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Reason and Authority in Legal Ethics

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Reason and Authority in Legal Ethics

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A fairly stable debate has developed in legal ethics between those who argue that a lawyer should always act on the balance of first-order moral reasons as they would apply to a similarly situated non-lawyer actor, and those who believe that a lawyer may not deliberate on the basis of ordinary first-order moral reasons, because of some feature of the lawyer's role.¹ Some have called the second position the "dominant view" to emphasize the pervasiveness of this reasoning among practicing lawyers.² The slogan of the dominant view is "zealous representation within the bounds of law," a phrase taken from an early set of rules regulating the practice of law.³ This definition includes not only adversarial litigation, but also negotiations, business transactions, client counseling, and regulatory compliance matters. In all cases, holds the dominant view, once the lawyer and client have established a professional relationship, the lawyer is required to make her best efforts to further the client's legally permissible ends, as long as these activities will not expose the lawyer or client to some risk of legal liability. Some who adhere to the dominant view believe that a lawyer may be criticized in moral terms for accepting a particular representation, or for failing to withdraw if legally permissible,⁴ but even this weaker version of the dominant view would require a lawyer to exclude first-order moral considerations from her deliberations, unless those reasons were aimed at a conclusion that the lawyer should not begin working on a matter, or should attempt to withdraw. Similarly, some dominant view proponents permits lawyers to engage their clients in moral conversation, making reference to first-order moral reasons, but if this conversation fails to change the client's mind, the lawyer is required to follow the client's lawful instructions.

Although the basic principle of the dominant view is that a lawyer should disregard otherwise applicable first-order moral reasons when representing a client, the dominant view is generally justified on the basis of countervailing moral reasons that also exist at the first order. Stephen Pepper argues, for example, that the role of the lawyer is justified on the grounds that it furthers the client's autonomy, which is a moral good for the client.⁵ Similarly, Charles Fried appeals to the intrinsic values of loyalty and friendship embodied in the lawyer-client relationship.⁶ Alternatively, one might make a straightforwardly consequentialist argument, pointing to the benefits of some act required by the lawyer's professional duties. For example, it may be the case that the long-run benefits of increased trust between lawyers and clients, which leads to enhanced compliance by clients with the law, are sufficiently significant to outweigh the costs of secret-keeping by lawyers, when disclosure of confidential information might have averted some harm to a third party. In any event, these arguments are supposed to underwrite a broad preclusion of most first-order values from the lawyer's deliberation. For example, a specific conclusion of the dominant view might be that a lawyer should not consider the harm to third parties as a reason against assisting a client in resisting a regulatory requirement.

The arguments for the dominant view are said to issue in permissions to engage in what would otherwise be morally wrongful conduct. Thus, lawyers are subject to a "role-differentiated" system of morality.⁷ The metaphor of role-differentiation imagines actors in situations that are identical

in all morally relevant respects, but subject to differing duties, which vary according to whether the actor occupies a given social role.⁸ We might ask whether it is possible to describe two morally identical situations, which vary *only* in respect of whether the actor occupies a social role or not. When David Luban wishes to criticize the lawyer's obligation to keep client confidences, he imagines a case from the domain of ordinary morality: Suppose Salieri swears you to secrecy and confides that he is slowly poisoning Mozart to death.⁹ He then draws from this analogy to argue that the lawyers representing Ford Motor Company should have warned potential victims, or the appropriate regulatory agency, of dangerous defects in the fuel system of the Pinto. The trouble with this argument is that the lawyer for Ford is acting within a complex institutional structure that is set up precisely to supersede ordinary moral reasoning. At the level of first-order reasons for action, we may disagree about the level of care that a manufacturer owes consumers when designing and building a product. Some may desire extensive protection, with the cost passed on to consumers; others may prefer that the product cost less, with the onus on consumers to purchase first-party insurance against potential accident losses. The value of providing access to inexpensive, albeit somewhat less safe cars may outweigh the reduced risk of accidents if all the cars in the world were required to be as safe as Volvos. In any event, these normative questions are channeled into procedures for producing definitive resolutions of the disputes. In the case of product manufacturers, the legal rule that has developed is roughly that a manufacturer need not take safety precautions whose marginal cost outweighs the expected marginal benefit, in terms of savings in accident costs. One may disagree morally with this rule, but the process for arriving at it serves to distinguish the Ford Pinto case from the example of Salieri poisoning Mozart to death. Salieri cannot justify his actions by pointing to a rule generated by an orderly process for resolving normative disagreement. The process may or may not be sufficient to supersede the actor's moral deliberation (that is the subject of this article), but it does change the morally relevant description of the two situations under comparison. For this reason, I believe talk of role-differentiation is misleading.

Whether or not they talk in terms of roles, opponents of the dominant view can be divided into two camps — call them moralists and legalists.¹⁰ The moralists, who comprise the majority of dominant view critics, locate the relevant values that should bear on lawyers' actions within the domain of ordinary morality. For example, Luban responds to Pepper that autonomy is not a moral good in itself, but is only instrumentally valuable in permitting a person to accomplish her ends. Whether those ends are themselves worthy is a further moral question that must be answered before we can evaluate the permissibility of the lawyer's assistance. The legalists, represented most prominently by William Simon, offer a very different critique. For Simon, the values that bear on the evaluation of a lawyer's actions are internal to the legal system. Because a lawyer's work on behalf of a client involves the interpretation and application of law, the moral permissibility of the lawyer's assistance to a client turns on whether the client is *legally* entitled to realize some goal; and his critique of the dominant view is that it requires lawyers to pursue clients' ends regardless of legal entitlement. Simon's legalism does not mean that ordinary moral values are completely excluded from the lawyer's deliberation, however. Simon professes to be influenced by Ronald Dworkin, who claims that "propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural

due process that provide the best constructive interpretation of the community's legal practice."¹¹ As Dworkin recognizes, verifying propositions of law through reference to the virtue of integrity requires a large-scale constructive political argument, in which moral principles such as fairness and justice are prominently featured. For Dworkin, integrity provides a touchstone for resolving conflicts between competing legal principles, such as individual responsibility and loss-spreading, or freedom of contract and substantive fairness. Simon needs something like Dworkinian integrity in his system of lawyers' ethics; otherwise, lawyers would make arbitrary or standardless decisions about how to act as representatives of their clients. Because these decisions directly affect the clients' legal entitlements, any unguided ethical discretion exercised by lawyers threatens the rule of law.

Both the dominant view and its moralistic and legalistic competitors share one important characteristic: In prescribing the lawyer's deliberations, none of these ethical theories gives much weight to the fact that the client's action is permissible under the law. For the dominant view, the law is treated only instrumentally, as a means for setting boundaries around permissible state interference with the client's autonomy. The source of the lawyer's ethical obligation is the value of autonomy, not anything intrinsic to the law. The moralists similarly discount the fact of legal permissibility, pointing out that legal entitlements are not conclusive of moral rights — one may have a legal right to do something morally wrongful.¹² Luban argues that dominant-view lawyers exhibit disrespect for the law by using it instrumentally, but his own theory of "moral activist" (one could call it "natural law") lawyering disrespects law in a different way, by treating the client's legal right as irrelevant to the lawyer's deliberations unless it is morally justifiable on grounds independent of its being a law. The legalist critics seem to have the greatest stake in the legitimacy of legal rights, but the most prominent member of this group, Simon, takes a rather surprising tack in the direction of natural law, arguing that apparent legal entitlements are not really part of the law unless they track moral principles.¹³ Moral reasoning is essential to the process of legal reasoning for Simon, as it is for Dworkin, because selecting among competing legal principles is ultimately a question of the constructive interpretation of the entire legal system, guided by principles of political morality. In Simon's view, if legal texts are interpreted correctly, the morally correct thing for a lawyer to do will also be the legally correct thing to do. Thus, for all of these ethical theories, first-order moral principles are in the driver's seat, with legality being only a prudential constraint on action.¹⁴

The relatively low deliberative significance of legality in legal ethics is unsurprising, in light of the conventional wisdom in political philosophy, holding that there is no general obligation to obey the law.¹⁵ The traditional arguments offered in justification of a general duty to obey — express and implied consent, gratitude, fairness, and utility — have all been subjected to devastating criticism. For this reason, hardly anyone writing on legal ethics believes that a legal obligation or permission is conclusive of moral deliberation. A moral "ought" must rather be based on all-things-considered deliberation on first-order reasons for action. An action is morally permitted or required only if morally permitted or required on its own merits, so to speak, leaving aside any general considerations of legality. From the client's perspective, this sort of reasoning makes a legal entitlement meaningless. A dominant view lawyer would of course assist the client in taking advantage of the legal entitlement, but only because that lawyer is dedicated to the value of autonomy.

If the client has a lawyer who disagrees with the dominant view, however, the client cannot obtain technical assistance to pursue certain legally permissible ends. In Hohfeldian terms, the client's claim-right to X is rendered empty by severing its connection with a duty on the part of the lawyer to facilitate the client's access to X.¹⁶ The lawyer is, in effect, overriding the client's legal entitlement to X on the basis of moral reasons. If the client does not share those reasons, the client is likely to feel betrayed by the lawyer's refusal to provide assistance.

One response to this problem is that the client does not have a *moral* claim-right to X, so the lawyer does not have a correlative moral duty to assist the client in obtaining X. Thus, the client is not wronged by the lawyer, morally speaking. For the client not to believe herself to be morally wronged by the lawyer's refusal to assist her in obtaining X, the client must agree with the lawyer's moral reasoning, the conclusion of which is that the client does not have a moral right to X. Critics of the dominant view, in effect, assume a fairly wide scope of agreement among lawyers and clients over the morality of the clients' ends. The possibility of moral *disagreement* between lawyers and clients appears to count in favor of the dominant view, because the client's autonomy is lexically prior to the other values considered by the lawyer in her own deliberation. The familiar objection raised here is that the client's autonomy, by itself, is not a reason for the lawyer to do anything. Perhaps the lawyer has made an express or implied promise to further the client's lawful projects, but this response simply invites the further objection that one cannot be morally bound by a promise to do an immoral act.¹⁷ From the standpoint of the lawyer's moral agency, then, a promise to assist clients in realizing their legal entitlements does not eliminate the problem of the lawyer's perceived complicity in immorality which results from assisting the client. There seems to be no reason for the lawyer to accept a moral constraint, to the effect that the client's autonomy should be lexically prior to the reasons the lawyer would otherwise take into account as a deliberating agent, including reasons that would require her to disassociate herself from another person's immoral projects.

Examples of cases raising this problem are familiar from the legal ethics literature: A client wishes to draft a will disinheriting his son for opposing the Vietnam war,¹⁸ a large agribusiness client seeks to exploit a loophole in a statute intended to benefit family farmers,¹⁹ a manufacturer of medical devices asks the lawyer to slow down the regulatory process through non-frivolous legal means in order to continue selling products the lawyer believes are defective,²⁰ the lawyer is bound by the legal duty of confidentiality not to reveal information that could save the lives of others.²¹ If we assume in each case that the moral dialogue between lawyer and client has reached an impasse, and the client insists on the lawyer assisting her in obtaining the relevant legal entitlement, the client and lawyer will in effect be disagreeing about whether the client has a moral claim-right to the entitlement. In the face of such a disagreement, the dominant view mandates that the lawyer defer to the client's resolution of the moral issues, notwithstanding the principle that one ought to take responsibility for one's actions and reason autonomously to a conclusion about what one ought to do.²² Critics of the dominant view similarly accept the imposition of moral reasons by one person on another, in this case by permitting the lawyer to refuse to provide assistance to the client in obtaining a legal entitlement that the client believes herself to be morally permitted to obtain. The dominant view and its opponents therefore seem to be arguing for competing priority principles, which justify subordinating the moral agency of one of the

parties — lawyer or client — to the other's judgment about how to proceed.

Talk of subordinating one's judgment to another's resolution of a practical dilemma calls to mind the concept of legitimate authority and the justification of a moral obligation to obey the law. As observed previously, most political philosophers do not accept a general duty to obey the law, so it appears that the law is of little assistance in these cases where either the lawyer or the client seeks to hold the other to a resolution of disputed moral issues. But there is a different way to understand the authority of law, which places moral disagreement at the foreground of a theory of legitimacy.²³ Rather than assuming that disagreement between lawyers and clients is a marginal case, this theory of authority begins from the assumption that disagreement is widespread, and that the authority of law depends on its capacity to enable collective social action in the face of persistent disagreement. On this account of authority, the first-order moral disagreement between the lawyer and client, concerning the permissibility of the client's ends, or the means by which she seeks to achieve them, may be dealt with by considering the second-order reasons given by the law.

Jeremy Waldron observes the intractability of good-faith disagreement on moral and political questions, and argues that the fact of disagreement provides second-order reasons not to act peremptorily on first-order beliefs about the good or justice.²⁴ In the political domain, action on the basis of considerations of justice, fairness, rights, or the good is of an essentially collective, or social character. It does not make sense to think about action in a sphere governed by the law as being grounded in an individual decision about what one ought to do. Rather, individuals bring only provisional or partial beliefs or views to a process of collective debate and resolution.²⁵ It is crucial to this process that no person's views about rights or justice should be accorded greater weight than others' views. People may attempt to persuade their fellow citizens, but in the end, when all the speeches and lobbying efforts are concluded, everyone submits his or her own beliefs about justice to a vote, and some faction's view becomes the position taken by society as a whole on the disputed issue. Although it does not directly represent each affected citizen's vote, the democratic process nevertheless exhibits the virtue of being respectful to the competing views of those with whom we disagree, consistent with the felt need to reach a decision and put an end to the process of deliberation and attempts at persuasion.²⁶ When we think in a philosophical mindset about matters of justice, we naturally believe we are right and that our view should prevail, although we acknowledge that others disagree with us.²⁷ When we are dealing with *politics*, however, the "felt need, shared by the disputants, for common action in spite of such disagreement"²⁸ impels us toward a procedural resolution of the dispute, with a view to settling on a single, definitive position representing our collective solution.

How can the result of this process be authoritative with respect to individuals who are subject to the resulting legal obligations? Granting that collective action in the face of moral disagreement is often necessary, acting on the basis of a law with which one disagrees appears to involve an abdication of one's moral agency, or acting in bad faith, as Sartre would call it. The most promising way to justify the legitimacy of a legal directive, and therefore to provide a second-order reason for an individual to comply with it notwithstanding its conflict with her moral beliefs, is to appeal to reasons that apply independently of the law to the person subject to the directive. This is the account of authority offered by Joseph Raz, upon which Waldron relies in his book. For Raz, authority is

legitimate when compliance with authoritative directives is a better way to achieve some end that an agent has, as compared with the agent trying to work out the balance of reasons for himself.²⁹ The justification for following expert authority obviously works in this way.³⁰ If I want to make a good brown beef stock, I would do better at that end by following Jacques Pépin's instructions than by trying to work out the procedure myself. Significantly, I am not acting in bad faith or subordinating my will to Pépin, because in following his directives I am acting on the basis of reasons that are my own — namely, the desire to make a good brown beef stock. The same is true for legal authority in some cases. Raz is actually very cautious about justifying legal authority along these lines. Although he calls this the "normal justification thesis," he believes there are many cases in which a legal official does not have superior expertise with respect to some end that is shared with the subject of the legal directive.³¹ Legal directives are legitimate only where the ostensible authority can claim expertise by virtue of being wiser, better informed, steadier of will, more efficient in decisionmaking, or better positioned to accomplish some objective, as compared with individuals. We can see how this model of legitimacy works with respect to something like a regulation requiring that a drug be sold only on a physician's prescription. Presumably the physicians working for the Food and Drug Administration are better than most individuals at figuring out whether a drug needs to be taken under medical supervision. For the government to claim superior expertise in working out purely normative issues, however, seems either arrogant or risible — no one believes that the U.S. Congress is a better moral decisionmaker than a reasonably thoughtful citizen.

Waldron's insight is that we all do share reasons that would justify deferring the resolution of normative issues to a lawmaking body. We all perceive the need for coordinated action in the "circumstances of politics," that is, in the condition of coexisting with others with whom we do not share beliefs about the good, justice, or rights.³² Another way to put the point is that we are disputatious but sociable creatures by nature; we each seek our own advantage, but we have a desire for peaceable society with one another.³³ From the standpoint of each affected citizen, one does better at living in a harmonious society with other quarrelsome beings by following legal directives, which are established pursuant to a process for treating disagreements fairly, with due respect for the moral agency of other citizens. To the extent that one wishes to treat one's fellow citizens respectfully in normative disagreements, one has a dependent reason, in Raz's sense,³⁴ which is taken into account by the process of resolving disputes through the means of the law. Following Raz further, this reason preempts recourse to the first-order moral reasons that were the subject of the disagreement. Because the citizen is now subject to a legitimate legal directive, she has a reason not to rely on these first-order reasons in her deliberation about how to act.

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

Because the law enables collective action notwithstanding deep and persistent disagreement, it ought to be taken seriously, in the sense that one ought not to try to come up with ways to nullify, defy, or evade the law.³⁵ Lawyers have a great deal of power to do harm here, by undermining the collective achievement of lawmaking by structuring transactions to evade statutory or regulatory requirements. They may also interfere with the operation of the law by resisting it on moral grounds. If the lawyer says to the client, in effect, “You have a legal entitlement to X but I refuse to assist you in obtaining that entitlement for moral reasons,” then the lawyer is simply reinscribing in the attorney-client relationship the very moral disagreement the law was intended to preempt. Thus, a theory of legal ethics that is respectful of the achievement represented by law must build in an ethical constraint to the effect that lawyers should further the end of facilitating collective action in the face of disagreement.

The argument outlined here differs from the usual defense of the dominant view because it does not depend on first-order moral values like the client’s autonomy or the intrinsic value of the lawyer-client relationship. Rather, this kind of modified dominant view is justified at the second order of reasons, by considerations relating to the reasons for treating legal directives as authoritative. These reasons are preemptive of the first-order moral considerations that would ordinarily give the lawyer a sufficient reason not to assist the client in realizing her ends. The conception sketched here differs further from the usual specification of the dominant view in that it gives reasons for lawyers to respect the law, notwithstanding their clients’ wishes, in some cases. Suppose the client wishes to set up a transaction to exploit a loophole in a statute, forum-shop for a judge predisposed to rule in her favor, or take advantage of the underfunding of state enforcement resources by playing the “audit lottery.” The normal dominant view would direct lawyers to assist clients in these projects, as long as they were not illegal under applicable law. The Waldronian dominant view, however, would call upon lawyers to respect the achievement represented by the law — that is, its capacity to facilitate collective action in the face of disagreement.³⁶ In cases where the lawyer’s actions would in effect undermine the capacity of the law to serve as a focal point for social action, they would be ruled out on second-order moral grounds. Interestingly, the lawyer’s obligation here is aligned with the traditional role of “officer of the court” which is appealed to frequently by opponents of the dominant view.

I offer this argument for the authority-based conception of legal ethics only tentatively at this point, because some difficulties remain to be worked out. One source of concern is its strongly utilitarian nature.³⁷ The authority of law, for Waldron at least, is based on the good of collective social action in spite of normative disagreement. In other words, a great deal of benefit is created by legal ordering, so the obligation to respect the law is given on utilitarian grounds. This is true despite the possibility that the laws interfere with the moral rights of some citizens. Waldron’s response would of course be that we disagree about what moral rights we have, so these can never be the basis for a theory of authority, but this response begs a deeper question of whether individual rights — even those that are contested — can be sacrificed in the name of collective action. It is usually thought to be the whole point of rights that they block the majority from interfering with some interest of individuals that is of fundamental moral importance.³⁸

A further objection is related to Waldron’s claim that a statute provides a single, definitive resolution of a disputed

normative question. What if, contrary to this suggestion, there are multiple reasonable ways of reading a statutory provision, and lawyers may disagree in good faith about which is the correct approach? As a reviewer of his book pointed out, Waldron does not say much about how ambiguous statutes should be interpreted.³⁹ He does not naively plump for a plain meaning or “dictionary” rule favored by Justice Scalia, but I do not think he is sufficiently worried about the possibility that the normative disagreements that were supposed to have been superseded by legislation arise again in the process of interpreting legal texts. The interpretive attitude taken by lawyers and judges toward statutes and common-law decisions can have a great deal of beneficial or harmful effect on the capacity of those legal texts to enable collective social action.

One does not have to believe that words have no determinate meaning in order to be troubled by some of the interpretive issues that courts deal with routinely. Does a statute prohibiting the interstate transportation of motor vehicles apply to airplanes?⁴⁰ Does a prohibition on “using” a gun in connection with a drug trafficking offense cover the act of driving around with a loaded gun in the trunk of a car?⁴¹ Not only are these statutes ambiguous, but the sorts of political disagreements they were intended to resolve, for example over the scope of the legitimate role of government in society, are recapitulated as statutory-interpretation issues. A person who believes that negative liberty is prior to equality or other positive rights is likely to support a principle of statutory interpretation that the words of legislation should be read narrowly, or that Congress should not be presumed to have the constitutional power to legislate on some matter. Reasonable lawyers can disagree about the interpretive attitude one ought to take toward the law. One principle might be that it is wrong to exploit loopholes, where a loophole is defined as a reading of the literal text of the statute in a way that is contrary to its obvious purpose. Of course, another lawyer might argue that one person’s loophole is just another person’s clever or aggressive legal position, and if Congress had intended to prevent the activity in question, it would have drafted the text with greater specificity. It seems like some kind of meta-statute is needed, specifying how statutes should be interpreted, but of course even a meta-statute would be subject to disagreement at the level of interpretation. Thus, lawyers’ interpretive attitudes are a critical variable in the effectiveness of the law in resolving disagreement and providing a focal point for collective action.

Having raised these as two of several difficulties with the authority-based justification of the dominant view, I do think it provides a more philosophically robust defense of this conception of lawyers’ ethics than its competitors. It brings legality closer to the center of issues relating to legal ethics, rather than relegating it to the periphery. It also assumes that moral disagreement is not a marginal case, but the backdrop against which we think about professional roles in the first place. If there was no disagreement, there would be no need for law. As Grant Gilmore quipped, “In Heaven there will be no law, and the lion will lie down with the lamb. In Hell there will be nothing but law, and due process will be meticulously observed.”⁴² Until we achieve heaven on earth, a theory of legal ethics must not assume that lions and lambs will be able to agree about their respective rights.

Endnotes

* I am grateful to David Luban and Greg Cooper for their valuable comments.

1. Here I follow Joseph Raz’s terminology, in recognizing a distinction between reasons for action (first-order reasons) and reasons to act,

- or to refrain from acting, on reasons (second-order reasons). Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979), 16-18.
2. William H. Simon, *The Practice of Justice* (Cambridge, MA: Harvard University Press, 1998).
3. ABA Model Code of Professional Responsibility, EC 7-1 (1969).
4. Monroe H. Freedman, "The Lawyer's Moral Obligation of Justification," *Texas Law Review* 74 (1995): 111.
5. Stephen L. Pepper, "The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities," *American Bar Foundation Research Journal* 1986: 613.
6. Charles Fried, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation," *Yale Law Journal* 85 (1976): 1060.
7. Richard Wasserstrom, "Lawyers as Professionals: Some Moral Issues," *Human Rights* 5 (1975): 1.
8. Arthur Isak Applbaum, *Ethics for Adversaries* (Princeton, NJ: Princeton University Press, 1999).
9. David Luban, *Lawyers and Justice: An Ethical Study* (Princeton, NJ: Princeton University Press, 1988), 186.
10. This distinction is clearly drawn by Luban, in a review essay of Simon's book. David Luban, "Reason and Passion in Legal Ethics," *Stanford Law Review* 51 (1999): 873. Luban argues that Simon's attempt to reduce all conflicts for lawyers between law and morality to conflicts among competing legal interpretations fails, because the lawyer's antecedent moral commitments largely determine which of several plausible legal interpretations she will accept.
11. Ronald Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press, 1986), 225.
12. Luban (1988), 12; cf. Jeremy Waldron, "A Right to Do Wrong," *Ethics* 92 (1981): 21.
13. Simon (1998), 82-108.
14. Simon does concede at least *prima facie* weight to a legal rule, where some legal procedure or institution is reliable and well positioned to achieve substantive justice. Simon (1998), 140. He insists, though, that the lawyer cannot treat the existence of a legal rule as an exclusionary reason unless the lawyer is prepared to reason from the ground up to a conclusion that the result reached by the relevant procedures and institutions will be just. As Luban points out, this requirement places great cognitive demands on the lawyer, and makes Simon's theory vulnerable to the objection that it is unrealistic as a working theory of ethics [Luban (1999), 895-96]. A further objection, anticipating the argument from Jeremy Waldron, below, is that lawyers reasoning in good faith are likely to disagree about whether the rules, procedures, and institutions of the legal system produce just results. If law is to serve its end of enabling social action in the face of disagreements about justice, it must preclude the kind of *de novo* review of the justice of results that Simon recommends.
15. Joseph Raz, "The Obligation to Obey: Revision and Tradition," *Notre Dame Journal of Law, Ethics & Public Policy* 1 (1984): 139; R.P. Wolff, "The Conflict Between Authority and Autonomy," in Joseph Raz (ed.), *Authority* (New York: New York University Press, 1990), pp. 20-31; A. John Simmons, *Moral Principles and Political Obligations* (Princeton, N.J.: Princeton University Press, 1979); M.B.E. Smith, "Is There a *Prima Facie* Obligation to Obey the Law?" *Yale Law Journal* 82 (1973): 950.
16. Wesley N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal* 23 (1913): 16.
17. Kent Greenawalt, "Promissory Obligation: The Theme of Social Contract," in Raz (1990), p. 290.
18. Wasserstrom (1975).
19. Simon (1998), pp. 4-5.
20. Very roughly, the facts of *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991).
21. One classic case is *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962).
22. Wolff, pp. 25-26.
23. Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999).
24. Waldron (1999), pp. 112, 196-97.
25. Waldron (1999), pp. 202-08.
26. Waldron (1999), pp. 111-14.
27. Waldron (1999), pp. 159-60, 227-30.
28. Waldron (1999), p. 207.
29. Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 53.
30. Raz (1979), pp. 21-22.
31. Raz (1986), pp. 74-80.
32. Waldron (1999), p. 105.
33. J.B. Schneewind calls this the "Grotian problematic" after Hugo Grotius. J.B. Schneewind, *The Invention of Autonomy* (Cambridge, UK: Cambridge University Press, 1998), 70-72, and *passim*.
34. Raz (1986), p. 41. A dependent reason is one that is based on reasons that already apply to the subject of a directive. In Raz's example, if two people refer a dispute to an arbitrator, the arbitrator's decision is supposed to reflect and be based upon the reasons put forward by the disputing parties. In large-scale social disagreements, the law functions in a similar manner; it embodies reasons that citizens have independently of there being law.
35. Waldron (1999), p. 100.
36. We probably need a name for this position, to distinguish it from the usual "zealous advocacy within the bounds of the law" version of the dominant view articulated by Pepper, Fried, Monroe Freedman, and others. Perhaps 'authority conception'?
37. I am grateful to Greg Cooper for this point.
38. John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 1971), § 68.
39. William N. Eskridge, "The Circumstances of Politics and the Application of Statutes," *Columbia Law Review* 100 (2000): 558.
40. *McBoyle v. United States*, 283 U.S. 25 (1931).
41. *Bailey v. United States*, 516 U.S. 137 (1995).
42. Grant Gilmore, *The Ages of American Law* (New Haven, CT: Yale University Press, 1977), 111.

RECENT ARTICLES OF INTEREST

—ABSTRACTS—

Edna Ullmann-Margalit and Cass R. Sunstein. "Inequality and Indignation," 30 *Philosophy and Public Affairs* 337-362 (2001).

"In this article we use some simple tools from game theory and behavioral economics to cast light on the maintenance and disruption of unequal relationships through private action and through law." The authors of this article deal with the following type of situation. In social life there are many inequalities, states of affairs in which some are advantaged and others, often a larger number, are disadvantaged. Not surprisingly, some (though not all) of these inequalities are regarded as unjust and produce indignation among the disadvantaged. Nevertheless, such inequalities often persist because altering the status quo would be harmful to both the advantaged and the disadvantaged, and both sides know it (in game theoretical terms, the status quo is an equilibrium). Yet despite this, people are sometimes willing to accept losses in the effort to alter the status quo, and a credible threat of such a disruption can lead to an alteration. The aim of Ullmann-Margalit's and Sunstein's article is to make a case for each of the foregoing claims and to show that law can play a role, on either side, in entrenching or altering relative advantages.

The authors review empirical evidence suggesting that indignation often leads the disadvantaged to risk their material