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5. Razian Authority and its Implications for Legal Ethics

W Bradley Wendel*

The question considered in this session is whether the concern of legal ethics is the morality of law, the morality of clients, or the morality of lawyers. The response I have been pursuing, in my recent book and elsewhere,⁵¹ is that all of these moral concerns are tied together in the lawyer's role. The morality of law, clients and lawyers are interrelated, but the political perspective is primary. The law serves a political purpose, of making public life possible despite first-order moral pluralism. When people disagree, either at the level of moral principles or over the facts that bear on the resolution of some issue, they can resolve their disagreement by force, deception or coercion; by an ongoing process of debate (as deliberative democrats recommend); or by using some kind of procedural mechanism to establish a collective resolution of the problem, which supersedes the considerations over which there was disagreement. Public life in a liberal democracy is largely structured by the framework of legal norms and institutions that enables citizens to coexist and cooperate, despite their disagreements. Of course, there are many considerations apart from law to which people refer in their dealings with one another. To the extent that the *lawyer's* role has any normative significance, however, its significance is bound up with the law's function of settling moral and empirical conflict.

The concept that knits the concerns of morality and public life together is political authority. Two other concepts, legitimacy and obligation, play a role in this analysis, so it is important to first show how they are related.⁵² Although there can be theoretical authorities who alter the reasons one has for believing something, for our purposes we are concerned with practical authorities, who give reasons that serve as premises in practical inferences.⁵³ That an authority has said 'do such-and-such', or 'don't do such-and-such', is a reason for the subject of authority. In this way, the authority has normative power over its subject. Significantly, the directive of an authority is a second-order reason—that is, a reason to act, or not to act, on other reasons.⁵⁴ It excludes reference to one's judgment of the merits of the case for acting. To accept a directive as authoritative means to treat it not as another reason to be factored into the balance of first-order reasons that bear on decision-making, but to regard it as pre-empting that kind of decision-making process altogether.⁵⁵ Why on earth

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⁵¹ See Wendel (n 50) 86–121 (ch 3: 'From Neutrality to Public Reason Moral Conflict and the Law').

⁵² For a helpful overview and clarification of these concepts, see Tom Christiano, 'Authority', *Stanford Encyclopedia of Philosophy* (2004), <http://plato.stanford.edu/entries/authority>. Legal theorists tend to run them all together in practice. See eg Dworkin (n 10) 191. Dworkin argues that '[a] state is legitimate if its constitutional structure and practices are such that its citizens have a general obligation to obey political decisions that purport to impose duties on them'.

⁵³ Joseph Raz, *The Authority of Law* (Oxford University Press, 1979) 10.

⁵⁴ *Ibid*, 17.

⁵⁵ *Ibid*, 27.

should anyone accept an authoritative directive as exclusionary? It would indeed be irrational to follow the commands of an authority unless the authority were legitimate.⁵⁶ A legitimate directive, however, is issued by an authority with the right to rule. This right correlates with duties on the part of the subject. These can be strong duties, such as the obligation of obedience, or something weaker, such as a duty of non-interference or to respect the law.

Joseph Raz has argued that the normal way of justifying authority—that is, establishing that it is legitimate—is to establish that following authority is likely to enable the subject to do better at complying with the reasons that would have applied to her anyway.⁵⁷ There is a deep connection between legitimacy and democracy, because Raz also argues that the primary function of political authorities is to serve the governed.⁵⁸ In a liberal democracy, legitimacy requires that government authorities issue directives that are rooted in considerations that may be endorsed by all affected citizens, as free and equal co-participants in governance.⁵⁹ I have argued that, in a liberal society, these considerations are the fact of reasonable pluralism, disagreement that cannot be settled by reasoning alone, and the need to settle on a basis for mutually beneficial cooperation. I have referred to this as a coordination problem, but it is not coordination in the game-theoretic sense (in which the substance of the solution is a matter of indifference, and it is important only that one solution be found and that it be exclusive of others). Rather, I mean to invoke the sense of the coordination as used by John Finnis, who argues that all individuals have an obligation to comply with the demands of morality, but that coordinating compliance with the demands of morality *in communities* necessarily requires an authority.⁶⁰ He puts the dilemma starkly: ‘There must be either unanimity, or authority. There are no other possibilities.’⁶¹ (There is another possibility, namely chaos, but then there would not be a stable community.) If reason alone is insufficient to secure unanimity, and I believe it is,⁶² then the only possibility for citizens who are bound to comply with the requirements of morality in a community is to follow the directives of an authority. For the purposes of legal ethics, the relevant reasons for lawyers are given not by ordinary morality, but by the law.

On the Razian conception of authority, the directives of an authority are based on reasons that apply in any event to its subjects. They sum up and replace the so-called dependent reasons that would have been taken into account by subjects, but it is not for the subjects of authority to reconsider whether the authority has correctly reflected these dependent reasons.⁶³ The directives of authority give content-independent reasons for action. Reasons that could have been relied upon before the authority issued its directive are

⁵⁶ See generally A John Simmons, *Political Philosophy* (Oxford University Press, 2008) 40–45; Joseph Raz, *Ethics in the Public Domain: Essay in the Morality of Law and Politics* (Clarendon, 1994) 212 (ch 10: ‘Authority, Law, and Morality’).

⁵⁷ Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986) 53.

⁵⁸ *Ibid.*, 56.

⁵⁹ John Rawls, *Political Liberalism* (Columbia University Press, 1993) 393 (in ‘Reply to Habermas’).

⁶⁰ John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980) 246.

⁶¹ *Ibid.*, 232.

⁶² For reasons well summed up by Rawls’s burdens of judgment or Waldron’s circumstances of politics. See Rawls (n 59) 54–58; Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 101–2.

⁶³ Raz (n 57) 47.

making goes on at several levels of remove from citizen input. Administrative agency regulations, for example, are often the product of intensive lobbying by affected industries, but ordinary people whose interests may be profoundly affected have little effective input into the process of drafting regulations. The more we consider the reality of the law-making process, keeping in mind Bismarck's dictum about laws and sausages,⁷⁰ the weaker the case appears to be for authority along the lines of Raz's normal justification thesis.

A great deal depends on how we understand the idea of 'taking into account' dependent reasons. I have argued for a thin procedural conception of legitimacy, in which the necessary democratic justification is supplied by political institutions and procedures that enable affected citizens to do tolerably well at making their views known and having their positions considered as an input into the ultimate settlement of a controversy.⁷¹ The resolution of disagreement must acknowledge citizens as free and equal, in that everyone is able to do the best she can hope to, by way of influencing the substance of laws. This is not a very demanding criterion in practice, however, because 'the best one can hope to do' is not much in a society of 275 million people. All of us are affected in some way by the myriad federal and state statutes and administrative agency regulations promulgated every day, to say nothing of common-law decisions, local ordinances, and enforcement decisions made by police officers and other officials. We may care deeply about the substance of some of these laws, but even in the case of a maximally motivated citizen, very few are able to do more than vote, write letters to legislators, donate to political campaigns, join interest groups, write blog postings, demonstrate, or maybe appear at a town hall meeting. It seems too strong to deny authority to laws that are enacted without every affected citizen being able to participate in the enactment process in a fuller way.⁷² If the necessary conditions for authority are too strong, then it is hard to see which laws enacted through the democratic process could possibly be legitimate. I had no direct or indirect input into the new health care reform legislation in the US, nor the enhanced regulation of the financial services industry, but I assume I have an obligation to comply with them, to the extent they affect me. Note that although the procedural standard for legitimacy need only be satisfied, it may suggest improvements in procedures to make them more responsive. Perhaps reforming campaign finance, or invigorating the press corps, are recommended. Even if these steps would be desirable, however, they should not be deemed *necessary* to the legitimacy of resulting laws.⁷³

⁷⁰ The saying that 'laws are like sausages—it is best not to see them being made' is often attributed to Bismarck.

⁷¹ Wendel (n 50) 98.

⁷² One of my colleagues related that his nine-year-old son was quite troubled that the federal government's 'cash for clunkers' program, which sought to take old, fuel-inefficient cars off the road, had a profoundly deleterious effect on the supply of old beat-up cars available to participate in the annual demolition derby at our local fair. My colleague's son was particularly upset that no one in the government took the interests of demolition derby fans into account when deliberating about the program. This is obviously a silly example, but it does illustrate that many laws have wide-ranging effects, and taking into account the position of all affected citizens would be such a cumbersome process that it would be impossible to regulate many activities.

⁷³ This may be a kind of reflective equilibrium argument, in that it begins with the assumption that most citizens regard most democratically enacted laws as legitimate, and thus any theory of legitimacy that states necessary conditions which would exclude these laws must be mistaken.

The position I am defending here is one in which the reasons for lawyers to act are given by the law, not considerations of justice or ordinary morality. In a classic book by Mortimer and Sanford Kadish, this distinction is expressed in terms of propositions of merit and propositions of appropriateness.⁷⁴ One feature that I object to in most theoretical legal ethics scholarship is the presumption that fully justifying one's action as a lawyer, acting in a representative capacity, is a matter of merit, with considerations of appropriateness either obscured or collapsed into considerations of merit. Kadish and Kadish note that, in some social roles, it is appropriate for an actor to have recourse to the end the role is designed to accomplish. More specifically, 'recourse roles' are those in which an actor may permissibly conclude that she is permitted to depart from the obligations of the role because following the obligations of the role will result in a deviation from the role's prescribed ends.⁷⁵ This is really the heart of Bill Simon's argument for the Contextual View.⁷⁶ The role of the lawyer is defined in terms of the end of ensuring that the legal rights of citizens are determined with reference to considerations of justice. If something a lawyer does, in accordance with the obligations of her role, would result in injustice, then the lawyer should be permitted to depart from these obligations in the service of the end of the role. Notice, however, that everything here turns on the assumptions one makes about the prescribed ends of the role. Granting the Kadishes' conception of recourse roles, one is justified in disregarding the actions required by a role only where those actions would subvert the ends of the role. For Simon, the purpose for which the role of lawyer is constituted is obtaining substantial (moral) justice. On that conception of the role's purpose, fairly frequent opting-out might be expected, since there are many actions required by the lawyer's role that serve procedural, not substantive justice, or which protect the client's interests without necessarily resulting in justice from some impartial point of view.

If, on the other hand, the ends of the role are understood differently, lawyers will be less frequently justified in disregarding the obligations of the role. The conception of the lawyer's role defended here draws from the way Finnis understands the authority of law, deriving as it does from the demand that all moral agents engage in practical reasoning about the relationship between their own well-being and the well-being of others.⁷⁷ Although people can agree on the importance of certain basic values at a high level of generality, everyone must determine what these moral values mean in terms of concrete, practical action. One's reasoning about the demands of morality must be coordinated with that of others; without this coordination, we cannot be said to be acting in a community.⁷⁸ Acting in communities with others, when one's actions affect the interests of others, necessarily requires thinking about what morality demands while also being sensitive to the possibility that others might disagree with one's specification of concrete principles for action, and how completing

⁷⁴ Kadish and Kadish (n 66) 7–12.

⁷⁵ *Ibid*, 29, 35.

⁷⁶ Simon (n 4).

⁷⁷ Finnis (n 60) 134.

⁷⁸ *Ibid*, 147–50.

principles should be weighted and prioritised. The role of the law, on this version of a social contract theory of obligation, is coordination, in the thicker sense of coordinating with others one's own obligation to reason about the demands of morality in a political community.⁷⁹ If this is the end of the legal system, then one important end of the role of lawyer is to facilitate this coordination, by advising clients and acting on their behalf with respect to the legal entitlements that have been established in the name of the political community. Understanding this role as a recourse role shows that lawyers are very seldom justified in acting on the basis of what they take to be the substantive justice of a situation, because substantive justice is one of the things people disagree about.

Obviously one may not accept my characterisation of the ends of the legal system and the role of lawyer, but the virtue of the recourse role approach is that it focuses analysis of what lawyers should do in particular cases on the ends of the role, rather than the rights and wrongs of actions in ordinary moral terms. Returning to the Alberta suicide example, there are reasons one might favour a rule requiring lawyers to disclose credible threats of suicide, but there are also reasons one might prefer a strict confidentiality norm with no permission or requirement to disclose. I have argued that whatever rule of professional conduct is adopted by a state court (in the United States) or a provincial law society (in Canada) ought to have authority for lawyers, notwithstanding an individual lawyer's belief that the result in some cases would be unjust.⁸⁰ The rule is legitimate as long as it is adopted using tolerably fair procedures which permit affected parties to have some voice in the law-making process, as is generally the case with respect to professional disciplinary rules. Citizens whose views are not reflected in the final settlement will inevitably complain that the process was defective, but all that is required is that the procedures be good enough, under the circumstances.⁸¹ There is still an obligation to comply with unjust laws, and those laws enacted by imperfect procedures. The law's function is to supersede disagreement about which procedures are good enough and what rights and obligations citizens ought to have. It could not fulfil this function if the professionals who administer it were permitted to act on the basis of reasons that were superseded by the law. Thus, the recourse role conception of the lawyer's obligation does not permit departure from the norms of the role. Whatever is required in the suicide example—disclosure or non-disclosure, depending on the state or province—remains an obligation despite the lawyer's belief that it is wrong.

This is really a defence of the principle of majority rule, and much of the criticism of this position can be understood as concern about the situation of 'discrete and insular minorities', as American constitutional lawyers would put it. The argument for thin procedural criteria of legitimacy is, essentially, that this is the best we can do. Rawls notes that hypothetical consent to a constitution which embodies the principle of majority rule would be based on three considerations: (1) among the limited set of alternatives that have any

⁷⁹ *Ibid*, 246–8.

⁸⁰ Wendel (n 50) § 3.2.2.

⁸¹ John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 353.

chance of being accepted by the contracting parties, there is none that would always yield results with which one agrees; (2) consent to some procedure is preferable to no agreement at all; and (3) it is likely that, in the long run, the burden of injustice is more or less evenly distributed over different groups in society.⁸² It is tempting to set up a conception of recourse roles so that a legal norm would not be legitimate (and thus would create obligations for lawyers) if it appears to create greater injustice for a less powerful group in society. As Rawls argues, we would not deem legitimate a legal system which recognised ‘slavery and serfdom, religious persecution, the subjection of the working class, the oppression of women, and the unlimited accumulation of vast fortunes’.⁸³ As I have argued, however, the American legal system accepts many instances of what one might characterise as the subjection of the working class (laws that make union organising highly burdensome, for example), religious persecution (the Supreme Court’s prohibition on prayer in public schools, as seen through the eyes of some religious fundamentalists), the oppression of women (for instance, the legal permissibility of much pornography), and the accumulation of vast fortunes (protected by the relatively low progressivity of our tax system). Moreover, there may be some entrenched political minorities who would use to their unfair advantage any opportunity they had to challenge as unjust a law enacted by a political majority.⁸⁴ Depending on one’s position on the left-right political spectrum, one may believe that in the United States, for example, evangelical Christians, corporations, teachers’ unions, people of colour, or GLBT citizens enjoy ‘special rights’ that are too easily asserted against the interests of electoral majorities.⁸⁵ The reason to favour thin criteria of legitimacy is that, due to reasonable moral pluralism, there may be reasonable positions on both sides of a dispute. As against the claim, for example, that the legal permissibility of pornography contributes to the oppression of women, there is a long history in the United States at least, of judicial decisions protecting unpopular, even reprehensible expression for reasons relating to distrust of state power and

⁸² *Ibid.*, 354–5.

⁸³ Rawls, ‘Reply to Habermas’ (n 59) 431.

⁸⁴ Rawls (n 81) 357.

⁸⁵ In other words, minority status is itself a contestable concept. Richard Abel provides a nice example in his history of the reform of the regulation of the Law Society of England and Wales. A candidate for the presidency appealed to the fears of the dominant group in the profession:

[The candidate] inverted the roles of oppressor and victim through typical Orwellian double-speak. Christians, not homosexuals, were being ‘treated with contempt’; prohibiting discrimination against homosexuals was ‘special legislation’, the ‘high watermark of bigotry’, which failed to recognize the ‘right of conscientious objection’. Homosexuals pretended to be a ‘beleaguered’ ‘weak, oppressed minority’ in order to win sympathy but actually had the ‘power and influence’ to make the Metropolitan Police adopt ‘a more “user friendly” approach to ‘gays importuning in public lavatories’.

Richard L Abel, *English Lawyers Between Market and State: The Politics of Professionalism* (Oxford University Press, 2003) 157. Abel’s use of the adjective ‘Orwellian’ shows that he thinks this is a bogus appeal to minority status, but a very similar style of discourse in the United States around the issue of same-sex marriage appears to reflect a sincerely held belief on the part of many conservatives that they are the beleaguered minority. In any event, it would be impossible to use dialogue alone when participants engage in a debate from such incompatible perspectives.

official orthodoxies of belief.⁸⁶ We should be very hesitant to proclaim a law illegitimate because it appears unjust by our lights. In the domain of politics, a citizen must think of her 'own uncompromising convictions about justice as just one set of convictions among others' and be 'willing to address, in a relatively impartial way, the question of what is to be done about the fact that people like [herself] disagree with others in the society about justice'.⁸⁷

There may be circumstances under which these conditions do not hold. Pervasive failure of the legal system to recognise political liberties, such as free speech and assembly, may render laws illegitimate.⁸⁸ One should be very hesitant, however, to permit a lawyer to regard laws as non-obligatory merely because the lawyer believes (sincerely and in good faith) that they are unjust. Many laws are unjust from the point of view of affected citizens, but this does not mean they are illegitimate. Perhaps the position defended here is cynical. In an ideal political system, citizens, legislators, judges and lawyers could be expected to adopt a public-minded point of view, pursue impartial justice, and not simply pursue their own interests.⁸⁹ But, I do not necessarily think that it is cynical to believe that well-intentioned citizens will disagree about what justice requires. Even those of my fellow citizens with whom I disagree most strongly (say, those who believe that extending the Bush tax cuts on the wealthiest 1 per cent of American families is a good idea) may be motivated by sincerely-held beliefs concerning the functioning of markets, distributive justice, and property rights. It seems to me that the role of lawyer must be defined and regulated in terms of fidelity to enacted, positive law, not to the underlying principles of justice that are superseded by the law. Otherwise, there is no way out of the endless disagreement that characterises public life in a pluralist society.

It should be emphasised, in closing, that this is an account of the ethics of lawyers in a basically just society. Some critics of this approach may find it alienating or dehumanising that a person, a moral agent, is turned into the instrumentality of something abstract and disembodied like 'the law' or 'the state'. That reaction may be due, in part, to the horrors of the twentieth century, when people too easily became agents of collective atrocities and enabled them by simply continuing to do their jobs. Consider figures like Adolf Eichmann, or Maurice Papon, a former Vichy official convicted of complicity in crimes against humanity for signing papers ordering the deportation of French Jews.⁹⁰ A person fulfilling

⁸⁶ For cases protecting insulting or offensive speech, see eg *RAV v City of St Paul*, 505 US 377 (1992) (cross burning); *Texas v Johnson*, 491 US 397 (1989) (flag burning); *Hustler Magazine v Falwell*, 485 US 46 (1988) (offensive parody ad); *Cohen v California*, 403 US 15 (1971) (jacket bearing the words 'fuck the draft'). Cases distinguishing obscenity from protected sexually explicit expression include *Renton v Playtime Theatres*, 475 US 41 (1986); *Young v American Mini Theatres*, 427 US 50 (1976). There are, of course, myriad exceptions for things like 'fighting words', *Chaplinsky v New Hampshire*, 315 US 568 (1942); speech that is likely to be overheard by children, *FCC v Pacifica Foundation*, 438 US 726 (1978) (George Carlin's 'seven dirty words' routine); and some expressive conduct, eg *Barnes v Glen Theatre, Inc.*, 501 US 560 (1991) (nude dancing); *United States v O'Brien*, 391 US 367 (1968) (burning draft card).

⁸⁷ Waldron (n 62) 160.

⁸⁸ Rawls (n 81) 356.

⁸⁹ *Ibid.*, 360.

⁹⁰ See Adam Gopnik, *Paris to the Moon* (Random House, 2000) 106–22 (chapter entitled 'Papon's Paper Trail').

pre-empted or excluded from the deliberation of subjects, and can no longer be relied upon.⁶⁴ The reason for precluding reconsideration is that the benefit of having an authority would be lost if subjects were permitted to go back and re-open the controversy that the authority was meant to settle. This conception of authority puts some normative pressure on the process by which disagreements are resolved. If a would-be authority purported to establish norms for the guidance of its subjects by throwing darts at a dartboard, or by taking bribes, then its directives would be based not on dependent reasons, but on whim or corruption. Critics of this account of authority, or at least my appropriation of it for legal ethics,⁶⁵ have argued that the mere fact of something's being a law is no assurance that it satisfies the normal justification thesis. In particular, we have no reason to believe that the law-making process has taken due account of dependent reasons.⁶⁶

One of the subjects discussed incidentally by the panel was an Alberta rule of professional conduct requiring lawyers to report credible threats by their clients to commit suicide. Most of the panelists were willing to grant the authority of this rule, for the reasons given in the American Restatement of the Law Governing Lawyers:

Typically, such rules [of professional conduct for lawyers] are formulated on the basis of extensive consideration of what conduct is practical and desirable for lawyers, including consultation involving the bench and bar and comparison with similar standards adopted in other jurisdictions.⁶⁷

Our Alberta lawyer panelist assured us that this description was accurate regarding the process of adopting the suicide rule.⁶⁸ But is it really a necessary condition of legitimacy that a law be adopted only after extensive consultation with all those who would be affected? The process behind the enactment of many laws does not satisfy the idealised picture of engaged, open debate. Provisions are tucked away in the final draft of gargantuan bills exceeding 1,000 pages in length as a favour to special interest groups, and in these cases it is likely that other legislators never even knew of the existence of the language in question, let alone had a chance to debate about it.⁶⁹ Even in the absence of any kind of skulduggery, much law-

⁶⁴ Raz, 'Authority, Law, and Morality' in *Ethics in the Public Domain* (n 56) 213.

⁶⁵ Bill Simon raised this objection in the panel discussion.

⁶⁶ This discussion presupposes that lawyers and citizens have adequate reasons to justify their actions in legal terms. See Mortimer R Kadish and Sanford H Kadish, *Discretion to Disobey: A Study of Lawful Departures from Legal Rules* (Stanford University Press, 1973) 4. Kadish and Kadish consider that 'why, or whether, a person ought to seek to justify his actions before the law is a very different question from how he is to justify his actions before the law'. I have argued elsewhere that justifying one's actions in legal terms is a way of showing respect for one's fellow citizens, and I will not repeat that argument here: see also Wendel (n 50).

⁶⁷ Restatement (Third) of the Law Governing Lawyers, § 52, cmt (considering the admissibility of rules of professional conduct to show breach of the standard of care in a civil action for damages).

⁶⁸ See also Ted Schneyer, 'Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct' (1989) 14 *Law & Society Inquiry* 677. Schneyer describes the law-making process in this case as involving 'the most sustained and democratic debate about professional ethics in the history of the American bar'.

⁶⁹ A notorious example, of which most people are aware only because of the role of credit-default swaps in the financial industry meltdown, is legislation introduced by Senator Phil Gramm to ensure that CDSs were treated neither as financial derivatives nor as insurance contracts by regulators. See eg Eric Lipton and Stephen Labaton, 'Deregulator Looks Back, Unswayed' *New York Times*, 16 November 2008, A1.

a social role can also be ‘the instrument by which the French state casually delivered children to their murderer’.⁹¹ Lawyers can be the instrument of great evil as well as participating in the system that contributes to social solidarity. I would never deny the truth of this observation, yet would contend that little follows from it, in terms of understanding the normative significance of the legal profession as it exists in modern, essentially just societies like the United Kingdom, Canada, Australia, New Zealand, and even the United States. As Larry Alexander and Fred Schauer have pointed out, ‘[t]o design a system of authority around *Dred Scott* (or Nuremberg), rather than around the views of contemporary politicians about abortion or school prayer, is to make a decision-theoretic choice that is far from obvious’.⁹² This is not a denial of the possibility of grave injustice, even evil, that is accomplished through the willing participation of agents acting in social roles. When a role enables someone to become the instrumentality of evil, none of the authority claims defended here hold. The important word, however, is ‘evil’, not merely the sort of ordinary injustice that may be expected even in an otherwise just political order. The discussion among the panelists in this session concerns injustice, not evil, and the ethics of lawyers in those cases is appropriately oriented toward the settlement and coordination function of the law.

⁹¹ *Ibid*, 111.

⁹² Larry Alexander and Frederick Schauer, ‘On Extrajudicial Constitutional Interpretation’ (1997) 110 *Harvard Law Review* 1359, 1383.