing that interpretation ought to look to whatever rationality is immanent in a particular mode of ordering); See LON L. FULLER, *THE MORALITY OF LAW* 96 (rev’d ed. 1964) (noting that the natural law regulating “the enterprise of subjecting human conduct to the governance of rules” is conceptually no different from the natural law of carpentry, as perceived by a carpenter who is interested in a building not falling down).

<sup>185</sup> See generally Carl G. Hempel, *The Logic of Functional Analysis*, reprinted in *READINGS IN THE PHILOSOPHY OF SOCIAL SCIENCE* 349 (Michael Martin & Lee C. McIntyre eds. 1994); Larry Wright, *Functions*, 82

response is to define a function in terms of the proper working of a system such as a biological organism. But of course this just pushes the problem back one step, to defining the *proper* working of something. Concepts like adaptive fitness can be used to define the proper working of organisms, but in the case of social practices like law there is not such a clear external referent which can be used to define the function of the practice. Fuller says the function of law is subjecting human activity to the governance of rules, but one might also argue that the function of law is to ensure that justice is done, protect human rights,<sup>186</sup> limit the power of the state, express the community's public values,<sup>187</sup> enable the little guy to stand up to the big guy and say, "hey, you can't do that to me,"<sup>188</sup> and so on. Not surprisingly, I have my own views about the best way to understand the function of law, but I offer them somewhat tentatively, as *a* view about the function of law. If one finds this view attractive, then certain things follow from it, as a matter of the internal normativity of that practice (which is to say, as principles of legal ethics). If another functional account seems more attractive, then different internal normative standards will follow from it.

As mentioned previously, I think the function of the legal system (writ large, including legislatures, courts, and administrative agencies, as well as roles or offices within the system, such as lawyer and judge, and rhetorical practices that constitute the distinctive mode of

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Phil. Rev. 139 (1973).

<sup>186</sup> See, e.g., Thomas Bingham (Baron of Cornhill), *The Rule of Law*, 66 CAMBRIDGE L.J. 67 (2007).

<sup>187</sup> See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* (1986) (talking in terms of a community of principle, not public values, but making essentially the same point); Owen M. Fiss, *The Death of the Law*, 72 CORNELL L. REV. 1 (1986).

<sup>188</sup> One way of understanding the defense of the rule of law in E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* 258-69 (1975). I owe the colloquial formulation to Yasutomo Morigiwa, but he has published it only in Japanese.

justification of directives given by the system) is to enable citizens to establish, using tolerably fair procedures, a provisional framework for peaceful coexistence and cooperation, despite the evident fact of deep and persistent disagreement, pertaining to just about everything that otherwise could serve as a framework.<sup>189</sup> If the law is to perform this function, it must be the sort of thing that is capable of establishing an autonomous domain of legal *entitlements*, the content of which may be ascertained without resort to the kinds of moral reasons about which there is disagreement. Entitlements are further to be differentiated from mere client interests, as well as the fortuity of not having been punished for some conduct, through evasion, deception, luck, or the exercise of raw power. More specifically, “X has a legal entitlement to  $\phi$ ” means *both*:

- (1) X is acting under a claim of right that is established in the name of the political community as a whole. And
- (2) X is saying more than, “I can get away with  $\phi$ ’ing.”

Thus, at a minimum, we can identify what is wrong with the directive attributed to Andrew Jackson, that “You must find a law authorizing the act or I will appoint an Attorney General who will.”<sup>190</sup> The problem is that Jackson’s stance conflates *lawful* power with raw power. (It could be understood as an appeal to the indeterminacy of law,<sup>191</sup> but I think it is better understood as

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<sup>189</sup> Cf. JOHN RAWLS, *POLITICAL LIBERALISM* xxviii (1993) (noting that it is the very fact of “the absolute depth of . . . irreconcilable conflict” that makes liberal political institutions necessary).

<sup>190</sup> Quoted in CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* 18 (1992).

<sup>191</sup> For a more recent statement along similar lines, although more clearly an appeal to legal indeterminacy, consider President George W. Bush’s reaction to the *Hamdan* case, which held that all detainees were covered by Common Article 3 of the Geneva Conventions, proscribing outrages upon human dignity. Bush responded: “That’s like — it’s very vague. What does that mean ‘outrages upon human dignity’? That’s a statement that is wide open to interpretation.” See Press Conference of the President (Sept. 15, 2006), available at

simply a threat.) In most cases, however, principle (1) will be the more important basis for differentiating among interpretive communities that claim to be legitimate. The idea of an entitlement established in the name of the society as a whole presupposes a certain underlying rationality to the regime of laws enacted by the society. A legal norm is a substantive position, arrived at through debate and deliberation, not through some arbitrary process like flipping a coin. Indeed, the authority of legal norms depends on their reflecting the reasons that citizens had for acting, prior to the resolution of disagreement by the legal process.<sup>192</sup> An arbitrary, arational process of settling disputes would not be entitled to respect by the purported subjects of its authority.<sup>193</sup> That means that interpreting and applying laws is a reasoned activity, and interpretive communities can do better or worse *as reasoners*.

This may be starting to sound mysterious, but it is only mysterious as a theoretical problem. As a description of a practical activity, it is perfectly intelligible. Identifying good or bad instances of legal reasoning is exactly what lawyers do. The standards of lawyering craft resist distillation into summary form, but experienced lawyers nevertheless can recognize well reasoned judgments or instances of fallacious argumentation. To continue our domestic spying example, one can criticize the government lawyers' advice to the Bush administration,

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<<http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html>>. The unedited comment is reported in Richard Leiby, *Down a Dark Road: Movie Uses Afghan's Death to Ask Tough Questions About U.S. and Torture*, WASH. POST (April 27, 2007), at C01.

<sup>192</sup> See Joseph Raz, *Authority, Law and Morality*, in *ETHICS IN THE PUBLIC DOMAIN* (1994).

<sup>193</sup> The reference to the authority of law here is necessarily conclusory, but I have defended elsewhere, at length, the proposition that the law has authority for citizens to the extent it enables them to transcend the "circumstances of politics" — namely, the shared interest in living together and cooperating on mutually beneficial projects, notwithstanding deep and persistent disagreement. Since following the directives of legal authority enables citizens to do better at realizing their shared interest in coexistence in the circumstances of politics, as compared with their ability to do so without resorting to relatively formal procedures of norm-enactment, the legal system's claim to authority is legitimate. See W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363 (2004).

authorizing the warrantless wiretapping program on the basis of the AUMF and wartime executive power, with reference to the failure of that advice to cohere with existing law.<sup>194</sup> First of all, the FISA statute contemplates a situation of war, and permits warrantless wiretapping during wartime, but only for a limited period of time.<sup>195</sup> Under ordinary principles of statutory construction,<sup>196</sup> this specific limitation on wiretapping in a time of war would control over the general grant of power in the AUMF. Moreover, the Supreme Court has said that where Congress has spoken with regard to an issue, the President's authority is at its lowest ebb, even in wartime.<sup>197</sup> That rule pertains not only to the open-ended claims of executive power in the lawyers' letter, but to the interpretation of conflicting statutes, such as the AUMF and FISA. Congress has acted to regulate the President's authority to conduct electronic surveillance, and the AUMF does not change that specific regulation in any way. From the standpoint of proponents of strong executive power, the AUMF should be seen as redundant in any event, so it cannot change the regulatory scheme adopted by FISA without specifically amending FISA. The government lawyers might respond that the President has the authority to disregard Congressional restrictions — at one time the Office of Legal Counsel took that position with respect to prohibitions on torture<sup>198</sup> — but the Justice Department wisely chose not to make that argument in this case, because it is wholly lacking in legal support.

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<sup>194</sup> See William E. Moschella, *December 22, 2005, Letter from the Department of Justice to the Leadership of the Senate Select Committee on Intelligence and House Permanent Select Committee on Intelligence*, reprinted in 81 IND. L.J. 1360 (2006).

<sup>195</sup> See 50 U.S.C. § 1811.

<sup>196</sup> See NORMAN J. SINGER & J.D. SHAMBIE, *STATUTES AND STATUTORY CONSTRUCTION* (7th ed. 2007).

<sup>197</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>198</sup> See Memo from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172 (Karen J. Greenberg

“Wait a minute!” a reader might respond. “You are saying that an argument should not be relied upon because it lacks legal support, but you have defined legal support in terms of interpretive communities, and we know that there is an interpretive community that believes the President does have the authority to disregard Congressional regulation in wartime. You are ruling that out as a legitimate argument only because you dislike the substantive result, not because it is inadequately supported.” In response to this line of objection, it would be necessary to go through the same process, in order to demonstrate that there is no adequate legal basis for the conclusion that the President has the authority to ignore statutory limitations on his conduct. Again, although interpretive communities are at the center of this process of argumentation, communities are not jurisprudential primitives. There are standards for evaluating some interpretive communities as being dedicated to the process of recovering the meaning of a legal norm, with the assumption that legal argumentation is essentially a process of reason-giving. But now my imaginary interlocutory is becoming increasingly agitated. “The lawyers gave reasons why the President should be permitted to disregard Congressional limitations, and there is an interpretive community of lawyers who find those reasons persuasive.” The problem with this response is, upon closer scrutiny it turns out that the reasons they gave are not the sorts of reasons that make reference to what the law actually is, but to what the lawyers think the law ought to be. The underlying theoretical argument in this paper is a frankly normative defense of legal positivism. This is not an oxymoron; rather, it is the idea that there is something normatively attractive about having a way of organizing social cooperation that precludes reference to the sorts of evaluative debates that we find intractable. That procedural resolution of

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& Joshua L. Dratel, eds., 2005).

disagreement must be faithful to some extent to the underlying matters that citizens care about. It must take them into account, but also yield directives that supersede these underlying reasons. The legal system thus embodies a process of reasoning, but an autonomous one — it is reasoning with respect to particular kinds of reasons. These are the reasons picked out as part of law, by content-independent criteria, by virtue of their social sources (if you like, in reliance on a Hartian rule of recognition). Lawyers participate in the craft of reasoning on the basis of certain social sources but not others, taking certain considerations as part of the law and excluding others. If a would-be interpretive community tries to incorporate different norms, it may be criticized as engaging in something other than the process of trying to recover the meaning of the law, as settled by authoritative procedures.

#### IV. *Conclusion.*

I realize there are difficult jurisprudential questions lurking just beneath the surface of this argument. For example, Ronald Dworkin insists that the justification of a conclusion of law must reach out beyond social sources to incorporate, or at least cohere with, the community's underlying principles of political morality.<sup>199</sup> For Dworkin there can be no purely source-based, content-independent criteria for identifying the law. One might put this Dworkinian point in historical terms by observing the process of legal change, referencing cases familiar to everyone, like *Brown v. Board of Education*, or those known only to lawyers, such as Cardozo's decision in

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<sup>199</sup> See Ronald Dworkin, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY* (1977).

*MacPherson*.<sup>200</sup> Positivists have given different answers to this line of objection; Hart's response, that judges simply make law at the point when source-based legal norms run out, is well known.<sup>201</sup> Legal systems also contain internal rules respecting the process of evolution, self-correction, and even reversal; there is an entire body of Supreme Court doctrine on overruling its own precedent, for example. These jurisprudential issues can be restated in connection with the critique of the government lawyers' advice on domestic spying as follows: Who is to say that the radical executive power view is non-law, as opposed to nascent law that has been recognized by an exceptionally prescient group of lawyers, just as Cardozo was the first to grasp the evolving principles of manufacturer liability to consumers?

The answer to this objection can be stated in terms that have been suggested above, with respect to the context in which a lawyer offers an interpretation of law. Suppose there is a novel interpretation of law — akin to the reversal of the separate-but-equal principle or the abolition of the privity doctrine. The novelty of that position can be ascertained by observing either that (1) a numerically large interpretive community rejects it, or (2) it is accepted only by a numerically small interpretive community. In this way, the novel interpretation is like the strong executive power view urged by Yoo and Addington. I would be willing to bite the bullet and state that the position is illegitimate, *because the interpretive community is numerically in the minority*, but only where the interpretation is being offered as the basis for advice on what the client — whether a private client or a government actor — is legally authorized to do. Recall the expressivist argument above. To the extent a lawyer seeks to justify her client's conduct with

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<sup>200</sup> See *supra* note \_\_\_\_.

reference to the discourse of legality, she is constrained to rely on relatively mainstream interpretive community views. In litigation, on the other hand, a lawyer is permitted to urge the tribunal to accept a novel interpretation. It does not matter that only a tiny interpretive community accepts the interpretation, because the tribunal is free to reject it. On the other hand, it may accept it, believing it better to cohere with the community's political morality, or whatever. Courts have the power to make these sorts of determinations — to extend, modify, or reverse existing law — and lawyers are legally permitted to make these arguments.<sup>202</sup> But nothing follows from this permission when lawyers are advising clients on what the law is, as opposed to what it should (or might) be. In that case, fidelity to law requires either advising on mainstream interpretations of the law, or open disobedience in a way that exposes the client's conduct to scrutiny and checking by other institutions.

The “politicization” critique can therefore be restated in terms of the value of legality, so that we can approve or disapprove of the advice given by government lawyers according to how much they respect the existing legal settlement, as opposed to trying to make an end run around existing law to act on the basis of the policy preferences of elected officials. This position denies that the job of government lawyers is simply to enact the policy preferences of incumbent officials, but it also denies that government lawyering is a locus for the contestation of legal meaning. There are plenty of avenues provided by the legal system for dialogic engagement and jurisgenerative politics. The system as a whole must respond to the need for flexibility and permitting citizen engagement. However, that response should not take the form of constructing

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<sup>201</sup> See HART, *supra* note \_\_\_\_, at 145-54.

a conception of government lawyers' ethics that emphasizes values other than fidelity to law.

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<sup>202</sup> The language of “extend, modify, or reverse” is from Fed. R. Civ. P. 11.