

Spring 2001

Morality, Motivation, and the Professionalism Movement

W. B. Wendel

Washington and Lee University

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

W. Bradley Wendel, Morality, Motivation, and the Professionalism Movement, 52 S. C. L. Rev. 557 (2001).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

MORALITY, MOTIVATION, AND THE PROFESSIONALISM MOVEMENT

W. BRADLEY WENDEL*

I. INTRODUCTION	557
II. AMBIGUITIES OF PROFESSIONALISM	560
A. <i>Oligopoly</i>	561
B. <i>Technique</i>	563
C. <i>Altruism</i>	568
D. <i>Etiquette</i>	571
E. <i>Aspiration</i>	574
F. <i>Social Values</i>	576
III. THE SKEPTICAL CHALLENGE TO ETHICS EDUCATION	578
IV. RESPONSES TO POSNER AND GLAUCON	586
A. <i>Non-Prudentialism</i>	587
1. <i>What We Care About</i>	587
2. <i>Internalism</i>	592
B. <i>Ducking the Question: Morality and Prudence</i>	597
V. IMPLICATIONS FOR LEGAL PROFESSIONALISM	599
A. <i>Meaningful Work</i>	599
B. <i>"They're Kids . . . Scare Them": A Limited Role for Prudentialism</i>	602
V. CONCLUSION	608
I. INTRODUCTION	

The professionalism movement aims to improve the conduct or, more controversially, the moral character of lawyers. It also incidentally seeks to bolster the public image of lawyers, either to ward off additional regulation by non-professionals or simply to make the practice of law more satisfying. This conference is focused specifically on the effectiveness of commissions, centers,

* Assistant Professor of Law, Washington and Lee University. I am grateful to conference organizers Roy Stuckey and Deborah Rhode for their invitation to *The National Conference on Enhancing the Professionalism of Lawyers*, and to Deborah Rhode and Jack Sammons for their thoughtful comments.

and committees in responding to the perceived crisis in professionalism. In this paper, I want to ask a similar question at a higher level of abstraction. The proposals made by reformers, whether they modify law school curricula, expand mandatory continuing legal education, or promulgate professionalism creeds and oaths, all share a foundational premise: Lawyers can be motivated through education to act rightly, even if it is contrary to their self-interest to do so. The validity of this premise has been under sustained attack, however, throughout much of the history of moral philosophy and more recently in the Holmes Lectures delivered by Judge Richard Posner.¹ In the domain of professional ethics, critics have pointed to several conditions that discourage ethical conduct: the changing structure of the legal profession, the rise of multi-state and multi-disciplinary law practices, the pressure of billable hours, and the specialization of law practice.² Posner and the structural critics make essentially the same claim: Instruction in matters of ethics is insufficient to motivate a lawyer to act against her self-interest.

The critics argue that something else is necessary for motivation: the threat of legal sanctions, informal penalties imposed by a social or occupational group (such as retaliation, ostracism, gossip, or other forms of public disapproval),³ or the realignment of incentives to bring ethical precepts into line with the lawyer's self-interest. It is time for scholarship on legal ethics and professionalism to face this argument squarely, particularly in the discussion of the effectiveness of professionalism programs and centers. Unfortunately, even the best writing in professional ethics tends to assume that figuring out the answer to some ethical dilemma is the end of the task and that lawyers will be properly motivated to act rightly once the solution to a problem has been clarified.⁴ For example, William Simon, a leading academic legal ethicist, "takes for granted that lawyers are substantially motivated to act ethically."⁵ This assumption might be borne out, but it must be demonstrated, not assumed as an axiom. I hope to illuminate the connection between ethical knowledge and motivation by drawing from the sizeable literature on value theory and reasons for action within academic moral philosophy. My claim is not that lawyers must become applied philosophers, but that educators of lawyers can

1. Richard A. Posner, *1997 Oliver Wendell Holmes Lectures: The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1664-68 (1998) [hereinafter Posner, *Lectures*].

2. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 4 (1993); DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 915-20 (1999).

3. See Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. (forthcoming 2001).

4. For a noteworthy exception, see Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273 (1998).

5. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1144 (1988). This position may be called an error thesis, insofar as it implies that acting unethically can be attributed to the agent's being wrong about what she ought to do in the circumstances. See J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 35 (1977).

take comfort from this body of scholarship, for the picture is not as bleak as Posner and other critics of ethics education suggest.⁶

Reasons for action certainly can refer to interests, desires, or attachments of the agent, but they are not all reducible to self-interest. A person may care a great deal about family members; friends; a nation or culture; religion; artistic or intellectual achievement; an ideology or cause such as socialism, feminism, the labor movement, or the eradication of poverty; or abstract ideals like justice, liberty, or benevolence. Personal commitments matter to us because they are valuable, not merely because we choose them as objects of our desire. In that way, they are not equivalent to arbitrarily-given preferences, such as a taste for rum-raisin ice cream. Instead, they are values whose source is external to us, in which we are invested, in the strong sense of being moved by them in our lives.⁷ My claim is that many, if not most lawyers, are drawn to their work by a perception of overlap between their personal commitments and ideals to which the legal profession is dedicated. To the extent there is motivational force to professional ethics, it derives from these shared values.⁸ Of course, there may be lawyers who share none of the value commitments of the legal profession; for these lawyers, coercion may be the only effective motivation for action. But I believe (and hope) that few lawyers are truly motivated solely by making money. If this claim is borne out, arguments in legal ethics are not doomed to irrelevance, as Posner contends.⁹

Before discussing motivation, Part II takes a brief look at several definitions of “professionalism” that have been offered. This symposium is aimed at assessing the effectiveness of various means for improving lawyer professionalism, so it is necessary to clarify some conceptual uncertainties before proceeding with the central task of the conference. Following the discussion of professionalism, Part III summarizes Posner’s challenge to ethics education and relates it to some classic debates in moral philosophy. The argumentative heart of the paper is in Part IV, which explains the connection between reasons for action and ethical knowledge. Finally, Part V relates this argument specifically to the legal profession.

6. See *infra* Part III.

7. Compare the term “moral sources” as it is used in CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 91-107 (1989) (defining the good as a moral source “in a highly general sense, designating anything considered valuable, worthy, admirable, of whatever kind of category”).

8. The growing scholarship on lawyers’ dissatisfaction with their jobs reveals that a significant source of this unhappiness is the disjunction between lawyers’ value commitments and their day-to-day activities. See *infra* note 236.

9. See *infra* notes 137-45 and accompanying text.

II. AMBIGUITIES OF PROFESSIONALISM

The inability of those who criticize the state of the legal profession to agree on the definition of the word “professionalism”¹⁰ considerably muddies the debate over whether education about professionalism can have any motivational force. Thus, it is never especially clear what should be done about the supposed crisis or whether suggested reforms are likely to be successful. One of the more embarrassing failures to clearly define terms comes from the American Bar Association’s Professionalism Committee, which adopts this definition of a professional lawyer: “A professional lawyer is an expert in law pursuing a learned art in service to clients and *in the spirit of public service*; and engaging in these pursuits as part of a common calling to promote justice and the public good.”¹¹ The ABA’s analysis is hopelessly circular because of the key phrase “in the spirit of public service.” “Public service” is defined by the committee as follows: “A lawyer representing individual clients and zealously advocating their interests *in a professional manner* is engaged in public service.”¹² Since “professional” or “in a professional manner” was the term for which we were seeking a definition in the first place, the ABA’s report begs the question. The circularity is not merely semantic because the appropriate balance between service to clients and public service is highly contestable; a conception of professionalism must provide guidance for lawyers who are struggling with this conflict of duties.

In this Part, therefore, I will attempt to identify a definition of professionalism by considering some of the claims that critics have made about the declining state of this value among American lawyers. Taken together, these polemics demonstrate not only that professionalism is susceptible of a wide range of definitions (a fairly unremarkable point), but also that the professionalism critique proceeds from a diversity of normative standpoints. Each one of these conceptions posits a different balance between the principle of service to clients and the spirit of public service. In other words, there are multiple visions of good lawyering with some currency among lawyers, judges, and professors, and one’s reaction to any given proposal to improve lawyer

10. See VINCENT LUIZZI, A CASE FOR LEGAL ETHICS: LEGAL ETHICS AS A SOURCE FOR A UNIVERSAL ETHIC 67-107 (1993) (reviewing and criticizing numerous definitions of professionalism).

11. A.B.A. SECTION ON LEGAL EDUC. AND ADMISSION TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM 6 (1996) [hereinafter TEACHING AND LEARNING PROFESSIONALISM] (emphasis added). This definition is borrowed from Roscoe Pound. See ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953) (stating that a profession is characterized by “pursuing a learned art as a common calling in the spirit of public service”).

12. TEACHING AND LEARNING PROFESSIONALISM, *supra* note 11, at 6 n.22 (emphasis added).

professionalism depends critically on which of these visions one subscribes to.¹³

A. Oligopoly

One group of critics emphasizes the Weberian conception of a profession as a tightly controlled guild or cartel and attacks the legal profession for erecting barriers to entry to lower-cost competitors or for excluding others in society from its ranks.¹⁴ On this account, the coveted label "profession" allows its members to exclude competitors and elevate their social status, and it reduces pressure on the occupation to lower its fees or otherwise make its services more broadly available. It also obviates external regulation of the occupational group, such as legislation or oversight by an administrative agency.¹⁵ In order to maintain guild status, relatively free of government regulation, an occupational group must convince the public that it possesses specialized knowledge that may be used for socially desirable ends. Professionals may use a variety of strategies to maintain the public's respect, such as employing mystifying styles of language and imposing onerous education and licensing requirements (such as bar examinations) as conditions for entry into the profession.¹⁶

Those within the profession who implicitly accept the guild structure may fulminate against what they perceive as occasional bad apples who tarnish the reputation of the profession and bring about pressure for increased regulation by non-professionals.¹⁷ Correspondingly, critics can explain the emphasis

13. See Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 268 (1995) (arguing that professionalism is not a monolithic concept and that many different justifiable visions of ethical lawyering coexist in the American legal tradition).

14. See, e.g., RICHARD L. ABEL, *AMERICAN LAWYERS* 17-30 (1989); RICHARD A. POSNER, *OVERCOMING LAW* 39-60 (1995) [hereinafter POSNER, *OVERCOMING LAW*] (discussing the rise of the legal profession's cartel and how it allows firms to increase prices above competitive levels); RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 185 (1999) [hereinafter POSNER, *PROBLEMATICS*] (stating one key to the law maintaining its professional mystique is to limit outside competition and minimize inside competition); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 687 (1981) (noting "[l]awyers are . . . partisans in the class conflict that capitalism generates and cannot resolve, and virtually all lawyers are enlisted on the side of capital"); RHODE, *supra* note 2, at 209-10 (advocating less restrictive approaches to licensing lawyers and paraprofessionals who provide legal services to underserved segments of the public).

15. See, e.g., WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 134 (1998) ("Hurst and Hart argued that when business lawyers failed to curb their clients abuses, government typically responded with regulatory constraints. Of course, the more likely this response, the more the argument for responsibility shaded into the argument for long-run self-interest.").

16. POSNER, *PROBLEMATICS*, *supra* note 14, at 186-88; cf. STANLEY FISH, *Anti-Professionalism, in DOING WHAT COMES NATURALLY* 215 (1989) (stating that anti-professionals claim professions lose sight of what is true, valuable, or socially useful).

17. See, e.g., MODEL CODE OF PROF'L RESPONSIBILITY Preamble (1980) ("[I]t is the desire for the respect and confidence . . . of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct."); RHODE, *supra* note 2, at 5

professional ideology places on self-regulation and governance through codes of ethics as a public-relations ploy to blunt the attacks of those who seek to expose the guild system as an illegitimate restraint on the provision of legal services. We reasonably may be suspicious of a group that claims to place itself beyond the reach of moral criticism by promulgating rules for its own governance. Critics who focus on the oligopolistic tendencies of professions also advocate reforms, such as increased pro bono work by lawyers,¹⁸ a broader range of alternative dispute resolution procedures,¹⁹ or relaxed licensing requirements, depending on other ideological commitments, such as their relative degree of confidence in the free market.²⁰ Of course these reforms may also be criticized as bad-faith attempts to perpetuate the process of mystification by “concealing the self-interested character of efforts to limit competition.”²¹

Although the oligopoly explanation accounts for some observed features of the legal profession, it is difficult to square with the loss of market control experienced by lawyers over the past ten or twenty years.²² It also does not take into account the decreasing role of the organized bar, relative to courts and legislatures, in regulating the profession.²³ Although no lawyer wishes to be disciplined, there are a great many practical situations in which running afoul of the disciplinary codes should be the least of the actor’s worries. In addition

(reporting belief by New York bar leaders that the misdeeds of a few lawyers attract disproportionate public attention); Diana Huffman, *Ethics Review Needed to Polish Public Image of Bar*, LEGAL TIMES, Jan. 31, 1983, at 9 (illustrating publicized ethical violations by lawyers and their impact on the public’s perception, and urging the bar to treat ethical issues more seriously). Many reforms, such as the prohibition on direct-mail solicitation of accident victims, have been motivated by the bar’s anxiety about the public’s perception of lawyers. See *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 626-29 (1995) (upholding such a regulation).

18. See, e.g., RUDOLPH J. GERBER, *LAWYERS, COURTS, AND PROFESSIONALISM* 21 (1989); Richard C. Baldwin, “*Rethinking Professionalism*”—*And Then Living It!*, 41 EMORY L.J. 433, 448-49 (1992); Jill Chaifetz, *The Value of Public Service: A Model for Instilling a Pro Bono Ethic in Law School*, 45 STAN. L. REV. 1695, 1709-11 (1993).

19. RHODE, *supra* note 2, at 131-35.

20. These critics can be avid defenders of the market, or can adopt a very different ideal of social justice, for example, emphasizing a more egalitarian distribution of resources or racial justice. See Eliot Friedson, *Professionalism as Model and Ideology*, in *LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 215, 218 (Robert L. Nelson et al. eds., 1992) (noting Milton Friedman’s proposal to eliminate professional licensing); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 514-42 (1996) (critiquing the professional values that result in discrimination against black lawyers).

21. POSNER, *PROBLEMATICS*, *supra* note 14, at 189.

22. See ELLIOTT A. KRAUSE, *DEATH OF THE GUILDS: PROFESSIONS, STATES, AND THE ADVANCE OF CAPITALISM, 1930 TO THE PRESENT* 283 (1996); Herbert M. Kritzer, *Abel and the Professional Project: The Institutional Analysis of the Legal Profession*, 16 LAW & SOC. INQUIRY 529, 540-44 (1991).

23. For an account of the struggle between the organized bar and other institutions to exercise dominance over regulation of the legal profession, see Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992).

to worrying about losing their licenses, lawyers must also avoid being sanctioned by courts, being sued by clients or third parties for malpractice, having their transactions rescinded for fraud, or even being fined or imprisoned for violating criminal law.

The critics of professionalism as guild ideology may be attacking a strawperson, since it is relatively clear that lawyers have not been notably successful in maintaining their independence from external sources of competition or regulation. At the same time, however, there is some truth to the observation that the rhetoric of professionalism can be a smokescreen for the bar's interest in being free from external regulation. There is an admirable dimension to the struggle for professional independence—freedom from state-sponsored regulation makes it easier for lawyers to challenge the exercise of state power.²⁴ But lawyers must be careful to ensure that their self-imposed scheme of regulations is in the public interest; otherwise, pressure will build on state actors to bring the bar's self-imposed norms into line with social interests.

B. Technique

Professionalism is also employed as a synonym for technical competence.²⁵ This definition is familiar from ordinary language, as in "that plumber really did a professional job" or in Arthur Applbaum's parody of the claims of professionalism made by Charles-Henri Sanson, the executioner of Paris.²⁶ What is interesting about this sense of the word is that it frequently excludes discussion of a moral dimension of professional roles. One critic has written that the university has historically disdained ethics education, claiming to be uniquely suited to produce experts at demanding tasks requiring extensive education.²⁷ University teachers have avoided talking about values because the skills of reflective judgment and ethical reasoning were foreign to the university's expertise in transmitting "objective," rigorous knowledge.²⁸ The professions, eager to capitalize on the prestige of the natural sciences, have been enthralled with scientific models of their disciplines, as in the technocratic conception of legal reasoning made famous by Langdell.²⁹ This vision of the relationship between ethics and technical mastery continues to be reflected in some contemporary writings about ethics education in law schools. For

24. See Robert W. Gordon, *The Independence of Lawyers*, 68 B.U.L. REV. 1, 10-11 (1988).

25. See, e.g., DARYL KOEHN, *THE GROUND OF PROFESSIONAL ETHICS* 15-33 (1994); DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* 21-37 (1983) (explaining the model of Technical Rationality, which states that professionals solve rigorous problems by applying scientific theory and technique).

26. See ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* 15-42 (1999).

27. See William F. May, *Professional Ethics: Setting, Terrain, and Teacher*, in *ETHICS TEACHING IN HIGHER EDUCATION* 205, 206-07 (Daniel Callahan & Sissela Bok eds., 1980).

28. See *id.* at 207.

29. See SCHÖN, *supra* note 25, at 28-29.

instance, two commentators on legal education make the startling suggestion that “instruction in professional responsibility should not be premised on the correctness of any particular [moral] theory.”³⁰ Apparently, the legal profession may legitimately impose regulations on lawyers, but law professors must pretend that these regulations are value-neutral.

This stance is—not to put too fine a point upon it—untenable. The division between scientific knowledge, on the one hand, and ethics, on the other, has been undercut from several different directions. First, legal rules embody a moral position, as any first-year law student who has expressed horror over the absence of a duty to rescue in tort law³¹ or any student of constitutional law who has struggled with reproductive-rights and sexual-privacy issues can attest.³² The legal realists taught us that legal judgments are fundamentally policy decisions—that is, moral and political decisions legitimated by legal reasoning. This critique has been carried through by modern philosophers of law, particularly Ronald Dworkin, who emphasizes the necessary connection between legal rules, underlying moral principles, and the authority of law.³³ In an inherently normative discipline, such as professional ethics, the very process of teaching the subject requires stating and contesting evaluative judgments.³⁴ Second, the once-dominant logical positivist view in philosophy, which held that ethical concepts are nonsensical because they could not be reduced to empirically testable propositions,³⁵ has given way to a much more sophisticated understanding of the relationship between facts and values.³⁶ Third, the claims

30. Ian Johnstone & Mary Patricia Treuthart, *Doing the Right Thing: An Overview of Teaching Professional Responsibility*, 41 J. LEGAL EDUC. 75, 83 (1991); see also Lee Modjeska, *On Teaching Morality to Law Students*, 41 J. LEGAL EDUC. 71 (1991) (arguing that law professors should guard against ideological abuse and focus on imparting knowledge and communication skills).

31. Discussion of the legal and moral duties to rescue is seemingly endless. For a recent academic exchange, see Symposium, *Law, Ethics, and the Good Samaritan: Should There Be a Duty to Rescue?*, 40 SANTA CLARA L. REV. 957 (2000). The *locus classicus* is James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908).

32. On the moral content of law, see generally Kent Greenawalt, *Legal Enforcement of Morality*, 85 J. CRIM. L. & CRIMINOLOGY 710 (1995).

33. See RONALD DWORKIN, *LAW'S EMPIRE* (1986); see also Jean Bethke Elshtain, *Law and the Moral Life*, 11 YALE J.L. & HUMAN. 383 (1999) (arguing that the law is a form of moral thinking).

34. See MIKE W. MARTIN, *MEANINGFUL WORK: RETHINKING PROFESSIONAL ETHICS* 102-03 (2000).

35. See, e.g., ALFRED JULES AYER, *LANGUAGE, TRUTH, AND LOGIC* 102-12 (Dover Publications 1952) (1946).

36. See generally RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* (1983) (comparing the concepts of dialogue, debate, conversation, and communication and their impact on ethics and politics); STANLEY CAVELL, *Part Three: Knowledge and the Concept of Morality, in THE CLAIM OF REASON: WITTGENSTEIN, SKEPTICISM, MORALITY, AND TRAGEDY* (1979); JOSEPH DUNNE, *BACK TO THE ROUGH GROUND: 'PHRONESIS' AND 'TECHNE' IN MODERN PHILOSOPHY AND IN ARISTOTLE* 187-91 (1993); THOMAS NAGEL, *THE VIEW FROM NOWHERE* 138-63 (1986); BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 132-55 (1985); Richard N. Boyd, *How to Be a Moral Realist, in ESSAYS ON MORAL*

to objectivity of the natural sciences have been questioned,³⁷ although it is important not to exaggerate the extent to which scientific knowledge is merely culturally contingent.³⁸ Certainly, though, the identification of objectivity solely with the methods of empirical science is no longer accepted without question.³⁹ Ethics differs from science, both in its characteristic methods of establishing the truth of claims and in the expectation of how much consensus can emerge from its methods, but this difference is not a sufficient reason for rejecting the claims of ethical reasoning to objectivity.⁴⁰ Fourth, the technocratic model of the professions, in which ethical inquiries are excluded, requires agreement on ends,⁴¹ which has notably been lacking in law as well as the other professions. Finally, the descriptive accuracy of the model of professions as the domain of evaluatively neutral, "rational" (in the Weberian sense⁴²) reasoning is not normatively attractive even if it could be realized. As William Simon and others have argued, the conception of professional knowledge as bureaucratic, formalized, and emptied of ethical significance leads to profound alienation on the part of its practitioners, who feel disconnected from other members of society and from the ideals that gave meaning to their occupation.⁴³

If professional activity is not a bureaucratic, technical process, then what is it? Working out the relationship between facts and values is an ongoing project for professional ethicists, many of whom have been attracted to the concept of judgment, as explicated by thinkers such as Aristotle and Hannah Arendt.⁴⁴ As many have observed, the legal system serves multiple ends simultaneously, and choosing among them cannot be a matter of cost-benefit

REALISM 181, 188-99 (Geoffrey Sayre-McCord ed., 1988).

37. See, e.g., PAUL FEYERABEND, *AGAINST METHOD* (Verso 1988) (1975); THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 5-6 (1962).

38. See ALAN SOKAL & JEAN BRICMONT, *FASHIONABLE NONSENSE: POSTMODERN INTELLECTUALS' ABUSE OF SCIENCE* 268-79 (1998).

39. See, e.g., CAVELL, *supra* note 36, at 256-64 (noting that science does not have a "more direct avenue to truth" than ethics just because ethics is based on opinions and science is based on data (citations omitted)); Stephen Darwall et al., *Toward Fin de siècle Ethics: Some Trends*, 101 *PHIL. REV.* 115, 126 (1992).

40. See, e.g., John Rawls, *Kantian Constructivism in Moral Theory*, 77 *J. PHIL.* 515, 519 (1980) ("Kantian constructivism holds that moral objectivity is to be understood in terms of a suitably constructed social point of view that all can accept.").

41. See SCHÖN, *supra* note 25, at 33-34, 41.

42. See MAX WEBER, *Bureaucracy*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 196, 214-16 (H.H. Gerth & C. Wright Mills trans. & eds., 1946).

43. See SIMON, *supra* note 15, at 109-37.

44. See generally MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994); KRONMAN, *supra* note 2, at 97 (stating that a wise judgment in the personal sphere rests on the promotion of integrity, while a wise judgment in the political sphere rests on the promotion of political fraternity); David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 *GEO. J. LEGAL ETHICS* 31, 35-36 (1995) (citing Arendt's view that moral judgment is especially important in what Arendt calls "dark times").

analysis which reduces all ends to some common metric.⁴⁵ We can deliberate rationally about ends (they are not just a matter of faith or ideology),⁴⁶ but this reasoning is not an algorithmic, quasi-scientific process; rather, it is a matter of judgment, which is a difficult faculty to theorize on a scientific model. Legal reasoning, according to these scholars, is not reducible to scientific methods, nor can it be collapsed into some other discipline, such as economics.⁴⁷ It is something ineffable—a craft or perhaps an intellectual virtue—that can be appreciated only by those steeped in its mysteries and duly initiated into the inner circle. I do not mean to be too derisive here; there are obviously certain kinds of knowledge that may only be acquired by a long process of study and subordination to the guidance of more experienced practitioners, such as aesthetic judgments on a rich domain like music or literature. But moving too far in the direction of anti-theory tends to remove practical reasoning from criticism. So, any professional's judgment is held to be as good as anyone else's, or professional judgment is reposed with a small cadre of elites, uniquely equipped with the virtues to deliberate about ethical matters.⁴⁸

The result, in the case of legal reasoning, is that celebrations of Aristotelian practical wisdom have a tendency to come off as quietistic. Throughout the purported “golden age,” a time for which many long, lawyers enjoyed monopolistic rents; charged virtually anything they wanted for their services; excluded blacks, women, and Jews from law firms, and campaigned assiduously to keep the “wrong people” out of the profession; recognized virtually no obligation to perform pro bono work or otherwise improve access to legal services;⁴⁹ and did little to enforce the constitutional rights of

45. See, e.g., KRONMAN, *supra* note 2, at 53-66 (stating that as long as a question can be answered by objective calculations, the deliberative procedure required is clear, but the basis of judgment is less clear when a question cannot be decided by objective criteria); Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885 (1996) (arguing that highly technocratic lawyers cannot be good ethical deliberators).

46. See HENRY S. RICHARDSON, *PRACTICAL REASONING ABOUT FINAL ENDS* (1994).

47. See KRONMAN, *supra* note 2, at 240-64.

48. An eminent anthropologist's caution about interpretive orientations toward cultures can equally be applied to models of practical judgment that emphasize particulars over general theories and which stress the ineffability of professional reasoning:

The besetting sin of interpretive approaches to anything—literature, dreams, symptoms, culture—is that they tend to resist, or to be permitted to resist, conceptual articulation and thus to escape systematic modes of assessment. You either grasp an interpretation or you do not, see the point of it or you do not, accept it or you do not. Imprisoned in the immediacy of its own detail, it is presented as self-validating, or, worse, as validated by the supposedly developed sensitivities of the person who presents it

CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 24 (1973).

49. This was before *Gideon v. Wainwright*, 372 U.S. 335 (1963).

individuals.⁵⁰ It is therefore essential to disentangle practical wisdom and professional judgment from their historical connection with the elites of the corporate bar, whose claims to be repositories of unique professional integrity were often belied by the anti-social ends to which they employed their expertise.

I believe there is considerable merit to the undertaking of identifying professional activity with the exercise of judgment, but a pair of dangers must be avoided along the way. The first is the tendency, just noted, to identify the end of professional expertise with preservation of the status quo, a pitfall presented by the Aristotelian pedigree of many accounts of judgment.⁵¹ Aristotle identified judgment as a virtue, an excellence, which not all possessed equally; the anti-egalitarian implications of this identification should be clear, as they are in Kronman's book.⁵² The opposite problem is avoiding turning professional ethics education into a program of indoctrination. Although it is incorrect to claim that learning professional ethics ought to be value-neutral, it also should not become a kind of Maoist "re-education" process, where "tenured radicals" try to enlist their students in revolutionary causes. Teachers must respect their students' autonomy and the contestability of many of the normative propositions that are encountered in the course of studying the moral basis of the professions. But virtues such as broad-mindedness, tolerance, and intellectual humility are not only compatible with a values-centered approach to professional ethics, but they also require a strong commitment to values in order to be intelligible.⁵³ (For what is tolerance if not a nonrelative imperative to respect dissenting viewpoints?) Thus, teachers of professional ethics must be aware of potential biases and personal preferences that may not stand up to scrutiny and must avoid preaching and resorting to non-rational methods of persuading students, such as coercion or smuggling in a hidden agenda of their own idiosyncratic views. At the same time, however, they must not fall into the trap of thinking that professionalism is equivalent to agnosticism on matters of moral import.⁵⁴ The proper balance between detachment from and commitment to particular normative stances in professional ethics is not only fair to competing viewpoints and encourages the students to think independently but also inspires the students to have a thoughtful engagement with the subject

50. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 263-68 (1976); POSNER, *PROBLEMATICS*, *supra* note 14, at 197-98; Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549, 559 (1996). Interestingly, the ABA's professionalism committee is skeptical of the nostalgic longing by some sectors of the professionalism movement. See *TEACHING AND LEARNING PROFESSIONALISM*, *supra* note 11, at 4-5.

51. See *supra* note 44 and accompanying text.

52. See KRONMAN, *supra* note 2, at 41-52.

53. See *id.* at 92-101.

54. For a thoughtful exploration of the tension between educators' moral agency and students' autonomy, see MARTIN, *supra* note 34, at 102-08.

through the instructor's own engagement and passion. It is certainly not achieved by eliminating discussion of values from ethics education.

C. Altruism

A third elaboration on the concept of professionalism is that it entails subversion of the lawyer's pursuit of material gain.⁵⁵ Arguments that lawyers should not use their knowledge for pecuniary gain have long been a staple of critics. George Sharswood, in his influential nineteenth-century lectures on legal ethics, citing Gibbon, actually pins some of the blame of the fall of Rome on lawyers taking cases for money:

The consequences [of law becoming a trade] may be best told in the impressive language of the historian of the Decline and Fall of the Empire:—"The noble art, which had once been preserved as the sacred inheritance of the patricians, was

55. See, e.g., GERBER, *supra* note 18, at 23 ("Today we have lost the ability to distinguish between a calling and a station in life, to see differences between a profession and a trade. To the extent that law students and lawyers become absorbed in status and gain, law ceases to be a profession . . ."); Arlin M. Adams, *The Legal Profession: A Critical Evaluation*, 93 DICK. L. REV. 643, 652 (1989) (noting "the decline of professionalism and its replacement with commercialism"); Norman Bowie, *The Law: From a Profession to a Business*, 41 VAND. L. REV. 741 (1988) (noting the undesirability of the law becoming more like a business and losing its focus on its purpose, society's values, and justice); Tom C. Clark, *Teaching Professional Ethics*, 12 SAN DIEGO L. REV. 249, 251 (1975) ("[T]he primacy of service over profit is the criterion which distinguishes a profession from a business."); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1231 (1995) ("[I]n contrast to businesspersons, who maximize financial self-interest, lawyers altruistically place the good of their clients and the good of society above their own self-interest."); MICHAEL H. TROTTER, PROFIT AND THE PRACTICE OF LAW: WHAT'S HAPPENED TO THE LEGAL PROFESSION 197-98 (1997). Ironically, other definitions of professionalism distinguish a profession from a hobby or pastime by the presence of a profit motive: "Professionals engage in their chosen activities 'for a living' rather than 'for fun'—as amateurs or dilettantes . . ." Stephen Toulmin, *The Meaning of Professionalism: Doctors' Ethics and Biomedical Science*, in KNOWLEDGE VALUE AND BELIEF 254, 256 (H. Tristram Engelhardt, Jr. & Daniel Callahan eds., 1977).

Some law schools have taken to the Internet to reassure prospective students that, in the view of the faculty, students there will not be learning a mere business, but will be inducted into a *profession*. See, e.g., Washburn University School of Law, at <http://www.washburnlaw.edu/prospect/overview.htm> (last visited Dec. 7, 2000) ("Students learn that the law is a profession and not a mere trade."); Pepperdine University School of Law, at <http://law-www.pepperdine.edu/prospect/deansmsg.shtml> (last visited Dec. 7, 2000) ("We believe that the law is a profession, not a business."). Finally, in an amusing twist on the rhetoric of professionalism, a firm of personal-injury lawyers representing plaintiffs announced in a New York City subway advertisement that they are "Professional Lawyers that Fight to Win Large Money Awards for YOU" (emphasis added) next to their phone number, "1-888-I-GOT-INJURED." This poster apparently seeks to reassure prospective clients that the firm is not a bunch of ambulance chasers but a group of professionals who are concerned about lofty principles of justice, not fat contingency fees.

fallen into the hands of freedmen and plebeians, who, with cunning rather than with skill, exercised a sordid and pernicious trade. . . . The splendid and popular class was composed of the advocates, who filled the Forum with the sound of their turgid and loquacious rhetoric. Careless of fame and of justice, they are described for the most part, as ignorant and rapacious guides, who conducted their clients through a maze of expense, of delay, and of disappointment; from whence, after a tedious series of years, they were at length dismissed when their patience and fortune were almost exhausted." Is not this probably the history of the decline of the profession in all countries from an honorable office to a money-making trade?⁵⁶

Less fancifully, Justice O'Connor has written that the distinguishing feature of a profession is that "membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market."⁵⁷ Her words echo the so-called Stanley Commission Report, issued in 1986 by the ABA's Commission on Professionalism.⁵⁸ The commission began by asking whether the legal profession had "abandoned principle for profit, professionalism for commercialism."⁵⁹ Not surprisingly, given the way the question was posed, the commission concluded that many of the symptoms of declining professionalism "could begin to be addressed by subordinating a lawyer's drive to make money as a primary goal of law practice."⁶⁰

The commercialism critique implies that law risks becoming something grubby and ignoble, no longer a source of honor and esteem, if lawyers make too much money at their jobs. But it proves too much, at least in the oversimplified form in which it is usually presented. First, the commercialism critique insinuates that any professional who is trying to earn an honest living must be acting unethically.⁶¹ In its most pernicious form, this argument might

56. GEORGE SHARSWOOD, A COMPOUND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW: DELIVERED BEFORE THE LAW CLASS OF THE UNIVERSITY OF PENNSYLVANIA 72-73 (1854) (citation omitted). Lest anyone miss Sharswood's point, he again admonished his audience of young lawyers who might be motivated by filthy lucre, that "[a] horde of pettifogging, barratrous, custom-seeking, money-making lawyers, is one of the greatest curses, with which any state or community can be visited." *Id.* at 80. Perhaps Sharswood was inspired to his polemical excesses by the behavior of the fictional lawyers in Dickens's *Bleak House*, which had been published the previous year. See CHARLES DICKENS, *BLEAK HOUSE* (Norman Page ed., Penguin Books 1971) (1853).

57. *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 488-89 (1988) (O'Connor, J., dissenting).

58. The report, formally entitled "... *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*," is reprinted at 112 F.R.D. 243 (1987).

59. *Id.* at 251.

60. *Id.* at 300.

61. See GLENDON, *supra* note 44, at 69-71.

seem to license unethical behavior as long as the actor was willing to admit that she was merely a businessperson, not a professional. But surely businesspeople recognize an obligation to act within the bounds of moral obligation, even though they have profit-making as one of their avowed aims.⁶² (Or, they recognize earning a profit for their shareholders as a moral obligation, akin to a trusteeship relationship.)⁶³ Second, it is not hard to convince oneself that one's primary motivation is not to make money and so to imagine that one is acting professionally and not in need of further inquiry into moral questions.⁶⁴ Finally, attacking the profession for its *undue* commercial orientation presupposes an ideal balance between altruism and profit motivation, but its proponents do not specify how that balance is to be worked out.⁶⁵ We do not live in an age of aristocrat-lawyers, who live off their inherited wealth while contributing to the public good out of a sense of noblesse oblige. Lawyers—at least most of them—must earn a living representing clients. There is more than a whiff of elitism in the demand that lawyers behave more like “professionals” than businesspeople. Consider the language from Gibbon quoted by Sharswood—patricians are good, plebeians are bad.⁶⁶ This dichotomy suggests that wealthy lawyers who have no need to earn a living through the practice of law are to be admired, while struggling, hard-working, store-front lawyers (often immigrants or members of other out-of-power groups) are the cause of the profession's woes. Indeed, many so-called ethical regulations, such as the organized bar's continuing attempt to restrict advertising and soliciting by lawyers, have been prompted by lower-class lawyers' attempts to make a

62. The literature on business ethics is growing rapidly, and I cannot hope to summarize it here. For some representative contributions to the field of business ethics, see generally WILLIAM C. FREDERICK, *VALUES, NATURE, AND CULTURE IN THE AMERICAN CORPORATION* (1995); ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 230-82 (1980).

63. See FREDERICK, *supra* note 62; GOLDMAN, *supra* note 62.

64. See Thomas L. Shaffer, *Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer Professionalism as a Moral Argument*, 26 GONZ. L. REV. 393, 411-13 (1990/91).

65. Surprisingly, there are some who not only disagree with the commercialism argument, but claim the bar should identify *more* closely with commercial interests. For example, Geoffrey Hazard criticizes the profession for drifting away from its traditional function of protecting business property against the pressures of popular majorities. See Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1266-80 (1991). Compare the populist sentiments of Louis Brandeis, who argued that the role of lawyers is to curb “the excesses of capital” lest “[t]here will come a revolt of the people against the capitalists.” Louis D. Brandeis, “The Opportunity in the Law,” in *Business: A Profession*, Address Before the Harvard Ethical Society (May 4, 1905), in *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 5, 8 (Geoffrey C. Hazard, Jr. & Deborah L. Rhode eds., 3d ed. 1994). The difference between the arguments of Brandeis and Hazard perhaps can be attributed to a generally decreasing attachment in the professions to the ideology of social trusteeship. See STEVEN BRINT, *IN AN AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE* 8-10 (1994).

66. See *supra* text accompanying note 57.

living.⁶⁷ One must therefore be wary of the rhetoric of professionalism, as it is sometimes merely an attempt by powerful lawyers to preserve the status quo.

More subtle critics of the profession's obsession with profit have pointed out ways in which the emphasis on bottom-line considerations has had far-reaching effects on the legal profession.⁶⁸ Advancement, evaluation, compensation, and partnership decisions within large law firms are generally dependent in large part upon the number of hours billed by lawyers. The resulting inexorable pressure to bill hours leads not only to bill padding and fraud,⁶⁹ but to tension with attorneys' lives outside the workplace and clashes with family commitments. The adverse consequences of long hours on families tend to fall disproportionately on women, as Deborah Rhode and others have observed.⁷⁰ Moreover, as business development becomes more important to attorneys' careers, clients gain leverage to force lawyers to take actions that are unethical, compromising lawyers' independence of professional judgment.⁷¹ Finally, as Anthony Kronman argues, the result of intense pressures to work long hours is a rather one-dimensional kind of person, who cares only about work and is inhibited from developing as a complete human being, and as a result is unable to exercise practical judgment on behalf of clients.⁷²

D. Etiquette

Some reformers of the legal profession inadvertently trivialize the concept of professionalism by equating it with norms of civility that are relatively inconsequential. At the risk of being charged with selectively quoting the literature, one can easily find numerous exhortations to lawyers to return clients' phone calls, not berate office staff, work with opposing counsel to schedule depositions, and not file motions when one's adversary is leaving for a vacation.⁷³ Without meaning to denigrate the importance of civility, and recognizing that incidents of petty rudeness can be cumulative and truly damaging to the effective functioning of the judicial system, it is important to bracket issues of etiquette from the substantive analysis of legal ethics.

67. See Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATION IN THE AMERICAN LEGAL PROFESSION* 177, 190-91 (Robert L. Nelson et al. eds., 1992) [hereinafter *IDEALS/PRACTICES*].

68. See, e.g., RHODE, *supra* note 2, at 31-38.

69. See Lisa Lerman, *Blue Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 *GEO. J. LEGAL ETHICS* 205 (1999).

70. RHODE, *supra* note 2, at 36-37.

71. The famous OPM debacle is widely blamed in part on the disproportionate importance to the law firm of the client, which accounted for as much as sixty percent of the firm's billings. See, e.g., GEOFFREY C. HAZARD, ET AL., *THE LAW AND ETHICS OF LAWYERING* 305, 310 (3d ed. 1999).

72. See KRONMAN, *supra* note 2, at 299-300, 304-07.

73. See, e.g., John Patrick Dolan, *Courtesy Is Its Own Reward: Lawyers Need to Treat Others with Respect or Face the Consequences*, A.B.A. J., Jan. 1997, at 104.

More seriously, the emphasis on politeness and preservation of the sensibilities of all participants in the judicial process may shade into repressiveness, which is not too strong a word, when the incivil litigants belong to unpopular or marginal groups. Consider, as an example, Chief Justice Burger's diatribe against rudeness:

At the drop of a hat—or less—we find adrenalin-fueled lawyers cry out that theirs is a “political trial.” This seems to mean in today's context—at least to some—that . . . the necessity for civility—all become[s] irrelevant.

....

. . . Speakers are shouted down or prevented from speaking. Editorials tend to become shrill with invective and political cartoons are savagely reminiscent of a century past.⁷⁴

What caused the Chief Justice to slip from a discussion of civility in litigation to a condemnation of shrill editorials? The answer is suggested by his reference to political trials: The challenges to the authority of judges in cases like the Chicago Seven conspiracy trial⁷⁵ would have been fresh in Burger's memory in 1971 as he wrote his address to the American Law Institute. Many observers from the legal establishment believed the riots at the 1968 Democratic convention in Chicago were a harbinger of the coming apocalypse.⁷⁶ Freaky, long-haired young people seemed to be taking over the streets, showing no respect for law and order and traditional social values.⁷⁷ Of course, the other perspective on the riots begins from observations of police brutality and the justice of the protesters' cause, which was to bring to public attention the government's conduct of the war in Vietnam and the lack of any serious antiwar candidate from either political party.⁷⁸ In any event, the protesters' arguments were treated with extraordinary disrespect by the presiding judge, Julius Hoffman, who repeatedly sustained prosecution objections to reasonable

74. Warren E. Burger, *The Necessity for Civility*, 52 F.R.D. 211, 213-14 (1971).

75. See generally ANTHONY LUKAS, *THE BARNYARD EPITHET AND OTHER OBSCENITIES: NOTES ON THE CHICAGO CONSPIRACY TRIAL* (1970); JOHN SCHULTZ, *THE CHICAGO CONSPIRACY TRIAL* (rev. ed. 1993); DANIEL WALKER, *RIGHTS IN CONFLICT: CONVENTION WEEK IN CHICAGO, AUGUST 25-29, 1968* (1968) (report submitted by the National Commission on the Causes and Prevention of Violence).

76. See generally WALKER, *supra* note 75, at 163-285 (detailing and illustrating the riots at the 1968 Democratic National Convention).

77. See generally LUKAS, *supra* note 75, at 26 (noting the opinions of various jurors on the street demonstrators). One of the participants in the *National Conference on Enhancing the Professionalism of Lawyers: Can Commissions, Committees and Centers Make a Difference?* (Savannah, GA, Oct. 20-21, 2000), recalled that his law school faculty paid attention to ethics and professionalism only once—when a state bar association attempted to deny admission to one of the school's graduates on the ground that he had a beard.

78. See WALKER, *supra* note 75, at 1 (stating the violence was “inflicted upon persons who had broken no law”).

attempts to introduce exculpatory evidence, denied defense motions without hearing arguments, helped the government pick a biased jury, and handed out dozens of contempt sentences, sometimes for offenses as minor as laughing or smirking.⁷⁹ What Chief Justice Burger characterized as unprofessional conduct by lawyers like William Kunstler and Leonard Weinglass⁸⁰ may also be understood as exemplary professionalism by lawyers for unpopular clients facing the authority of the government and the animus of a biased judge. Certainly there is nothing unprofessional about challenging the state's abuse of power or resisting contempt citations based on imaginary slights to the judge's dignity.⁸¹

I am not denying that some lawyers are jerks and that in the mine-run of cases their obnoxiousness is not ennobled by resisting government oppression, as in the Chicago Seven trial. But when the professionalism movement becomes preoccupied with politeness, rather than more serious ethical concerns, it risks legitimating attempts by powerful actors to preserve the status quo, as against challenges by brash, defiant, and, yes, sometimes rude outsiders. More broadly, the Chicago Seven case shows the potential for the rhetoric of professionalism to be abused by powerful insiders. In a similar, but less dramatic case, a lawyer made a motion to disqualify a judge in a rural county for engaging in ex parte contacts with the opposing lawyer.⁸² Not only did the judge deny the motion, but he accused the lawyer who filed it of acting in an unprofessional manner and forced the lawyer to apologize.⁸³ Of course, it is engaging in ex parte communication that is unprofessional, not making a good-faith motion to disqualify the judge. Because of the insularity of the community in which the lawyer practiced, however, the extant power structure was able to define as unprofessional behavior that which fully complied with formal legal rules.⁸⁴ Furthermore, the norm of civility enforced by the community may be at odds with formal legal entitlements. For example, in many small towns it is considered unprofessional to interrupt an adversary's closing argument with an objection; in some states, however, the objecting lawyer risks waiving the objection by waiting until the end of the closing argument.⁸⁵ The lawyer is therefore whipsawed between considerations of "professionalism": courtesy to the opposing lawyer and doing an effective job representing one's client. The bottom line is that professionalism cannot

79. See generally SCHULTZ, *supra* note 75.

80. See *infra* text accompanying note 74.

81. See Caplin & Drysdale, *Chartered v. United States*, 491 U.S. 617, 647 (1989) (Blackmun, J., dissenting) (urging lawyers to resist some judges' "preference for nonconfrontational styles of advocacy").

82. See ROY B. FLEMMING ET AL., *THE CRAFT OF JUSTICE: POLITICS AND WORK IN CRIMINAL COURT COMMUNITIES* 156 (1992).

83. See *id.*

84. See *id.* at 154-56.

85. Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO ST. L.J. 801, 824-25 (2000).

become such a consuming value that lawyers are tempted to neglect obligations they have to their clients simply to respect the formal structure of the dispute-resolution system.

E. Aspiration

Another sense of the word that frequently is encountered at professionalism conferences and in the literature is that of an aspirational code of conduct—a set of norms that, for some reason, cannot be embodied in an enforceable set of legal rules. For example, the report on professionalism prepared by a group of prominent lawyers and judges for the Conference of Chief Justices stresses the aspirational nature of professionalism, calling it an ideal transcending mere legal ethics and “the highest dictates of the legal profession.”⁸⁶ The report recommends that law teachers “should clarify the distinction between professionalism and overzealous advocacy.”⁸⁷ It recognizes that this difference cannot be captured in enforceable rules, so the report recommends that state involvement be limited to educational initiatives, such as compulsory attendance at “an ethics school” or other continuing legal education programs.⁸⁸ This critique resembles some of the objection to Bill Clinton’s behavior as President; many have argued that the role of President carries with it obligations to behave as an exemplar of the highest moral values of the nation—a public role model, so to speak.⁸⁹ It is also familiar from the frequent references to Atticus Finch in professionalism discussions; the protagonist of *To Kill a Mockingbird* is supposed to be understood (and, in fact, is understood) by lawyers as a hero, not merely as someone who adequately measures up to some mandatory standard of conduct.⁹⁰ The attribution of heroism makes sense only if we recognize some kind of non-mandatory dimension to lawyers’ ethics, so that we can say that one lawyer exceeds others in excellence, but the other, ordinary lawyers are not acting immorally.

Unfortunately, identifying professionalism with aspiration tends to open wide the door to pious-sounding platitudes. Consider the American Bar Association’s expressed hope that its *Canons of Professional Ethics* would provide “a beacon light on the mountain of high resolve to lead the young

86. A.B.A. CONFERENCE OF CHIEF JUSTICES, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM 1 (1999), available at <http://ccj.ncsc.dni.us/natlplan.htm> (last visited Jan. 11, 2001) [hereinafter Chief Justices’ Report]. The Chief Justices’ Report further provides that “[u]nlike disciplinary rules that can be implemented and enforced, professionalism is a personal characteristic.” *Id.*

87. *Id.* at 15.

88. *See id.* at 19-20.

89. *See, e.g.*, RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 148-66 (1999).

90. For a thoughtful and provocative argument that Atticus Finch ought to be displaced in the pantheon of lawyer-heroes by the more nuanced character of Gavin Stevens, see Rob Atkinson, *Liberating Lawyers: Divergent Parallels in Intruder in the Dust and To Kill a Mockingbird*, 49 DUKE L.J. 601 (1999).

practitioner safely through the snares and pitfalls of his early practice up to and along the straight and narrow path of high and honorable professional achievement.”⁹¹ If the ABA had intended its pronouncements on legal ethics to sound like a bad graduation speech, it certainly succeeded in this passage. Such empty exhortations to virtue are all too common in commentary by lawyers on professionalism, with the result that lawyers and law students often do not perceive questions about professional morality to be intellectual issues worthy of sustained study and reflection. Thus, whatever quarrels I have with Posner’s article, and there are many, it is at least refreshing that he has chosen to employ his rhetorical talents on a critique of ethics education. His attack may ironically strengthen law-school-based ethics curricula by forcing educators to think more rigorously about their discipline.

As everyone involved with the law of professional responsibility is well aware, the disciplinary rules of the legal profession formerly contained a series of aspirational statements of ideals to which lawyers ought to aspire, but which were not to form the basis of disciplinary actions if violated.⁹² The two-tiered structure of the Model Code of Professional Responsibility, with its division between black-letter, enforceable disciplinary rules (“DR”s) on the one hand, and idealistic ethical considerations (“EC”s) on the other, was frequently criticized for creating interpretive confusion.⁹³ Courts sometimes looked to the ECs to illuminate the meaning of DRs, treating the aspirational statements as something like legislative history.⁹⁴ In some places, key terms in the DRs were defined in the ECs, making this interpretive spillover inevitable.⁹⁵ Some critics also contended that the idealistic tone of the ECs was an anachronistic embarrassment to the legal profession, at least if it was properly regarded as a profit-making enterprise like any other.⁹⁶ No one proposes exhorting oil companies to charge fairly for their product; rather, the Federal Trade Commission commences an investigation of price-gouging when gas prices appear too high. To defend an aspirational conception of professionalism, one would have to point to ways in which professions differ from ordinary business ventures. I believe there is such a connection, but it does not support conceiving of professionalism on a purely aspirational dimension. Rather, the essence of professional ethics is located in the connection between the ends served by the profession and some social need. Social interests generate moral principles, but they are mandatory, not aspirational. The following section outlines this conception of professionalism.

91. *Report of the Committee on [the] Code of Professional Ethics*, 1906 A.B.A. REP. 600, quoted in David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 45 (1995).

92. See DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 44 (1994).

93. See *id.* at 48-49.

94. See *id.*

95. See *id.*

96. See *id.* at 49-50.

F. Social Values

Some sociologists of the professions, from the structural/functional school, posit that the aim of professionalism ought to be to create greater coincidence between professional values and the moral principles of the political community as a whole.⁹⁷ Drawing from the work of Talcott Parsons, these theorists understand professions as performing important social functions, like promoting health (medicine) or justice (law). Professions mediate between citizens, the state, and other organizations in society by reposing complex knowledge with specially trained and public-spirited individuals, who then enable citizens to conform their actions to social norms.⁹⁸ The role of a professional on the structural/functional account is shaped by public needs, so professional institutions such as schools and self-regulatory mechanisms like disciplinary codes exist to channel professional behavior in socially desirable ways.⁹⁹ Significantly, the needs of the public here are for goods and services that are essential to human life:

[T]he professions . . . deal with something different than do the crafts and business. . . . [H]ealth care, obtaining justice, being taught, or gaining salvation are not precisely commodity transactions. . . . To be cured or healed, we are forced to trust another human being with the most sacred, intimate, and vital aspects of our own existence.¹⁰⁰

Precisely because of the importance of the interests affected by professional activities, professionals are required to respect certain widely shared moral values. In other words, professional activities cannot be justified by moral principles that are purely internal to the practice.¹⁰¹ Doctors cannot disregard patient interests, and lawyers cannot ignore either the interests of clients or the

97. See William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565, 568 (1985); see also Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, in IDEALS/PRACTICES, *supra* note 67, at 230; Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1159 (1958) (noting a lawyer's role is justified in terms of the social functions that make it understandable, acceptable, and even necessary).

98. See IDEALS/PRACTICES, *supra* note 67, at 177, 180-81; ABEL, *supra* note 14, at 34.

99. See Robert L. Nelson & David M. Trubek, *Introduction to IDEALS/PRACTICES*, *supra* note 67, at 15-16.

100. Edmund D. Pellegrino, *Values in Professional Education*, in VALUES IN TEACHING AND PROFESSIONAL ETHICS 15, 25 (Carlton T. Mitchell ed., 1989); see also KOEHN, *supra* note 25, at 54-68 (discussing the public pledge as the ground of professional authority).

101. See APPLBAUM, *supra* note 26, at 48-58. For a critique of a conception of professional ethics that isolates itself from generally applicable moral values and my response to this argument, which emphasizes the connection in most fully realized accounts of professional ethics between professional values and common moral principles, see W. Bradley Wendel, *Professional Roles and Moral Agency*, 89 GEO. L.J. 667 (2001) (review essay).

demands of impartial justice. Thus, professionals are bound by values such as beneficence, nonmaleficence, fidelity, and compassion.¹⁰²

The structural/functional account of sociologists is intended to be descriptive as an explanation of how professions actually behave. It is also possible to construct a normative version of this theory in which the social interests served by the professions serve as the basis for justifying moral rules that are binding on professional agents.¹⁰³ In exchange for the performance of valuable functions by professionals, political actors in society grant to the professions limited monopolies over the provision of services of a particular kind.¹⁰⁴ The social values that form the grounding of professional morality are "public" in the sense that they are presupposed by and invoked in justification of political and moral institutions.¹⁰⁵ These values generate more specific professional duties.¹⁰⁶ For example, the social function of helping people understand the law and conform their conduct to it supposedly implies an obligation of confidentiality on the part of lawyers; if clients could not trust their lawyers not to "rat" on them to the authorities, they would not provide enough information for the lawyer to give informed advice on the law.¹⁰⁷ Similarly, the function of lawyers to give legal advice, considered alongside the principle that restraints on liberty, other than those imposed by law, are held to be illegitimate in a democratic political order, generates a duty of respect for client autonomy; lawyers should provide dispassionate advice to clients, without attempting to sway them in one direction or another.¹⁰⁸ It is moral arguments and principles of this type to which the remainder of this paper is devoted. Specifically, I will now turn to the question of whether ethical

102. See Pellegrino, *supra* note 100, at 28; see also TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* (4th ed. 1994).

103. See generally PAUL F. CAMENISCH, *GROUNDING PROFESSIONAL ETHICS IN A PLURALISTIC SOCIETY* (1983).

104. See *id.* at 29-32.

105. The connection between political values and the justification of legal judgments has been argued vigorously by Ronald Dworkin. See, e.g., RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985). Other works that emphasize the moral dimension of judging include Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 276-81 (1990); Owen Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 29-31 (1979); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). I have pursued a similar line of reasoning with respect to legal ethics in W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1 (1999).

106. A list of some of these public values of the profession (such as providing competent representation and seeking justice) and the particular norms derived from these values is set out in the MacCrate Report. See SECTION ON LEGAL EDUC. AND ADMISSION TO THE BAR, A.B.A., *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM* 207-21 (1992) (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap).

107. This line of inferences has been severely criticized by numerous commentators, most persuasively by William Simon. See SIMON, *supra* note 15, at 54-62. I offer it not as an airtight argument but as an example of how principles of professional ethics can be derived from social functions.

108. William Simon also reconstructs this argument and again demolishes it. See *id.* at 26-52.

knowledge (such as understanding the connection between a particular social need and moral obligations) can motivate professionals to do the right thing.

III. THE SKEPTICAL CHALLENGE TO ETHICS EDUCATION

The ubiquitous judge and law professor Richard Posner recently delivered a blistering attack on moral education in universities in the forum of the 1998 Holmes Lecture at Harvard Law School.¹⁰⁹ Although Posner's critique is not particularly original, the high profile of the author and the vehemence of his criticism of secular academic moral philosophy¹¹⁰ ensures that new attention undoubtedly will be paid to the status of ethical knowledge and how ethics ought to be taught in professional schools. If this argument gains wider currency, efforts to educate lawyers as part of the professionalism movement may come under attack from critics like Posner.

Ethics, according to Posner, is merely an accident of evolution, a human trait that has evolved along with opposable thumbs and linguistic competence.¹¹¹ Ethical claims, therefore, are susceptible only to the kind of evaluation that would be appropriate to biological observations.¹¹² We should praise a feature of an organism that is adaptive—that is, a feature which enhances the probability of the species' survival given the exigencies of its environment—and condemn as maladaptive a characteristic of an organism that does nothing to make the continuity of a species more likely. Posner states, “[i]nfanticide is abhorred in our culture, but routine in societies that lack the resources to feed all the children that are born.”¹¹³ So according to Posner, we can confidently condemn infanticide only because we are judging from a standpoint of great material wealth. We cannot state that infanticide is categorically, universally, and objectively evil; the best we can say is that it is “wrong for us” because it does not make our survival and the continuation of our species more likely in light of our social circumstances. This is obviously a relativistic stance, and Posner freely admits that in his view moral principles can be judged only from within a culture: “There are no *interesting* moral universals. . . . [A]s a practical matter, no moral code can be criticized by appealing to norms that are valid across cultures”¹¹⁴ He even flirts with

109. See Posner, *Lectures*, *supra* note 1. The lectures were expanded, somewhat revised, and published as a book by the same title. See POSNER, *PROBLEMATICS*, *supra* note 14.

110. Posner's Holmes Lectures were so vitriolic that his critics in moral philosophy have been compelled to offer psychological explanations for his visceral dislike of the discipline. See James Ryerson, *The Outrageous Pragmatism of Judge Richard Posner*, LINGUA FRANCA, May-June 2000, at 27, 33-34 (quoting Jules Coleman and Martha Nussbaum).

111. Posner, *Lectures*, *supra* note 1, at 1659-61.

112. See *id.*

113. *Id.* at 1650.

114. *Id.* at 1640. Moreover, as he argues, philosophical texts situated in different cultures have nothing to say to us given the very different presuppositions of the authors, the difficulties of reconstructing meanings in other languages, the historical context of any argument, and so on. See *id.* at 1672. Posner ignores the discipline of hermeneutics, which seeks methods of reaching

existentialism, confessing sympathy with the position that if a person wished to opt out of the prevailing moral system of his culture, as did Meursault in Camus's *The Stranger*, then an observer would be unable to pronounce the agent's deeds as wrong.¹¹⁵ As a result, Posner finds himself painted into some uncomfortable corners; surprisingly, he accepts this situation with aplomb. The Nazi genocide was wrong because it was not adaptive to the needs of German society, he argues, and the genocide of Native Americans which accompanied the westward expansion of the United States is less strenuously criticized because it did serve the needs of a growing society.¹¹⁶ (Notice, though, that Posner does not say that the slaughter of the native population was not morally wrong, although the direction of his argument implies that he would have a hard time avoiding this conclusion.)¹¹⁷ Beyond the criterion of adaptive fitness, however, there are no higher standards to adjudicate differences between the moral codes of different cultures.¹¹⁸

In his reply to critics, Posner tries to disavow some of the "radical" statements he made in his lecture, which were seized upon by philosophers.¹¹⁹ It is true that Posner repudiated what he called "vulgar relativism"—the view that cultural differences in moral codes require cultures to enjoin a principle of toleration of differences.¹²⁰ He did, however, enthusiastically adopt the relativist position that a culture can be judged only by local criteria—for instance, we can only say, "We take Nazis to have been bad people. Of course, the Nazis would disagree. There is nothing to which we can appeal to resolve

understanding across temporal and cultural boundaries. See generally HANS-GEORG GADAMER, *TRUTH AND METHOD* (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1989) (1960).

115. Posner, *Lectures*, *supra* note 1, at 1643.

116. See *id.* at 1652.

117. Posner does not elaborate on why the Holocaust was maladaptive from the standpoint of Nazi ideology. (Perhaps by chasing Jewish scientists to America in the pre-war years, Hitler gutted his rocket and atomic-bomb programs and damaged the weapons-building capabilities he needed to win the war.) I have a hard time differentiating Posner's two examples (the Holocaust and the genocide of Native Americans) on the basis of social adaptivity. He suggests elsewhere that our perceptions of adaptivity are colored by historical hindsight, so that if Hitler had won, we may have evaluated his moral code differently. See *id.* at 1654. If that is true, then there is nothing to the criterion of adaptive fitness that can be divorced from historical contingency. But surely Posner does not want the analysis of the adaptivity of a moral code to depend on such factors as whether Hitler violated his nonaggression pact with Stalin or whether he would have permitted his generals to retreat at Stalingrad. Too many such factors unrelated to Nazi moral principles determined the ultimate collapse of the Third Reich. The bottom line is that adaptive fitness is a descriptive concept that does not carry over from biology to intelligible use in morality. As Judge Noonan forcefully observes in his response to Posner, "No one I know criticizes Hitler because after twelve years of power he came to a bad end; he is criticized because he was a bad man doing bad deeds." John T. Noonan, Jr., *Posner's Problematics*, 111 HARV. L. REV. 1768, 1771 (1998).

118. See Richard A. Posner, *Reply to Critics of the Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1796, 1799 (1998) [hereinafter Posner, *Reply*].

119. See *id.* at 1819-20.

120. See Posner, *Lectures*, *supra* note 1, at 1642.

this disagreement.”¹²¹ The only thing that differentiates this position from vulgar relativism is that it does not entail a nonrelative principle of toleration. The United States was justified (again, by its own lights) in enforcing its moral code by bombing and invading Germany, for example. This position does avoid the self-refuting nature of a resolutely local moral code that nevertheless requires a universal practice of toleration, which is itself a moral stance, but is no less radical and objectionable. Ironically, it seems that Posner cannot avoid slipping into nonrelative claims about science, for he argues that ethical beliefs can be praised as adaptive or criticized as maladaptive.¹²² He has little to say about sociobiology in his reply, suggesting that he does not take its claims seriously, either descriptively or normatively.¹²³ But whether it is economics or evolutionary biology, Posner is plainly impressed with the claims of natural science to deliver “objective” knowledge¹²⁴ and believes that because moral reasoning does not proceed along the same lines, it is incapable of reaching some kind of final resolution.¹²⁵

121. See Posner, *Reply*, *supra* note 118, at 1815 (“I no longer doubt . . . that one can speak intelligibly of moral progress. But always one is speaking from a particular standpoint, rather than *sub specie aeternitatis*. To us, slavery is an abomination, so we consider its abolition a mark of progress.”); see also POSNER, *PROBLEMATICS*, *supra* note 13, at 174 (arguing the religious belief in the immorality of homosexuality and the secular liberal belief in sexual equality are beliefs that are equally incapable of meaningful verification). It is unclear, given Posner’s guarded endorsement of subjectivism and the existentialism of Camus, whether he believes moral judgments are relative to communities (nations, ethnic groups, etc.) or to individuals. Cf. Gilbert Harman, *Moral Relativism Defended*, 84 PHIL. REV. 3, 7-8 (1975) (arguing that obligations of decency and respect for human life do not apply to Hitler because he lacked attitudes necessary for him to have reasons to be decent and respectful of human life).

122. See Posner, *Lectures*, *supra* note 1, at 1640-42.

123. See Posner, *Reply*, *supra* note 118, at 1811-12.

124. See Posner’s praise of scientific models of legal reasoning, and criticism of “soft” accounts of legal norms, in his book version of *Problematics*:

For the academic lawyer, however, moral theory is an escape from having to think of law as a form of social science or policy science. Law conceived in scientific terms might have an embarrassing transparency, for legal claims might then actually be falsifiable. Moral theory and constitutional theory, in contrast to scientific theory, are at once opaque and spongy. . . . These theories are alternative mystifications to the traditional concept of law as an autonomous and hermetic discipline.

POSNER, *PROBLEMATICS*, *supra* note 14, at 204.

125. See Posner, *Reply*, *supra* note 118, at 1811-12. Posner’s fixation on the claims of empirical science reflects some anxiety within moral philosophy about its role *vis-à-vis* natural science:

Perhaps most contemporary philosophers would agree that our going view treats empirical science as the paradigm of synthetic knowledge, and that an acceptable account of ethics must “place” it with respect to this paradigm, either by effecting some sort of methodological (and perhaps also substantive) assimilation (which might include a correction of some stereotypes of empirical science), or by establishing a convincing contrast.

Darwall et al., *supra* note 39, at 126; see also Christine Korsgaard, *Reflective Endorsement*, in *THE SOURCES OF NORMATIVITY* 49, 67 (Onora O’Neill ed., 1996).

Posner's arguments for the vacuousness of moral theory are, ironically, themselves vacuous. The diversity of cultures and the seemingly endless variety of moral claims they have put forward is not, in and of itself, an argument for moral relativism.¹²⁶ One may be an error theorist of morality, just as one may subscribe to error theories of epistemology: Millions of people believe their destinies are determined by the position of heavenly bodies, telephone psychics can tell their fortunes, or the earth is only six thousand years old. These people are simply wrong. Epistemological error does not mean that true beliefs about matters of fact can never be formed or that truth claims cannot be empirically validated. Similarly, diversity of opinion about normative questions does not eliminate the possibility that some cultures promulgate moral codes that are mistaken. Slavery, human sacrifice, suttee, torture, genocide, Jim Crow laws, apartheid, religious persecution, footbinding, and female genital mutilation are great moral evils. They are not just evils for cultures who recognize this fact, although there may be reasons we should evaluate people less harshly in light of their limited capacity for understanding the wrongfulness of an act.¹²⁷ Granted, giving a metaethical account to support this confident assertion is an involved task,¹²⁸ and it is probably true that moral concepts are more certain in their extensions than in their meanings. It is also likely that objectivity in the domain of moral reasoning means something different than objectivity in natural science. Furthermore, it is a truism that there are passionately contested moral questions about which confident assertions of right and wrong are unwarranted—abortion, affirmative action, and capital punishment spring to mind. But to conflate the observations of moral diversity into a demonstration of moral relativism requires many argumentative steps that Posner simply skips over.

Posner seeks to bolster his argument for relativism by observing that no convincing answers to hard questions about morality exist and that an ethical argument can generally be answered by a counterargument.¹²⁹ This contention assumes what Bernard Williams has called the superpower theory of argument—that philosophical claims succeed only if they completely annihilate their competitors, leaving them in a pile of smoking rubble.¹³⁰ But a moral argument can be a useful step on the way to a fuller understanding even though some of its rivals still exert a gravitational pull on our reasoning. Utilitarianism

126. See, e.g., ROM HARRÉ & MICHAEL KRAUSZ, *VARIETIES OF RELATIVISM* 186-88 (1996) ("[T]he anthropological argument does not demonstrate that there are not universal principles."); Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718, 1720-21 (1998) (noting Posner seems unaware of how sociology or anthropology bears on moral relativism); Martha C. Nussbaum, *Still Worthy of Praise*, 111 HARV. L. REV. 1776, 1785-87 (1998) ("Relativism is consequently untenable as a descriptive view, except in a form so modest that it fails to support Posner's argument.").

127. See Dworkin, *supra* note 126, at 1719-20; Nussbaum, *supra* note 126, at 1785-86.

128. See Nussbaum, *supra* note 126, at 1787-91; Darwall et al., *supra* note 39, at 173-74.

129. Posner, *Lectures*, *supra* note 1, at 1644, 1666, 1699.

130. See WILLIAMS, *supra* note 36, at 84.

and the Kantian categorical imperative both fail to account for all of our moral intuitions, and neither can, by itself, serve as the sole grounding principle of a decent moral order.¹³¹ However, both principles are indispensable ingredients in an ethical system: It would be monstrous to ignore consequences altogether (an action that would result in the death of one person is generally to be preferred to one which would result in the death of a hundred), but it is also necessary to give some weight to the dignity and inviolability of individual persons (there would be something wrongful about torturing a suspect to learn the location of a bomb planted in Times Square, even though the torture might be justifiable on an all-things-considered basis). Simply because a moral theory is made up of sometimes incompatible first principles and there are occasional conflicts among values, or difficulty in making tradeoffs between competing values, the theory is not hopelessly subjective or impotent to provide motivation; it merely makes working out the right action difficult in some cases.¹³²

Difficult questions on the margin and the variety of possibly mistaken moral beliefs do not establish the impossibility of evaluating moral claims across cultural boundaries. Posner wishes to argue that if these rival values are derived from the moral codes of incommensurable cultures, there is no possibility of accommodating them both within a single moral code in any meaningful way.¹³³ But even philosophers who believe in the strong incommensurability thesis agree that many clashes among values can be adjudicated rationally if there is some point of connection or common ground between the cultures.¹³⁴ Dialogue can frequently uncover value commitments or premises shared by the parties, which can form a starting point for discussion. Even Israelis and Palestinians can agree on a number of moral principles—the importance of sovereignty over land, the centrality of religious shrines and geography to national identity, the ideal of peaceful coexistence, and so on. To be sure, the parties disagree about the application of these principles to a concrete dispute, but the claims are not “incommensurable” in the strong sense used by Posner, as a synonym for mutual unintelligibility.¹³⁵ The parties are perfectly capable of understanding concepts like “an undivided

131. See, e.g., ROBERT AUDI, *Intuitionism, Pluralism, and the Foundations of Ethics*, in *MORAL KNOWLEDGE AND ETHICAL CHARACTER* 32, 33 (1997).

132. See Darwall et al., *supra* note 39, at 178; CAVELL, *supra* note 36, at 254-55; T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 198-99 (1998). It is interesting to note the parallel between Posner's appeal to the indeterminacy of moral argument and its frequent use of paired oppositions, on the one hand, and critical legal studies arguments about the indeterminacy of law, on the other. See, e.g., MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987). Posner is no crit when it comes to law, so one would expect him to have less sympathy for this style of argument in the domain of morals.

133. Compare the similar claim by ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 11-12 (2d ed. 1984).

134. See, e.g., POSNER, *PROBLEMATICS*, *supra* note 14, at 113-15 (noting the existence of some moral judgments that are widely accepted and considered moral truths).

135. See POSNER, *PROBLEMATICS*, *supra* note 14, at 41.

Jerusalem" or "authority over Jewish settlements on the West Bank," although they disagree vehemently over each party's entitlements to interests that both recognize as legitimate objects of pursuit. Moreover, the parties can agree in principle on what counts as a moral argument despite their inability to agree on a conclusion.¹³⁶ Disagreement at the level of conclusion does not mean that moral arguments are irrational or incapable of getting off the ground; diverse cultures frequently offer diverse moral evaluations of the same conduct, which tends to mask a great deal of agreement on both the premises of the arguments and on the procedures for conducting discussions about morality.

Posner goes on to argue that knowing principles of ethics cannot provide a motivation for doing the right thing: "Knowing the moral thing to do does not furnish a motivation for doing it; the motivation has to come from outside morality."¹³⁷ His argument for this proposition is not entirely clear. Perhaps it is supposed to follow from his sociobiological understanding of ethics as being merely a by-product of evolution. Having eyes or toes gives me no reason to watch films or go dancing, so why should the appearance of ethical norms in the human species give us any reason to seek good and avoid evil? Many philosophers have noticed the difficulty in pointing to brute facts about nature as a source of motivation to behave in one way or another.¹³⁸ The problem with this argument is that biology is evaluatively neutral: "[T]he engine of evolution, natural selection, is a completely dumb, intentionless process."¹³⁹ The evolutionary pedigree of some aspect of human behavior is simply irrelevant to whether or not it is morally obligatory, permitted, or prohibited. Later, Posner changes tactics. He returns to his familiar economic mode and argues for a purely instrumental understanding of rationality: If we have some goal—for example, increasing material prosperity—then careful thinking can help us find ways to achieve that objective.¹⁴⁰ What reasoning cannot do is to persuade others that their ends are wrongly chosen.¹⁴¹ Posner draws a distinction between moral philosophers, who merely construct arguments, and "moral entrepreneurs," who have the persuasive resources (rhetorical, political, organizational, etc.) to actually change behavior.¹⁴² The need for moral

136. See CAVELL, *supra* note 36, at 262; JEFFREY STOUT, *ETHICS AFTER BABEL* 200-19 (1988).

137. Posner, *Lectures*, *supra* note 1, at 1641.

138. See Christine Korsgaard, *The Normative Question*, in *THE SOURCES OF NORMATIVITY*, *supra* note 125, at 7, 37 (citing MACKIE, *supra* note 5, at 38, 44 and the famous "Argument from Queerness").

139. Charles Fried, *Philosophy Matters*, 111 HARV. L. REV. 1739, 1749 (1998).

140. Posner, *Lectures*, *supra* note 1, at 1670.

141. This is a conventional assumption in economics and some strands of moral philosophy. For example, DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986) has been challenged by philosophers who argue that ends can be the subject of rational criticism. See, e.g., RICHARDSON, *supra* note 46, at 22 (arguing that "practical reasoning" allows rational deliberation about ends); ROBERT P. GEORGE, *MAKING MEN MORAL* (1993) (arguing from a metaphysical perspective that "practical rationality governs choice and action").

142. Posner, *Lectures*, *supra* note 1, at 1667.

entrepreneurs arises from the countervailing effects of self-interest; as Posner puts it, “the vast majority of us are unwilling to pay a high price in selfish joys and comforts forgone to be good.”¹⁴³ Moral argument is also obstructed by the emotions, which may conflict with the demands of cold rationality.¹⁴⁴ Posner suggests it is only the moral entrepreneur who can persuade others to modify their ends and experience new emotions, to seek altruism instead of self-interest, and to seek justice instead of personal advantage:

If you want to turn a meat-eater, especially a nonacademic meat-eater, into a vegetarian, you must get him to love the animals that we raise for food, and you cannot argue a person into love. If you want to make a person disapprove of torturing babies, show him a picture of a baby being tortured; don’t read him an essay on moral theory.¹⁴⁵

The argument rehearsed by Posner—that rightness, goodness, and justice have no motivational force—is, of course, not new. Although many philosophers, including Hobbes, Hume, and Butler, have wondered whether morality and self-interest are independent, the relationship between these two domains was famously considered in Plato’s great dialogue, *Republic*.¹⁴⁶ The question, why one ought to do the right thing if doing wrong were more profitable, was posed to Socrates by two interlocutors, Thrasymachus and Glaucon.¹⁴⁷ Socrates had already convinced Thrasymachus that justice was more than merely the advantage of the stronger,¹⁴⁸ but Glaucon remained unpersuaded that someone who could get away with injustice would act justly:

[T]hat those who practice [justice] do so unwillingly and from want of power to commit injustice, we shall be most likely to apprehend that if we entertain some such supposition as this in thought—if we grant to both the just and the unjust license and power to do whatever they please, and then accompany them in imagination and see whither desire will conduct them. We should then catch the just man in the very act of resorting to the same conduct as the unjust man because of the self-advantage which every creature by its nature pursues as a good, while by the convention of law it is forcibly diverted to paying honor to “equality.”¹⁴⁹

143. *Id.* at 1666.

144. *Id.* at 1672.

145. *Id.* at 1674.

146. PLATO, *REPUBLIC* (Paul Shorey trans. 1930), reprinted in *THE COLLECTED DIALOGUES OF PLATO* (Edith Hamilton & Huntington Cairns eds., 1961).

147. *See id.* at ll. 339c-354b.

148. *See id.* at ll. 358a-d.

149. *Id.* at ll. 359c-d.

Glaucou then related a story about a mythical figure who had license to commit injustice with impunity.¹⁵⁰ A shepherd was minding his sheep one night when a great storm and earthquake struck nearby, opening a chasm in the ground. The shepherd went down into the chasm and discovered a magic ring, which made him invisible when worn. He used the power of his ring to sleep with the king's wife and eventually to kill the king and take over the kingdom, obviously improving his life substantially. So Glaucon challenged Socrates: Naturally, people aspire to the *appearance* of justice, because of the social approbation that the just person may obtain. But surely a just person would do the same thing as an unjust man, if only he had the magic ring. Furthermore, he would be crazy not to:

For that there is far more profit for him personally in injustice than in justice is what every man believes For if anyone who had got such a license within his grasp should refuse to do any wrong or lay his hands on others' possessions, he would be regarded as most pitiable and a great fool by all who took note of it, though they would praise him before one another's faces.¹⁵¹

Glaucou demanded that Socrates explain why one who could reap the benefits of *seeming* just, without actually being just, would not live a life of injustice like the shepherd.¹⁵² As Posner asks, what is the motivational force of ethics beyond the simple fear of getting caught?¹⁵³ Why should a lawyer not take any action that will gain an advantage for her clients, provided that neither the lawyer nor the client violates any applicable law? To put the question in Glaucon's terms, granting that we all desire to appear as good people, what reason do we have for acting rightly if we can get away with wrongdoing?¹⁵⁴

If Posner and Glaucon's claim about the motivational effect of ethical knowledge is correct, the entire enterprise of teaching students (and lawyers) about right and wrong is fundamentally misguided. Two potential responses suggest themselves. The first is to structure ethics education around psychological egoism and try to show people that acting rightly is in their self-interest. (As we will see, this has been a common move by philosophers.)¹⁵⁵ The second is to take the tack of moral entrepreneurship by using non-rational

150. *Id.* at ll. 359c-360b.

151. *Id.* at ll. 360c-d.

152. *Id.* at ll. 360e-361d.

153. See *supra* notes 137-45 and accompanying text.

154. See also DAVID HUME, *An Enquiry Concerning the Principles of Morals*, in ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 280 (L.A. Selby-Bigge ed., 3d ed. 1975) (claiming that no theory of morals can be useful unless it shows that the duties it enjoins are in the interests of the agent).

155. See *infra* Part IV.

persuasion to change behavior. But as I will contend, Glaucon's challenge and its contemporary analogue in Posner's argument are themselves misconceived.

IV. RESPONSES TO POSNER AND GLAUCON

Moral philosophers have traditionally drawn a sharp distinction between reasons for acting that appeal to the agent's self-interest and "moral" reasons for action—that is, reasons that have force despite the agent's desires. This statement from W.D. Ross is typical: "As soon as a man does an action *because* he thinks he will promote his own interests thereby, he is acting not from a sense of its rightness but from self-interest."¹⁵⁶ This dichotomy between moral and nonmoral motivations was most clearly realized with Kant, who insisted that only rightly motivated actions count as moral; those done from a sense of self-interest were not part of the domain of ethical reasoning:

Ethics concerns itself solely with disposition

. . . It is not easy to give an explanation of the exact meaning of disposition. Take, for instance, a man who pays his debts. He may be swayed by the fear of being punished if he defaults, or he may pay because it is right and proper that he should. In the first case his conduct . . . marks him as a good citizen, but it is only in the latter case that it . . . constitutes him a good man; for then he acts from or on account of the inner goodness of the action, and his disposition is moral.¹⁵⁷

The Kantian strategy is to find reasons for being moral that will apply universally (or categorically, in Kant's terminology), rather than being bound up with a given agent's culture, desires, or other contingencies.¹⁵⁸ Thus, while it may be true that acting rightly may be in the interests of the agent and that good people generally lead better lives than evil ones, the correspondence between happiness and acting rightly is not necessary for there to be sound reasons for acting morally: "To hold that the wicked never profit from their wickedness is a view that I, as much as anyone, would prefer to be true. Unfortunately, all of the evidence appears to show that it is false."¹⁵⁹ This line of argument is intended to meet Glaucon's challenge head-on, by convincing the skeptic that behaving justly is mandated even where one might escape

156. W.D. ROSS, *THE RIGHT AND THE GOOD* 16 (1930).

157. IMMANUEL KANT, *LECTURES ON ETHICS* 71-72 (Louis Infield trans., 1979); *see also* IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 26 (James W. Ellington trans., 1981) ("[W]hat is essentially good in the action consists in the mental disposition, let the consequences be what they may.").

158. *See* Korsgaard, *supra* note 125, at 49, 89.

159. BERNARD GERT, *MORALITY: A NEW JUSTIFICATION OF THE MORAL RULES* 228 (1988).

criticism from one's neighbors. We can call this line of argument the non-prudentialist stance.¹⁶⁰

A. Non-Prudentialism

1. *What We Care About*

One type of non-prudentialist argument in ethics assumes that the agent is motivated by some interest other than *her* own desires. In Harry Frankfurt's terms, the *agent* cares about something, and this something may be used as a reason in a moral argument.¹⁶¹ A person who cared about nothing other than her own interests would be a sociopath, or at least a very bizarre individual.¹⁶² Most people care to avoid causing needless suffering, to have people close to them flourish, and to accurately discern the truth and act on true beliefs.¹⁶³ Of course, people do not care only about moral rectitude; they have personal projects, loyalties, and ideals that extend beyond the domain of the moral, and in some cases conflict with moral reasons.¹⁶⁴ Nevertheless, these objects are not reducible to self-interest. They are objects of devotion and desire—things in which we have invested ourselves—implying that there is some way in which the objects matter in and for themselves, not merely because we desire them.¹⁶⁵ A person devoted to artistic excellence or intellectual achievement believes that her activities have worth that transcends their being subjectively desired. The difference between desires and things we care about occurs at the second order; as Frankfurt puts it, we care about caring about things.¹⁶⁶ It is somehow constitutive of our selves, our personhood, that we commit ourselves to certain projects or to being certain kinds of people. Thus, the person's desires are not merely winds that blow her about, but are things with which she actively identifies herself. This volitional step involves a self-defining commitment. The person says, "This is who I am."

As Martha Nussbaum observes, the ancient skeptics' strategy of freeing people from vexing questions of right and wrong produced a strange psychological ideal: a radically detached stance and an automaton-like

160. I am using the term "prudence" to refer to acting on principles that are in the agent's self-interest. This usage (which is common in contemporary moral philosophy) should be distinguished from the Aristotelian usage as a translation for *phronesis*, or practical wisdom. Anthony Kronman employs prudence in this sense in his book about ethical reasoning for lawyers. See KRONMAN, *supra* note 2, at 209-25 (explaining prudence in the latter sense means a faculty of judgment by which an agent perceives the proper mix of goods in a well-lived life).

161. See, e.g., HARRY G. FRANKFURT, *The Importance of What We Care About*, in *THE IMPORTANCE OF WHAT WE CARE ABOUT* 80 (1988).

162. See *infra* note 170 and accompanying text.

163. See FRANKFURT, *supra* note 161, at 81.

164. *Id.* at 81-82.

165. *Id.* at 83; see also *id.* at 89 ("[W]hen a person is responding to a perception of something as rational or beloved, his relationship to it tends toward *selflessness*.").

166. *Id.* at 87.

disposition to be moved by instincts and animal drives, secure on one's Zen-like peace of mind.¹⁶⁷ Most people do not aspire to this kind of detachment and would consider a life bereft of cares and interests to be a less than human existence. As soon as a person becomes embedded in the richness of interpersonal existence, however, she acquires reasons for acting morally—reasons that depend on the kind of beings we are and the requirements of sociable interaction. When people start to ask questions about ethics, it is because they believe there is something there—an answer that can appeal to some motivation they already possess. Robert Nozick's pithy statement captures this argument brilliantly: "When in the *Republic* Thrasymachus says that justice is the interests of the stronger, and Socrates starts to question him about this, Thrasymachus should hit Socrates over the head."¹⁶⁸ Of course, Thrasymachus and Glaucon do not hit Socrates over the head; they listen politely, implying that they are hoping Socrates would produce a set of reasons that they share for acting justly.¹⁶⁹ To return to Frankfurt's argument, Socrates's interlocutors had already committed themselves to being reasonable people, motivated by the right concerns. They were looking for Socrates to show them how justice was connected with something they cared about.

If a person cares about nothing, there is little a philosopher can do:

[I]t is very unclear that . . . we could *argue* [such a person] into caring about something. We might indeed "give him a reason" in the sense of finding something that he is prepared to care about, but that is not inducing him to care by reasoning, and it is very doubtful whether there could be any such thing. What he needs is help, or hope, not reasonings.¹⁷⁰

As Williams implies, however, the person is extremely rare who cares about nothing; indeed, we would call that person a psychopath.¹⁷¹ The task for ethics education, then, is to identify what people care about and determine how morality is related to those things. For example, if someone wishes that others not suffer evil, he will be motivated to act morally by that reason: "One should be moral because he will cause or increase the likelihood of someone suffering evil if he is not."¹⁷² Or, a person may care about acting on reasons that can be generalized because she understands and accepts the fairness of abiding by reciprocal obligations.¹⁷³

167. See MARTHA C. NUSSBAUM, *THE THERAPY OF DESIRE* 296-98 (1994).

168. ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 434 (1981).

169. See PLATO, *supra* note 146, at ll. 358a-e.

170. BERNARD WILLIAMS, *MORALITY: AN INTRODUCTION TO ETHICS* 3 (1972).

171. *Id.* at 8-10.

172. GERT, *supra* note 159, at 228.

173. See DAVID SCHMIDTZ, *RATIONAL CHOICE AND MORAL AGENCY* 143-45 (1995).

Many philosophers insist that a concern for the welfare of others is common to all rational persons: by virtue of being rational, all moral agents care about pursuing the good, being benevolent or altruistic, telling the truth, or keeping promises, even when it is not advantageous.¹⁷⁴ But obviously plenty of people live a life of self-interested detachment from the affairs of others, at least of "remote" others not associated by familial or friendship ties. (In fact, studies of the United States have shown a marked decline in participation in a wide variety of civic, charitable, and social activities in recent decades.)¹⁷⁵ These people are not, however, resolutely amoral. As Bernard Williams shows, it is almost impossible not to subscribe to at least a minimal set of moral duties.¹⁷⁶ Unless someone is highly abnormal, someone else probably exists to whom that person believes she owes certain responsibilities, such as refraining from causing harm and attending to certain needs.¹⁷⁷ The person exhibits a range of sympathies for those close to her—perhaps her family, friends, or close business associates. Therefore, she has moral dispositions, such as the desire to refrain from hurting and the desire to help those people she cares about in time of need.¹⁷⁸ At the very least, a person may care about realizing the benefits of cooperation with others. Each party to a bargain can share a surplus, which would not exist in the absence of cooperation that is constrained by moral rules.¹⁷⁹ These limited moral dispositions provide a purchase for moral argumentation; for a reasoned argument may show the person that her sympathies or the particular duties she recognizes can be generalized to apply to others.

It may seem as though this argument invites the kind of subjectivism that Posner so enthusiastically embraced and which I am so anxious to deny. If the force of moral reasoning depends on what people care about and different people care about different things, how can any moral argument apply

174. For historical examples, see TAYLOR, *supra* note 7, at 255-65, 281-83, 329-31, 364-67.

175. See, e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (showing through data that Americans have become increasingly disconnected from family, friends, neighbors, and social structure). The most horrific example of the lack of concern for others is surely the case of David Cash, who did nothing to prevent his friend from raping and murdering a seven year-old girl. His explanation for failing to act is appalling in its extreme callousness and indifference to strangers:

[T]he simple fact remains I do not know this little girl. I do not know starving children in Panama. I do not know people that die of disease in Egypt. The only person I knew in this event was [my best friend] Jeremy Strohmeyer . . . I'm not going to lose sleep over somebody else's problem.

Joshua Dressler, *Some Brief Thoughts (Mostly Negative) About "Bad Samaritan" Laws*, 40 SANTA CLARA L. REV. 971, 972 (2000) (quoting Lynda Gorov, *Outrage Follows Cold Reply to Killing*, BOSTON GLOBE, Aug. 9, 1998, at A1).

176. See WILLIAMS, *supra* note 170, at 9-12.

177. *Id.*

178. *Id.*

179. See GAUTHIER, *supra* note 141, at 11.

universally? The crucial step here is to distinguish things that a person ought to care about from those improperly made universal objects of commitment:

The fact that what a person cares about is a personal matter does not entail that *anything* goes. It may still be possible to distinguish between things that are worth caring about . . . and things that are not. . . . Although people may justifiably care about different things . . . this surely does not mean that their loves and their ideals are entirely unsusceptible to significant criticism of any sort or that no general analytical principles of discrimination can be found.¹⁸⁰

In the moral domain, there may be things that all persons *ought* to care about, so that when they engage in second-order reflection (“What should I make as the objects of my commitments?”), they will realize that they should be committed to certain moral ideals.¹⁸¹ A full explanation of the nature of evaluation of ends is beyond the scope of this Article, but I hope it is clear from the discussion of Posner’s argument that he stipulates a narrow definition of rationality. For Posner, as for many social scientists influenced by neoclassical economics, a desire is rational if and only if it satisfies some existing desire of the agent.¹⁸² But we might wonder whether a different definition of rationality is required when reasoning about morality; perhaps this kind of reasoning requires questioning whether the objects of our desires are valuable or worth desiring.

One way to make the nature of moral rationality explicit is to inquire into the *purposes* behind moral rules. The purposes that undergird widely applicable moral norms make reference to things that are valuable for their own sake, not because they satisfy some contingent desire that an agent happens to have. Moreover, these underlying purposes serve as sources of motivation for an agent provided that two conditions are met: (1) the purposes behind the rule are things that rational people ought to care about, and (2) the agent is inclined, through proper training or upbringing, to care about the interests protected by the rule. To use an analogy, imagine the following conversation:

- Son: Dad, why do you always drive so slowly by the VMI campus on your way to work?
 Dad: Because the speed limit is 25.
 Son: Why is that the speed limit?

180. FRANKFURT, *supra* note 161, at 91; *see also* DAVID O. BRINK, MORAL REALISM AND THE FOUNDATIONS OF ETHICS 64, 125-35 (1989).

181. *See* T.M. SCANLON, WHAT WE OWE TO EACH OTHER 147-88 (1998).

182. *See* Posner, *Lectures*, *supra* note 1, at 1664-65.

Dad: Because there is a lot of pedestrian traffic on this street, and it is hard to see around the curves with all these high walls.

The chain of reasoning appeals to the purpose behind the rule—not hurting people—which is a purpose the son is assumed to share. Consider how odd a response would be of the form, “So what? Who cares if we run over pedestrians?” A person who claimed not to respect the legal rule because he did not care about refraining from hurting others would be poorly socialized, to say the least. Reasoning of this sort refers to considerations such as the fit between the agent’s desires and other ends or whether the agent is mistaken about the objects of his concern.¹⁸³

The justification of a moral rule works the same way as the justification of the legal rule described above. The demands of morality are explicated in terms of the purposes underlying a moral rule, with the purposes generally defined in terms of the good for some human practice.¹⁸⁴ For this reason, this form of argument is known as teleological because it depends on the *telos*, or purpose, of a social practice.¹⁸⁵ Keeping one’s promises, for example, can be defended as necessary in order to support an institution of promising with its associated expectations of performance. Similarly, marital fidelity is morally enjoined because it is necessary to realize the goods of a monogamous union, such as security, stability, and a deepening companionship. This teleological reasoning process refers to the purpose of the practice in which the moral rules arise.¹⁸⁶ The nature of the practice points to the reasons people have for acting rightly. Everyone understands the point of the moral rules and follows them because they accept the validity of the ends served by the practice. People care about maintaining trusting relationships, refraining from hurting others, and perhaps even about improving society and the welfare of others.

This account works well for discrete social practices whose boundaries are clearly delineated and whose ends are widely agreed upon. When philosophers seek to substitute “life as a whole” for particular practices, however, these theories run into well-known difficulties. These problems are aptly summarized in Alasdair MacIntyre’s dismissal of “the dreadful banality of the true end for man when its content is finally made known. All those remarkable virtues are to be practiced, all that judgment and prudence is to be exercised so that we may become—upper middle class Athenian gentlemen devoted to metaphysical enquiry.”¹⁸⁷ MacIntyre and others fault contemporary ethics for lacking a narrative, for being divorced from a richly described cultural background that

183. See Darwall et al., *supra* note 39, at 175-76.

184. This is what distinguishes moral reasons from *taboo*, an absolute or unconditional requirement that cannot be further explicated. See Alasdair MacIntyre, *Can Medicine Dispense with a Theological Perspective on Human Nature?*, in KNOWLEDGE VALUE AND BELIEF, *supra* note 55, at 25, 30-31.

185. See NOZICK, *supra* note 168, at 494-98.

186. See *id.* at 497.

187. MacIntyre, *supra* note 184, at 38.

provides an intelligible history for our moral commitments and values.¹⁸⁸ The classic teleological theory of ethics, Aristotle's, did supply this narrative, but its dependence on Aristotle's account of human nature renders it unsatisfactory for grounding ethical judgments in a society that is so markedly different from Fifth Century Athens.¹⁸⁹ Fortunately, professional ethics does not have a task as comprehensive as constructing an end for life as a whole. The professions are devoted to realizing only a subset of the goods available to a well-lived human life and are accordingly better suited to anchoring a teleological justification of moral rules. It is important to bear in mind MacIntyre's criticism, however, because it points to a potential flaw in some teleological accounts of professional ethics—namely, the tendency to identify the purpose of the practice with one contestable vision of the good for the profession.¹⁹⁰ As we have seen, critics of the contemporary practice of law occasionally fall under the sway of a nostalgic longing for an imagined golden age, when the profession was governed by wise elites.¹⁹¹ It is true that one dimension of the lawyer's role is the preservation of social institutions and ethical traditions against the corrosive effect of passions and discord.¹⁹² At the same time, however, the lawyer is supposed to be an agent of change, challenging the very institutions that conservative visions of the profession seek to safeguard. The difficulty for a teleological theory of professional ethics is to accommodate this plurality of ends and to work out the balance between the occasionally conflicting values that justify the lawyer's role. Although consideration of conflicts in values is beyond the scope of this work, I hope that this discussion has shown that even where the underlying values served by a profession are in tension, the values can provide a basis for motivating agents to conduct themselves ethically to the extent that they represent commitments that are shared by professionals.

2. Internalism

A different kind of response to questions about the motivational force of morality, one which has enjoyed mixed fortunes in the history of philosophy, is moral noncognitivism—the thesis that moral judgments are expressions of the appraiser's attitude toward some state of affairs.¹⁹³ Emotivism, one variety of noncognitivism, claims that moral judgments are expressions of approval or

188. See *id.* at 39; see also David Burrell & Stanley Hauerwas, *From System to Story: An Alternative Pattern for Rationality in Ethics*, in KNOWLEDGE VALUE AND BELIEF, *supra* note 55, at 111.

189. See Darwall et al., *supra* note 39, at 168.

190. See MacIntyre, *supra* note 184, at 28-31.

191. See *supra* note 50 and accompanying text.

192. See Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990).

193. See, e.g., BRINK, *supra* note 180, at 44 (describing, but not approving of, noncognitivist positions).

disapproval, or moral judgments are dispositions to particular emotional reactions given the state of affairs; it has been mocked as the “Yay! Boo!” theory of morality and has come in for sustained, and I believe persuasive, criticism.¹⁹⁴ A more plausible version of noncognitivism, prescriptivism, maintains that a moral judgment is the speaker’s assertion that an evaluation or recommendation ought to be concurred in by others.¹⁹⁵ Notably, both variants of the noncognitivist claim share the virtue of building motivation into moral concepts.¹⁹⁶ David Brink, who has written the best recent study of the relationship between motivation and morality, labels “internalism” the claim that “it is a part of the concept of a moral consideration that such considerations motivate the agent to perform the moral action or provide the agent with reason to perform the moral action.”¹⁹⁷ The problem with the internalist stance is that it can be easily shown that not everyone is motivated by moral reasons. A committed internalist could reply to this objection by denying that it is conceptually possible to fail to be motivated by moral reasons; if people were not moved by X to do Y, then it would follow that X is not a moral reason for Y. In other words, an internalist must refuse to accept the existence of amoral people—those who recognize moral reasons for what they are, but nevertheless refuse to perform moral actions.¹⁹⁸ What is the internalist to do with Glaucon and Thrasymachus, or Judge Posner for that matter?

For this reason, the motivational force of morality may be held to depend on contingent psychological factors, such as the beliefs and desires that an agent happens to have or internalized dispositions.¹⁹⁹ In this view, a reason to

194. See, e.g., MACINTYRE, *supra* note 133, at 11-21 (defining and criticizing emotivism); see also DWORKIN, *supra* note 105, at 173 (stating “the redescription of [philosophers’] moral beliefs as emotional reactions is just bad reporting”); Darwall et al., *supra* note 39, at 149-50.

195. The best-known statement of this position is R.M. HARE, *THE LANGUAGE OF MORALS* 1-16 (1952). See also CHARLES L. STEVENSON, *ETHICS AND LANGUAGE* 24 (1944). For a sophisticated recent example, see ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS* 30-35 (1990). Both versions of noncognitivism were displaced in the second half of the twentieth century by substantive theories such as John Rawls’s method of reflective equilibrium. See Darwall et al., *supra* note 39, at 123. For an intriguing revival of noncognitivism, consider the expressivist movement in law, which tells legal actors to express appropriate attitudes toward values. See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

196. See, e.g., BRINK, *supra* note 180, at 39.

197. *Id.*

198. See *id.* at 46-47.

199. Brink calls this position “externalism,” to contrast with internalism. See *id.* at 42. To make matters confusing, Bernard Williams has adopted different meanings for internalism and externalism. See BERNARD WILLIAMS, *Internal and External Reasons*, in *MORAL LUCK* 101, 101 (1981). For Williams, external reasons are those which do not depend on the agent’s actual subjective motivations. *Id.* at 106-08. Internal reasons are those which make reference to interests and motivations that the agent happens to have. *Id.* at 101-02. In Brink’s terminology, however, some of these reasons may be *external* in the sense that they make reference to the agent’s desires and are not motivational solely by virtue of being requirements of morality. See BRINK, *supra* note 180, at 48-50. I will track Brink’s definitions of internalism and externalism in this paper. See also Korsgaard, *supra* note 125, at 81 (following Brink’s sense of internalism).

behave morally must depend on some motive or desire that the agent has for its force, which will be furthered by his taking the prescribed action. In Frankfurt's terms, morality must be connected with something the agent cares about, although it is unnecessary to care for any particular thing.²⁰⁰ We can imagine a person who cares about none of the considerations that ordinarily motivate people to be moral, such as sympathy, benevolence, or justice. As Brink observes, we can still argue that an amoral person is wrong and that she *ought* to care about certain interests; such an amoralist is, however, conceptually possible.²⁰¹ Furthermore, while the things we care about may be reasons for action, they need not be conclusive reasons—they may be outweighed by other desires or interests, or we may be too lazy or weak of will to act on these reasons. Moral reasons need not be sufficient reasons for action in order to count as moral reasons.²⁰² This is an error into which Posner slips in his Holmes Lectures. Much of his argument for the ineffectiveness of moral theory is centered on the inability of moral argument to motivate some people, some of the time.²⁰³ But no one claims that a moral argument must be decisive in every case. Motivation may depend on contingent psychological factors, such as whether a person cares about concerns that ought to motivate her. The existence of an amoralist—someone who responds “so what?” when presented with moral reasons for action—is not an embarrassment to morality; it is an indictment of the rationality, education, socialization, or character of the person in question. Most people have reasons for action that depend on commitments, loyalties, or aspects of their personal identity which they are not willing or able to give up easily, or stand aside from, in the posture of the hypothetical amoralist critic.

An argument like this one has been developed with great sophistication by the neo-Kantian philosopher Christine Korsgaard.²⁰⁴ She observed that it is part of the nature of human beings to be reflectively self-conscious.²⁰⁵ We have desires, drives, and inclinations, but unlike animals who simply act on these whims, we can subject them to examination, asking whether these desires are good reasons for acting. When we deliberate about actions, we realize we must decide for a reason, because the will, in order to be free, must act under a law that it makes for itself.²⁰⁶ The familiar Kantian categorical imperative arises

200. See *supra* notes 161-66 and accompanying text.

201. See BRINK, *supra* note 180, at 48-50.

202. See *id.* at 60.

203. See *supra* note 137 and accompanying text.

204. See CHRISTINE M. KORSGAARD, *CREATING THE KINGDOM OF ENDS* (1996); Korsgaard, *supra* note 125. This section of the Article largely tracks Korsgaard's lecture, *The Authority of Reflection*, in *THE SOURCES OF NORMATIVITY* 90 (Onora O'Neill ed., 1996). I will ignore variations between this argument and some of the essays in *Creating the Kingdom of Ends* as the differences are not relevant for the purposes of this Article.

205. See Korsgaard, *The Authority of Reflection*, *supra* note 204, at 92.

206. See Christine M. Korsgaard, *Motivation, Metaphysics, and the Value of the Self: A Reply to Ginsborg, Guyer, and Schneewind*, 109 *ETHICS* 49, 50-52 (1998).

here—a free will must choose a law-like maxim for action.²⁰⁷ However, the next step of the argument is highly original: The will does not deliberate in a vacuum. Rather the structure of reflective self-consciousness forces us to construct a conception of personal identity. “When you deliberate, it is as if there were something over and above all of your desires, something which is *you*, and which *chooses* which desire to act on. This means that the principle or law by which you determine your actions is one that you regard as being expressive of *yourself*.”²⁰⁸ Self-identity is the principle of choice for the free will.²⁰⁹ Significantly, personal identity must be understood at a relatively low level of abstraction. Although we are all citizens of the “Kingdom of Ends,” by virtue of being human beings, we also bear particularized identities. A person may “think of herself as someone’s friend or lover, or as a member of a family or an ethnic group or nation. She might think of herself as the steward of her own interests, and then she will be an egoist. Or she might think of herself as the slave of her passions, and then she will be a wanton.”²¹⁰ This kind of conception of oneself, which Korsgaard calls an agent’s “practical identity,” is a way of *valuing* oneself—“a description under which you find your life to be worth living and your actions to be worth undertaking.”²¹¹

Normativity—that is, the binding nature of principles of action—is built into this account because violating the conception of oneself that forms the basis of one’s practical identity is intolerable. We express this sort of reasoning in ordinary life when we say, “I couldn’t live with myself if I did that,” or teach

207. See *id.* at 51.

208. Korsgaard, *The Authority of Reflection*, *supra* note 204, at 100.

209. See *id.*

210. *Id.* at 101. The term “wanton” is derived from Harry Frankfurt’s paper, *Freedom of the Will and the Concept of a Person*, in *THE IMPORTANCE OF WHAT WE CARE ABOUT*, *supra* note 161, at 11. Note that simply *being* a wanton, as opposed to deciding to live *as* a wanton, is ruled out by the nature of the will. One of Korsgaard’s critics gives a good account of why this is so: “If the will adopts some other law, notably the law of always choosing what the person desires, then it abandons its position of freedom by putting itself under the constraint of desires and inclinations that are alien to it.” Hannah Ginsborg, *Korsgaard on Choosing Nonmoral Ends*, 109 *ETHICS* 5, 8 (1998). Ginsborg overstates a bit here; it is possible to have some second-order desire to live as a wanton—that would still be an autonomous principle of the will. The only thing ruled out by the nature of the will is abandoning second-order reasons altogether, and permitting oneself to be simply blown about by first-order desires.

211. Korsgaard, *The Authority of Reflection*, *supra* note 204, at 101. Later in *The Authority of Reflection* Korsgaard seems to adopt the criticism made by communitarian critics like Michael Sandel of some versions of political liberalism, namely that liberalism posits a deracinated conception of the self that does not provide a sufficiently rich practical identity to enable the agent to make decisions. See *id.* at 118-19 (citing MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982)). “[W]e may begin by accepting something like the communitarian point. It is necessary to have *some* conception of your practical identity, for without it you cannot have reasons to act.” *Id.* at 120. It is interesting that she equates “practical identity” with the particularized, culture-bound conception of the self described by Sandel, and not with simply being human. There is some similarity here, I think, with the claim of MacIntyre, discussed above, that ethics detached from narrative is incoherent. See *supra* notes 183-84 and accompanying text.

children that they should not lie because if they did they would be liars. “Your reasons express your identity, your nature; your obligations spring from what that identity forbids.”²¹² Much of one’s practical identity is contingent; it depends on the race, sex, geographic region, and religion into which one is born, as well as choices made in one’s life, such as entering an occupation or adopting or repudiating some aspect of one’s social background. (As Korsgaard notes, falling in love with a Capulet might make one realize that being a Montague is not all that important. On the other hand, a person may choose to emphasize some aspect of her identity which had until that point been less important, by accepting a religious vocation, for example.)²¹³ What is not contingent for Korsgaard, however, is that we are governed by *some* conception of practical identity. “For unless you are committed to some conception of your practical identity, you will lose your grip on yourself as having any reason to do one thing rather than another—and with it, your grip on yourself as having any reason to live and act at all.”²¹⁴

The implication for professional ethics of this account should be clear. To the extent that a person’s professional identity is important to herself, it furnishes a reason for action. Professions are a natural foundation for personal identity, particularly in light of the leveling effects of mass culture and technology on traditional sources of meaning, such as religion, family, region, and in some cases ethnicity.²¹⁵ Moreover, as William Simon, Mike Martin, and others have argued, professionals *seek* meaning in their occupations; it is the nature of professions to make normative claims and the nature of professionals to believe they are engaging in a meaningful project.²¹⁶ Finally, the need for locating meaning in professional life is bound to increase as work occupies more and more of one’s time. As Anthony Kronman points out, modern law firm practice leaves very little time remaining in the week for family, social, religious, artistic, and charitable activities that would otherwise function as a basis for one’s personal identity. Thus, to the extent Korsgaard is correct, and humans need particularized identities as a ground of reasons for action, we can expect professionals to freight their careers with normative significance. Unless the legal profession is completely incapable of bearing this weight (and I do not think this is the case), it is possible to use the moral value that lawyers seek from their profession as a way to get the ethical argument started. Some suggestions for how these arguments might proceed are found in Section V.

212. Korsgaard, *The Authority of Reflection*, *supra* note 204, at 101.

213. *Id.* at 120.

214. *Id.* at 120-21.

215. This claim is often associated with Durkheim. See EMILE DURKHEIM, *PROFESSIONAL ETHICS AND CIVIL MORALS* (Cornelia Brookfield trans., 1958).

216. MARTIN, *supra* note 34; SIMON, *supra* note 15, at 109-37.

B. Ducking the Question: Morality and Prudence

Some philosophers have sought to make an end-run around Glaucon's challenge, by denying that acting immorally can ever be in one's self-interest. They seek to show that the belief that there is advantage in injustice is mistaken. The great historian of ideas Isaiah Berlin describes this tradition:

According to this doctrine—that virtue is knowledge—when men commit crimes they do so because they are in error: they have mistaken what will, in fact, profit them. If they truly knew what would profit them, they would not do these destructive things—acts which must end by destroying the actor, by frustrating his true ends as a human being, by blocking the proper development of his faculties and powers. Crime, vice, imperfection, misery, all arise from ignorance and mental indolence or muddle.²¹⁷

This argumentative move is common in professional ethics, where the practical downside of getting caught acting immorally is often clear. Alan Goldman, for example, explains that it is not in the long-run best interests of a corporation to cut corners on safety: "When a corporation blatantly ignores potential harm to the public from the marketing of its product, it can expect not only losses on that product when the harmful defect is discovered, but negative publicity that can affect the sales of its other products as well."²¹⁸ (This strategy is known in legal education as "fighting the hypothetical"—a favorite tactic of law students. Its maxim may be stated as: When faced with an inconvenient question, modify it until it can be answered.) If morality is considered in a game-theoretic context, moral norms can solve collective action problems and ensure cooperation, where defecting from cooperativeness would be detrimental to all participants.²¹⁹ By making this move, however, morality becomes assimilated to self-interest, or prudence, because it assumes that all participants in a social practice, or players in a game, are concerned only to maximize their own advantage.

We can call this rephrasing of Glaucon's challenge the "prudentialist stance." It represents a partial capitulation to a critic like Posner, for it accepts the centrality of self-interest as a motivating principle for humans.²²⁰

217. ISAAH BERLIN, *The Decline of Utopian Ideas in the West*, in *THE CROOKED TIMBER OF HUMANITY* 20, 28-29 (Henry Hardy ed., 1990).

218. ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 233 (1980).

219. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 136-39 (1984).

220. Posner tries to head off this move by definition—he defines morality as the set of duties designed to check our self-interest. See Posner, *Lectures*, *supra* note 1, at 1639. But if self-interest and morality are never opposed, there is no need to define and defend a separate sphere of moral duties. To turn the point around, if reasons must be ruled out as "moral" whenever they coincide with the agent's self-interest, there may be no moral reasons at all, if morality turns out

Prudentialism merely reconceives certain kinds of moral duties (or the totality of morality, depending on the strength of the prudentialist claims advanced) as having a basis in self-interest.

David Schmidtz observes that morality and prudence can have overlapping extensions.²²¹ That is, doing X might be the right thing to do based on non-prudential reasons, but it also might be in the best interests of the agent. To take familiar examples, civic volunteering may alleviate human suffering, but also improve the reputation of the volunteer in the eyes of the community. Voting, refraining from racial discrimination, keeping one's promises, and remaining loyal to one's spouse are all moral imperatives, but also function as signals to potential cooperative partners of the agent's reliability; moral reasons for acting are therefore buttressed by prudential reasons to behave in the same manner.²²² Similarly, a person may have profoundly moral reasons for doing X, but these reasons may nevertheless satisfy some interest the person has. Michael Perry gives an example of a religious person who gives money for famine relief because she has internalized the Christian imperative to "love one another just as I have loved you."²²³ If someone like Posner were to push this justification and ask why this person had internalized this Biblical precept, she might answer, "[b]ecause [this is] the way to live the most deeply satisfying life of which human beings . . . are capable."²²⁴ This reason certainly appeals to the agent's self-interest, but it is also a moral reason, in that it makes reference to the welfare of others and is a judgment about how one ought to act to express Christian love. (Perry assumes that the person in his story did not act merely out of fear of eternal damnation, which would be a non-moral reason.)²²⁵ The entanglement of self-interest with these motivations does not remove the action from the domain of the moral. Attempting to live one's life in conformity with religious ideals, or a secular understanding of the fundamental existential conditions of human life, is the very heart of the moral enterprise.

These possibilities do not mean that morality is merely a matter of self-interest. Indeed, the questions of whether X is moral and whether X is in one's self-interest are analytically distinct questions. "Whether or not moral imperatives are categorical, there remains a fact of the matter concerning whether following moral imperatives is to our advantage. To try to show that being moral turns out to be prudent is not to assume that moral imperatives are prudential imperatives."²²⁶ The possibility of extensional overlap shows how

to be in the interest of all rational, properly informed persons.

221. See SCHMIDTZ, *supra* note 173, at 132-33.

222. See ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

223. Michael J. Perry, Gianella Lecture, *What is "Morality" Anyway?*, 45 VILL. L. REV. 69, 76 (2000).

224. See *id.* at 76.

225. See *id.* at 77-78.

226. SCHMIDTZ, *supra* note 173, at 132; see also WILLIAMS, *supra* note 169, at 76 ("[I]t is quite unrealistic to force onto our religious moralist (or anyone else) an exclusive disjunction between the prudential and the moral.").

Glaucon's challenge can be misconstrued.²²⁷ Perhaps Glaucon was asking only whether he had non-moral reasons to *regret* acting morally. His question, so understood, was not a demand that Socrates show him that right action would always be in his self-interest. Similarly, professionals who ask whether it is in their self-interest to act morally might be wondering whether they will bear some cost as a result of doing the right thing. The question does not, however, mean that they are unwilling to behave morally. Just as the strong internalist claim (moral reasons always motivate) is false because it fails to allow for people who recognize the moral option but refuse to abide by it, the strong prudentialist claim is false because it denies that someone may act morally when it is not in her self-interest.

V. IMPLICATIONS FOR LEGAL PROFESSIONALISM

A. *Meaningful Work*

The first response that may be made to the Posner/Glaucon position is that it does not represent the standpoint from which most well-socialized professionals ask questions about their obligations. Law students and lawyers who ask questions about professional ethics are not stating their unwillingness to take morality seriously; they are asking for reasons that are connected with what they already care about. What they care about, in many cases, turns out to be an ethically meaningful occupation. The aspiration to belong to a profession whose social meaning corresponds to the moral longings of its practitioners is the motivating force for lawyers, and this reasoning gives purchase to the ethical arguments offered by educators and critics.

Two of the most significant recent works on legal ethics begin by observing the pervasive malaise among practicing lawyers. "No social role encourages such ambitious moral aspirations as the lawyer's, and no social role so consistently disappoints the aspirations it encourages," writes William Simon in *The Practice of Justice*.²²⁸ Anthony Kronman begins his book, *The Lost Lawyer*, by noting "doubts about the capacity of a lawyer's life to offer fulfillment to the person who takes it up."²²⁹ The cause of this dissatisfaction, according to both scholars, is the disjunction between the moral principles that give meaning, both personal and social, to the practice of law and the contemporary legal workplace, which gives very little weight to ethical matters other than a narrow range of norms such as confidentiality and loyalty to one's clients.²³⁰ According to Simon, in contemporary practice lawyers have become alienated from the moral sources that formerly gave meaning to their professional lives, with the result that their work now seems meaningless and

227. See *supra* notes 149-54 and accompanying text.

228. SIMON, *supra* note 15, at 1.

229. KRONMAN, *supra* note 2, at 2.

230. See *id.* at 2-3; SIMON, *supra* note 15, at 1-4.

empty.²³¹ Where formerly lawyers had been able to exercise considerable autonomy to adapt social values to the particulars of their clients' needs, the bureaucratization of law practice, with its emphasis on narrow specialization and highly technical problem-solving, has reduced these opportunities to undertake creative, normatively significant professional projects.²³²

Simon's solution to this problem is to recognize that lawyers bear more moral responsibility for the ends and means of their representation of clients than has formerly been acknowledged.²³³ This critique sounds pessimistic—lawyers have been evading responsibility, so blame should now be placed where it belongs. However, there is a positive side to this argument: the potential for greater self-realization and the exercise of lawyers' moral agency that may be tapped when the moral responsibilities of professionals are rightly understood. Similarly, Mike Martin argues that professionals may be motivated by moral concerns in addition to the obvious interest that all people have in making money at their jobs.²³⁴ "Professions provide opportunities to make ongoing contributions to the well-being of others,"²³⁵ and it is this opportunity that attracts many young people to professional careers. For example, would-be doctors talk about the importance of healing, and law school applicants invariably discuss concerns with justice and their desire to help people on the personal statement included with their applications for admission.²³⁶ The closing of these avenues for self-realization may be what underlies much of the phenomenon of dissatisfaction by practicing lawyers, and if that is so, one can imagine reducing professional malaise by restoring the connection between the social values that provide moral sources to practitioners and the actual conditions of occupational life.

Recall the example of the legal rule whose justification was avoiding harm to pedestrians. It would be odd to think of someone saying, "I do not need to pay attention to the rule because I do not care about running people over." Similarly, it seems peculiar to imagine a lawyer saying, "I can ignore ethical considerations in my professional life, because I do not really care about justice." Of course, the relationship between justice concerns and actions by lawyers may be attenuated and difficult to discern. A lawyer may believe in a strongly role-differentiated conception of legal ethics, in which justice is held to emerge from the partisan activities of lawyers on both sides, with a judge

231. See SIMON, *supra* note 15, at 111-26.

232. See *id.* at 112-13.

233. See *id.* at 112.

234. See MARTIN, *supra* note 34, at 23.

235. *Id.*

236. The reality may be less inspiring. Patrick Schiltz writes that most lawyers, at least those at big firms, are basically greedy, insecure, and competitive. See Schiltz, *supra* note 2, at 910-20. They tend to grasp instinctively for any brass ring dangled in their presence, keep score by comparing the amount of money they make with others, and fall into workaholism all too easily. As a result, for many big-firm lawyers, moral concerns become marginalized and ethics are reduced to complying with the technical law of professional responsibility.

serving as a neutral referee. On this model, what seem like justice-subverting activities may be, to the lawyer, activities that further justice in the long run, provided that the adversary system mechanism is properly set up and maintained.²³⁷ Familiar examples include cross-examination that casts doubt on a truthful witness's testimony and procedural stratagems that prevent a substantively valid claim from being considered by the tribunal. But even a lawyer who subscribes to a strongly role-differentiated conception is still concerned to justify her activities with reference to the purpose underlying the practice. It is difficult to imagine a lawyer saying, "Frankly, I filed that suppression motion because I wanted to make money, and I charge by the hour." Rather, a lawyer participating in a conversation about professional morality would relate her actions back to underlying values: "I filed the suppression motion because the police officers searched my client without a warrant and without consent; the exclusion of evidence in this case is justified because in the long run it is the only way to deter police misconduct."

Although it is hard to evaluate ethical reasoning with much precision, empirical studies have revealed that lawyers generally resort to arguments like this one to justify their activities. For example, the ABA recently sponsored an interview-based, interdisciplinary study of the ethics of large firm litigators.²³⁸ Lawyers' reasoning relied heavily on the adversarial norm, or what Simon calls considerations of long-run justice.²³⁹ For example, with respect to the discovery process, lawyers' justifications tended to take the following form: "You stay within the rules; to the extent it's within the rules, you have a duty to do everything you can for the client's interests."²⁴⁰ This reasoning may be faulty—much of current legal ethics scholarship is dedicated to debunking arguments of this form—but it is nevertheless a moral position, justified by the relative competence of decisionmakers (lawyers, judges, clients, drafters of rules) to make ethical decisions and the long-run incentive effects that would result if each player in the system deviated from her assigned role. The significance of the findings of the ABA study lies not in the persuasiveness of the arguments adduced by the lawyers, but in the seriousness with which the study's respondents took their obligation to offer good moral reasons for their conduct. The lawyers did not say, "Yeah, I'm a whore. I'm only in it for the money." The justifications they offered related to considerations of justice, fairness, political legitimacy, and loyalty to clients, along with some armchair

237. For persuasive criticisms of the "adversary system excuse," see APPLBAUM, *supra* note 26, at 3-14; DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 148-56 (1988); *see also* SIMON, *supra* note 15, at 62-68. I offer this argument not as one that I personally endorse, but as an example of how the connection between the purpose behind a practice (here, justice), and rules of the practice may be attenuated.

238. See Lawrence J. Fox et al., *Report, Ethics: Beyond the Rules: Historical Preface*, 67 *FORDHAM L. REV.* 691, 691 (1998).

239. See SIMON, *supra* note 15, at 53.

240. See Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 *FORDHAM L. REV.* 709, 710 (1998).

empiricism about the effectiveness of the adversary system.²⁴¹ These are by no means the kind of amorality whose views would lend support to Posner's critique of moral reasoning.²⁴²

Of course, there may be some recalcitrant lawyers who are resolutely amoral. For lawyers who simply refuse to pay any heed to ethical reasoning, there is little that any educational efforts associated with the professionalism movement, no matter how well conceived, can do. Consider this cynical comment by White House counsel John Dean on his role in the Watergate scandal: "I knew that the things I was doing were wrong, and one learns the difference between right and wrong long before one enters law school. A course in legal ethics wouldn't have changed anything."²⁴³ He is probably right, and for this reason, professional responsibility courses ought not to be aimed at the John Deans of the world. These lawyers are probably motivated by little other than the fear of getting caught, so the best we can do is to appeal to those motivations: "There is much we can do in society, ranging from attempts at persuasion to punishment of the person who does not behave morally, by connecting sanctions to motivations he does have."²⁴⁴ The following subsection considers a limited place for prudential, or self-regarding arguments, in professional ethics.

B. *"They're Kids . . . Scare Them"*²⁴⁵: A Limited Role for Prudentialism

The alternative response to the skeptical argument is in one sense a dodge: In most real-world cases, acting rightly, helping one's clients, and self-interest are not in tension. As one might say to Glaucon, in the real world of law practice there are no magic rings lying around to prevent a lawyer from acquiring a reputation for injustice.²⁴⁶ This argument is a surrender to critics like Posner, for it relies on proving a congruence between doing the right thing and acting in one's self-interest and in the interest of one's clients.²⁴⁷ But

241. See *id.*

242. See *supra* notes 124-25 and accompanying text.

243. Thomas Lickona, *What Does Moral Psychology Have to Say to the Teacher of Ethics?*, in ETHICS TEACHING IN HIGHER EDUCATION 103, 129 (Daniel Callahan & Sissela Bok eds., 1980) (quoting D. Goldman, "Exclusive Interview with John Dean," *Comment*, Boston University School of Law I (1979)).

244. NOZICK, *supra* note 168, at 411.

245. This line is from the movie *Bull Durham* and represents jaded catcher Crash Davis's response to his manager's desperate plea for any suggestions to improve the team's lousy performance. The manager's memorable locker-room tirade follows: "This is a simple game—you throw the ball, you catch the ball, you hit the ball." *BULL DURHAM* (Image Entertainment 1988).

246. See *supra* notes 149-55 and accompanying text.

247. I am assuming here that lawyer self-interest and the interest of the lawyers' clients generally coincide. Many ethical dilemmas addressed by the professionalism movement concern cases in which the client's interest conflicts with some other interest, such as that of a third party, opposing lawyer, court, agency, or society at large. There are, however, cases in which the

showing students how conforming to standards of professional morality can help their clients' causes is also a reflection of the reality of our endeavor. In most situations, unethical behavior that seems to be in the best interest of clients in the short run will have a long-term detrimental impact on the client's case or business transaction, to say nothing of the lawyer's reputation and effectiveness. To communicate this message, however, teachers of professional ethics must challenge a persistent theme in the tradition of the American legal profession—the myth that being a complete jerk is the path to success. Consider this statement about mergers and acquisitions practice in New York City:

Legal ethics becomes a paradoxical element of competition among lawyers: Those who practice closest to the line without crossing seem to gain an advantage. Goaded by the market, conscientious lawyers ask whether they do their clients a disservice if they don't exploit every opening. Some legal scholars warn that any lawyers who don't reach the limit are in breach of their professional obligations.²⁴⁸

This view may be called the Rambo narrative. It is pervasive among practicing lawyers, as sociologists have discovered,²⁴⁹ and it appears to be an attitude that law students somehow pick up from the fragments of cultural messages about lawyers that they encounter prior to law school. One way to counteract the Rambo narrative is to show that this style of lawyering is counterproductive and the clients of the would-be Rambos are better off with a representative conforming to the dictates of professionalism. It is the responsibility of judges, practicing lawyers, and law teachers to recount stories in which doing the right thing and the interests of clients coincide.

This section is entitled "They're kids . . ." to reflect the viewpoint of a legal educator, but the same lessons still need to be taught to some practitioners, particularly those early in their careers. The Rambo narrative does not get started in law school; the students may have a distorted view of the ethics of lawyers, but the mythology of take-no-prisoners lawyering has a basis in the

lawyer's self-interest and the client's interests diverge. Examples include the incentives created by hourly billing and the conflict of interest built into settlement negotiations in contingency-fee cases. Throughout this section, where I speak of client interests and lawyer self-interest, I will be assuming they are harmonious, but the same arguments apply, *mutatis mutandis*, to cases in which they conflict. (I am grateful to Peter Strauss for raising this objection in related contexts.)

248. LINCOLN CAPLAN, SKADDEN: POWER, MONEY, AND THE RISE OF A LEGAL EMPIRE 138 (1993).

249. See Gordon, *supra* note 240, at 716 (reporting on conclusion of ABA study of large law firm litigation practice that "there were few positive incentives, other than self-respect and the good opinion of judges and of lawyers from other firms to practice ethically"); Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837 (1998).

beliefs of many members of the bar. The pervasiveness of the Rambo narrative can be perceived not only from sociological studies like the ABA's study of big-firm litigators referred to above, but also from the growing number of articles by frustrated judges and experienced lawyers, cautioning their overzealous peers against becoming too enthralled with the junkyard dog ideal.

Judges have begun to come forward to warn lawyers that unethical behavior may compromise their clients' cases. For example, federal judge Alex Kozinski has written a humorous how-to guide for advocates hell-bent on losing an appeal.²⁵⁰ Here is an example of one of the losing tactics he suggests:

Best of all, cheat on the page limit. The Federal Rules of Appellate Procedure not only limit the length of the briefs, but also indicate the type size to be used. This was pretty easy to police when there were two type sizes—pica and elite. But these days it is possible to create almost infinite gradations in size of type, the spacing between letters, the spacing between lines and the size of the margins.

. . . Chiseling on the type size and such . . . tells the judges that the lawyer is the type of sleazeball who is willing to cheat on a small procedural rule and therefore probably will lie about the record or forget to cite controlling authority.²⁵¹

The rule cited by Judge Kozinski is an extremely trivial one, and he emphasizes its pedestrian nature by citing it along with numerous other pet peeves, such as the excessive use of acronyms and legal jargon in briefs.²⁵² But there is a serious point underlying this example: Ethical lapses have consequences in the real world of legal practice. Showing oneself to be a "sleazeball," in Judge Kozinski's words, may cost an advocate crucial credibility, and the client the case.

The previous discussion should not be overstated as no lawyer is going to fail to enter heaven for bending procedural rules, just as no one will suffer eternal perdition for exceeding speed limits or removing those little tags from mattresses. An excellent brief will not suddenly turn into a sure loser just because the lawyer tried to sneak a few extra words past a busy appellate court. However, these sorts of infractions tend to be cumulative.²⁵³ A lawyer who cheats on one little rule is more likely to cheat on another.²⁵⁴ Over time, this

250. Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. REV. 325 (1992).

251. *Id.* at 327.

252. *See id.* at 328.

253. Compare SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 24-26 (1978), on the cumulative effect of telling lies on the liar's character, with Schiltz, *supra* note 2, at 917 on the corrosive effect that billing fraud has on lawyers' ability to perceive unethical conduct.

254. *See* Kozinski, *supra* note 250, at 328.

habit of cutting ethical corners may diminish the lawyer's resolve to do the right thing where the lawyer experiences intense pressure to cheat. Judges know this and are suspicious of a lawyer's integrity even where the only evidence known to the judge is that the lawyer cheated on an inconsequential rule.

In all but the simplest cases, the lawyers know far more about the particulars of the law than does the judge. Certainly the advocates are much more familiar with the factual record than the judge because the lawyers have been living with the case, so to speak, for months or years. As a result of this asymmetry of information, judges are in the position of a rather uninformed purchaser of some product.²⁵⁵ In most markets, there are mechanisms such as third-party auditors to increase the reliability of information.²⁵⁶ In litigation, by contrast, we have only the adversary system, in which we trust the opposing lawyers to ferret out weak legal arguments and unsupported factual assertions. For this reason, judges assess the reliability of information through informal means. In smaller communities, they learn the reputations of lawyers for honesty and fair dealing through the grapevine. In large markets, where the cost of obtaining such information is high, judges may make judgments about the lawyer's integrity based on the available evidence. If submissions to the court are essentially accurate and candid, the lawyer gains credibility. If the lawyer has stretched the holding of a case too far or mischaracterized facts in the record, the judge may assume that the lawyer is not to be trusted.

The advantages of maintaining the confidence of the court are well known to experienced advocates²⁵⁷ but may not be obvious to beginning law students. New lawyers may not realize that judicial personnel do not do much independent research; they rely on lawyers to explain the legal framework, cite the right cases, not stretch the authority, and apply the law to the facts. "[J]udges must depend to some extent on counsel to bring issues into focus."²⁵⁸ Certainly most judges bring a wealth of experience to the bench, which results in their fairly reliable gut reactions to legal arguments. Law clerks may do some additional research at the direction of their judge, especially if one of the parties' lawyers has done a lousy job briefing an issue that may be dispositive of the case. However, when issuing dispositions, judges do not construct legal arguments from the ground up. They need lawyers to guide them through the analysis of the case. Naturally, they want to make sure that the guidance they

255. See generally Frank H. Easterbrook, *Adversary Inferences*, 20 HARV. J. L. & PUB. POL'Y 503, 503 (1996).

256. See *id.* at 506.

257. The literature for practitioners is full of articles that caution lawyers not to stretch the truth and to be jealous of their credibility. See, e.g., Andrew L. Frey and Roy T. Englert, Jr., *How to Write a Good Appellate Brief*, LITIG., Winter 1994, at 6, 6-7; Richard B. Klein, *A Dozen Ways to Anger a Judge*, LITIG., Winter 1987, at 5 (stressing the importance of lawyers' realizing and avoiding behavior that angers judges); Warren E. Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11, 13 (1966).

258. *Drope v. Missouri*, 420 U.S. 162, 176-77 (1975).

receive is reliable. Judges expect lawyers not only to be partisan, but also to be fair. They will not pay much attention to a lawyer who seems untrustworthy. Thus, a lawyer who tries to stretch a case too far runs the risk of alienating the judge and conceding to her adversary the crucial role of establishing the legal framework for deciding the case. As Ninth Circuit Judge Harry Pregerson has written:

Finally, make sure you do not mischaracterize the holdings of cases you cite. We do read the cases. If you are using a case as an analogy, point that out. If, under the guise of aggressive advocacy, you misuse a case or fail to discuss an unfavorable holding, you lose credibility. And your credibility is a critical item of your stock in trade.²⁵⁹

When the audience for professionalism education is broadened beyond law students, however, this sort of advice tends to sound patronizing to experienced lawyers. Nevertheless, there may be value in repeating it, particularly if the speaker is a judge who can remind lawyers of the importance of credibility in the courtroom.

The preceding example suggests an ordinary, everyday way that unethical law practice can be contrary to one's self-interest. More serious breaches of professional obligations can result in proportionately graver adverse consequences. The *Kodak-Berkey Photo*²⁶⁰ antitrust litigation is an especially vivid example of a catastrophe precipitated by dishonest practice.²⁶¹ The lawyers representing Kodak had retained an economist as an expert witness, expecting that he would testify that Kodak's domination of the market was due to its superior technological innovations, not to anticompetitive behavior.²⁶² The plaintiff's counsel requested any documents pertinent to the expert's testimony, Kodak's lawyer's resisted, and ultimately a magistrate ordered production of numerous documents including interim reports prepared by the economist.²⁶³ At the economist's deposition, one of Kodak's lawyers stated that he had destroyed the interim reports, which were somewhat unfavorable to Kodak's defense.²⁶⁴ The lawyer even filed an affidavit in a subsequent discovery dispute in the case, stating under oath that the documents had been destroyed.²⁶⁵ In fact, the lawyer had not destroyed the documents, but had

259. Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L. REV. 431, 436 (1986).

260. *Berkey Photo, Inc. v. Eastman Kodak Company*, 603 F.2d 263 (2d Cir. 1979), cert. denied 444 U.S. 1093 (1980).

261. For an overview of this case see JAMES B. STEWART, *THE PARTNERS* 327-65 (1983). Deborah Rhode summarized this case as a problem in her book. RHODE, *supra* note 92.

262. See STEWART, *supra* note 261, at 339-40.

263. *Id.* at 340.

264. *Id.* at 340-41.

265. *Id.* at 344.

hidden them in his office and withheld them from production.²⁶⁶ The affidavit was perjurious.²⁶⁷ The fallout was a calamity for the firm.²⁶⁸ Kodak fired it and hired one of its arch-rivals to defend the antitrust case.²⁶⁹ The firm paid its client over \$600,000 to settle Kodak's claims related to its conduct of the litigation.²⁷⁰ It lost Kodak's business, which had accounted for approximately one-fourth of the firm's billings and had employed thirty lawyers full-time.²⁷¹ The partner who had coordinated the firm's preparation of the economist's testimony was released from the firm and spent twenty-seven days in jail for contempt of court.²⁷²

It is predictable that recent law school graduates will find themselves handling discovery matters in litigation. Reviewing documents in response to requests for production is a classic junior associate assignment, as is assisting with document work in preparation for expert depositions. These new graduates will be deliberating with partners about whether or not to produce documents. If a partner wants to find a way to avoid production of harmful documents, what is the junior associate to do? She could try to broaden the conversation with the partner to include considerations about what justice requires.²⁷³ The adversary system cannot function effectively without full, candid disclosure of relevant information by both sides, the associate could argue. Thus, justice demands production of relevant documents in response to an adversary's request. It would be unrealistic, however, to think that a lawyer determined to avoid disclosing damaging information would be easily swayed by arguments from social justice. Arguments from justice are also easily countered by arguments from an institutional role—it is up to the judge to decide those questions of policy; the partner might admonish the junior associate. Appeals based on the Kantian categorical imperative, the principle of utility,²⁷⁴ or some other moral principle may also sound hopelessly moralistic and naive. This situation is one where arguments from prudence can serve as another arrow in the quiver of a lawyer determined to be honest in the face of pressure to bend the rules. If enough lawyers are familiar with stories where the bad guys get punished, maybe the sharper practitioners will comply with their ethical obligations out of concern for their client's cases, their malpractice exposure, and their professional reputation. (Associates have to be concerned because they can be disciplined personally even where they were acting on orders of

266. *Id.* at 348.

267. *Id.*

268. *See* RHODE, *supra* note 92, at 96.

269. *See id.*

270. *See id.*

271. *Id.*

272. *Id.* at 97.

273. *See, e.g.,* Amy Gutmann, *Can Virtue Be Taught to Lawyers?*, 45 STAN. L. REV. 1759, 1770 (1993).

274. *See supra* notes 131, 156-58 and accompanying text.

their supervisors.)²⁷⁵ The stories about sleazy lawyers getting their come-uppance would also be a useful corrective to the Rambo narrative, which glorifies behavior that is detrimental to the legal system. If it can be shown that many of these Rambos ended up harming their clients' causes, perhaps some of their glory will fade.

V. CONCLUSION

A theme that emerged from the discussions at this conference is that professionalism initiatives must generally speak to two different concerns. First, they must address the reward structures and incentives that characterize the market for legal services in which lawyers operate. Ignoring considerations such as lawyers' reputational interests, compensation and employment incentives, and the responses of judges, provides ammunition to critics like Posner, who doubt that theorizing about ethics can motivate right action. At the same time, however, programs aimed at improving lawyer professionalism must resist the identification of legal ethics with the morals of the marketplace. Doing the right thing is not simply a matter of responding rationally to the costs and benefits of a course of action that are structured by the relevant institutions, pace the rational-choice theorists. Rather, the essence of professionalism requires attending to the moral dimension of lawyering and seeking motivations in the intrinsic values that inform professional life.

275. See MODEL RULES OF PROF'L CONDUCT, R. 5.2(a) (1983).