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SHOULD LAWYERS LISTEN TO PHILOSOPHERS ABOUT LEGAL ETHICS?*

ABSTRACT. In the recent spate of philosophers' writing on legal ethics, most contend that lawyers' professional role exposes them to great risk of moral wrongdoing; and some even conclude that the role's demands inevitably corrupt lawyers' characters. In assessing their arguments, I take up three questions: (1) whether philosophers' training and experience give them authority to scold lawyers; (2) whether anything substantive has emerged in the scolding that lawyers are morally bound to take to heart; and (3) whether lawyers ought to defer to philosophers' claims about moral principle. I return a negative answer to each.

Great philosophers have split over the question of whether ordinary people need philosophers' assistance to discover their individual and collective moral duties. The dispute began early: In the *Republic*, Plato floated the argument that true moral insight is reserved to philosophers, since only they will have received the intellectual training necessary to perceive the ideal Form of the Good.[1] But Aristotle rejected both Plato's metaphysics and his elitist notion that philosophers possess a special storehouse of practical wisdom. He held instead that virtue is gained by acting rightly, not by engaging in philosophy or any other kind of ratiocination, and that moral insight is akin to perception.[2] His philosophical practice betrayed a belief that the

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[1] F. Conford, trans., *The Republic of Plato* (New York: Oxford U. Press, 1945) esp. 175–235. See also, A. Melden, *Ethical Theories* (Englewood Cliffs: Prentice Hall, 2nd ed. 1967) 59–66, cited hereinafter as *Melden*. Since many of the classical works to which I shall refer are conveniently collected in Melden's widely available textbook, I shall cite it when possible.

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principal proper aim of moral philosophy is to discover those principles which explain the operation of that perceptive faculty by which "everyone to some extent divines [a natural justice and injustice that is binding on all men . . .]."[3] He had scant sympathy with Plato's view that moral philosophy's task is to improve the imperfect moral conceptions that ordinary people hold.

Aristotle's position on this issue dominated moral philosophy until after Kant.[4] Then Platonic elitism (minus Plato's moral metaphysics) came once again into fashion in the nineteenth century, led by the great reforming utilitarians, Bentham, Austin, Mill and Sidgwick, but including also the archindividualist Nietzsche, who scorned utilitarianism as a remnant of "herd" morality.[5] Fashion again changed at the beginning of the present century, when Aristotelian modesty enjoyed a brief resurgence in the writings of the British intuitionists, especially

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[2] *Nicomachean Ethics*, esp. 1105b5–18, 1109b17–23, in *Melden* at 104–05, 110.

[3] *Rhetoric*, 1373b2–9. For sympathetic discussion of common moral faculty theory in metaethics, see M. Smith, 'The Obligation to Obey the Law: Revision or Explanation', *Criminal Justice Ethics* **8** (1989): 60.

[4] E.g., Aquinas held that general principles of practical reason are objectively binding and are "equally known by every one". *Summa Theologica*, Q, 94, Article 4, in *Melden* at 205. Similarly, Hume held that "the notion of morals implies some sentiment common to all mankind . . ." and that "the [moral] sentiments . . . are . . . the same in all human creatures, and produce the same approbation or censure . . ." *An Enquiry Concerning the Principles of Morals*, Sec. 9, in *Melden* at 303–04. Lastly, Kant held that ordinary people can perfectly well discover their duties without aid from philosophers, and that philosophy's only practical office is to explain the basis of ordinary practical reason in necessary truth, so that when this is understood ordinary persons may be less tempted to follow specious arguments and their inclinations contrary to duty. See *Foundations of the Metaphysics of Morals*, 404–05 (Prussian Academy pagination, 1785), in *Melden* at 327–29.

[5] J. Bentham, *Principles of Morals and Legislation*, (1789) esp. ch. 2, n. 7, in *Melden* at 375–79; J. Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld and Nicolson, 1954) 87–105; J. Mill, *Utilitarianism*, (1863) ch. 1, in *Melden* at 391–94; H. Sidgwick, *The Methods of Ethics* (London: Macmillan, 7th ed. 1906), p. 373, *Melden* at 492; F. Nietzsche, 'Thoughts on the Philosophy of Morals', in *Melden* at 435, 442–44.

W. D. Ross and H. H. Prichard.[6] Then, throughout this century's middle, both competing styles of normative theory fell from fashion during the heyday of the ethical emotivists, Ayer, Stevenson, and the early Hare.[7] But now Platonic elitism is back again in full flower, with such distinguished proponents as John Rawls, Derek Parfit, Norman Daniels, John Mackie, and a sea-changed Richard Hare – all of whom hold for various reasons that it is moral philosophy's task to revise and correct nonphilosophers' moral principles.[8]

Perhaps not coincidentally, there has recently been an explosion of philosophical activity in so-called "applied ethics". Philosophers, sometimes calling themselves "ethicists", undertake to advise health care professionals and business executives on their obligations with respect of their work. Research institutes staffed by philosophers proliferate.

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[6] W. Ross, *Foundations of Ethics* (London: Oxford U. Press, 1939), p. 312; H. Prichard, 'Does Moral Philosophy Rest Upon a Mistake?', *Mind* **21** (1912): 12, in *Melden* at 536–38.

[7] In the middle third of the present century, analytic philosophy put primary emphasis upon analyzing the meaning of language which expresses value conviction. The most influential analyses were "emotive" or "prescriptive", which either presupposed (or were generally believed to imply) that there are no "right answers" to moral questions. See, e.g., C. Stevenson, *Ethics and Language* (New Haven: Yale U. Press, 1944); A. Ayer, *Language, Truth and Logic* (London: Victor Gollancz, 2d ed. 1946); R. Hare, *The Language of Morals* (London: Oxford U. Press, 1951). This was in turn thought by many to imply that a theory of normative ethics can be no more than the rationalization of a philosopher's own point of view (whether this be idiosyncratic or culturally determined). So philosophers for the most part turned their attention to other things. It is very unclear why intellectual fashion has changed; certainly it is not because metaethical doubts about the possibility of objective normative truth have permanently been laid to rest. See, e.g., J. Mackie, *Ethics: Inventing Right and Wrong* (New York: Penguin, 1977); G. Harman, *The Nature of Morality* (New York: Oxford U. Press, 1977); B. Williams, *Ethics and the Limits of Philosophy* (Cambridge: Harvard U. Press, 1985).

[8] J. Rawls, 'Justice as Fairness: Political Not Metaphysical', *Phil. and Pub. Aff.* **14** (1985): 223; D. Parfit, *Reasons and Persons* (New York: Oxford U. Press, 1986) 453; N. Daniels, 'Wide Reflective Equilibrium and Theory Acceptance in Ethics', *J. Phil.* **76** (1979): 256; J. Mackie, *supra* n. 7 at 123; R. Hare, *Moral Thinking* (New York: Oxford U. Press, 1980): v, 1–24.

And lawyers have also come under ethicist scrutiny, which is of course our present topic.

My primary source of ethicist opinion about lawyers is a collection of essays entitled *The Good Lawyer*.[9] Its tenor is harshly critical. Virtually all its contributors contend that lawyers' professional role exposes them to great moral risk; and most conclude from this that lawyers often act in morally unjustifiable ways. Some even argue that the demands of the role inevitably corrupt lawyers' characters.[10] Those who hesitate to blame individual lawyers nonetheless argue that the role itself needs more or less drastic restructuring; and it is intimated that philosophers have much that is valuable to say about how this restructuring should go. If *The Good Lawyer* is a fair sampling of philosophers' opinions about lawyers and legal ethics (as I believe it is),[11] it appears that virtually all have felt constrained to adopt the role of scold.[12]

But should lawyers take the scolding seriously? I shall break this question into three others: (1) Whether philosophers' training and experience give them authority to scold lawyers; (2) Whether anything substantive has emerged in the scolding that lawyers are morally bound to take to heart; and (3) Whether lawyers ought to defer to philosophers' claims about moral principle. I shall return a negative answer to each.

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[9] D. Luban, *The Good Lawyer* (Totowa, NJ: Rowman & Allanheld, 1983), hereinafter *Luban(1)*. Slightly more than half of its articles are by philosophers, the rest by practicing lawyers or law professors. My critical remarks are directed primarily against the philosophers.

[10] The most disdainful is A. Eshete, 'Does A Lawyer's Character Matter?', in *Luban(1)* at 270. See also, G. Postema, 'Self Image, Integrity and Professional Responsibility', *id.* at 286.

[11] In a recent bibliographical essay, *Luban(1)* is styled "an outstanding contribution to the field in that it contains rigorous articles by eminent philosophers." B. Baumrin & J. Haber, 'The Moral Obligations of Lawyers', *Am. Phil. Assn. Newsletter on Philosophy and Law* (Fall, 1986): 9.

[12] Two essays are conspicuous exceptions, R. Wasserstrom, 'Roles And Morality', and B. Williams, 'Professional Morality and its Dispositions', in *Luban(1)* at 25 and 259. Both pose challenging questions; but their tone is respectful, not condescending.

I.

Both law and moral philosophy agree that practical normative conclusions are a joint function of normative principle and non-normative fact. From this truism it follows that philosophers are professionally qualified to speak authoritatively on questions of public morality only if their training gives them such authority both as to moral principle and upon matters of empirical fact. Let us focus first upon the question of whether lawyers have reason to be deferential towards philosophers' beliefs about the empirical facts of their professional lives.

We may begin by observing that the standard graduate curriculum in philosophy offers no training in the discovery of empirical fact; and a student will receive no hint that this is a difficult intellectual task, very often requiring mastery of immensely sophisticated research techniques. In the core courses of logic, metaphysics, epistemology, and philosophy of language, there is taught instead a positive disregard of factual complication and uncertainty. Since philosophers' primary focus has been upon the necessary, on what must be true, they have felt no obligation to test hypotheses against actuality, but test these rather against the possible or the conceivable. Thought experiments abound, often involving fantastical examples, such as Descartes' Evil Genius.[13] Indeed, in much classical and contemporary philosophy an example's logical or conceptual possibility is very often counted as having the same metaphysical or epistemological implications as would its actual reality.[14] This relentless pursuit of the necessary, and con-

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[13] R. Descartes, 'First Meditation', *Meditations* (1641). As is well known, Descartes initially argued that he must suspend judgment on every proposition, because he could not then exclude the possibility that a powerful wicked being deceives him always.

[14] See, e.g., G. Berkeley, *Of the Principles of Human Knowledge* (1710), para. 22, "I say [to any believer in material substance], the bare possibility of your opinion's being true shall pass for an argument that it is so". See also, Saul Kripke's renowned recent defense of Descartes' argument for mind/body dualism, viz., that, because it is possible that mind might exist independently of body, it is actually true that mind is not identical with body. S. Kripke, 'Naming and Necessity', D. Davidson ed., *Semantics of Natural Language* (Dordrecht: Reidel 1972), pp. 253, 334–42.

comitant disdain for that which is merely accidentally or fortuitously true, has been carried over into ethical theory: perhaps the most extreme example is Derek Parfit, who tests practical principles against examples in which persons split and fuse.[15]

I do not intend any sort of criticism in so describing philosophers' typical training and practice. I believe that there are necessary truths, and that philosophers ought to seek out and explain them: this is at the very heart of metaphysics, and perhaps of normative theory as well.[16] Nor do I mean to cast aspersions upon moral philosophers' appeal to fantastical examples: normative predicates apply not only in the real world, but in many merely possible worlds as well; and it is often with respect of these latter worlds that we can best test theories concerning normative predicates' conditions of reference.[17] However, I

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[15] Parfit, *supra* n. 8, esp. Pt. 3. For other expert employment of fantastical examples in normative theory, see also, J. Thomson, 'A Defense of Abortion', 'Killing, Letting Die and the Trolley Problem', 'The Trolley Problem', in her *Rights, Restitution and Risk* (Cambridge: Harvard U. Press, 1986) pp. 1–19, 78–93, 93–116; P. Foot, 'Abortion and the Doctrine of the Double Effect', in her *Virtues and Vices* (Berkeley: U. of California Press, 1978) pp. 19–32. The disregard of ordinary empirical fact is given more subtle expression in J. Rawls, *A Theory of Justice* (Cambridge: Harvard U. Press, 1971). Rawls denies that his quarry is necessary truth: "Moral philosophy must be free to use contingent assumptions and general facts as it pleases." *Id.* at 51. Still, his research is long on abstract argument and short on empirical investigation. As is well known, he recommends that we should determine which moral principles we ought now put into practice by divining what principles an ideal conclave would adopt under extremely rigorous and empirically unlikely limitations: including *inter alia* the "veil of ignorance," which prevents each member from knowing the nature of her society, her place in it, her particular desires, interests and capabilities, and even her particular conception of the good. *Id.* at 136–42. Rawls may not not seek to frame necessary truths relating to conduct; but his discussion nonetheless is pitched at a level of generality and abstraction which is very far removed from the mundane world of ordinary empirical fact in which we live.

[16] See M. Smith, 'Intuitionism and Naturalism: A Reconciliation', *Canadian J. Phil.* **9** (1979): 609, for explication and defense of a kind of ethical naturalism, which is the view in metaethics that fundamental moral principles are analytic (i.e., necessary truths of language).

[17] See, e.g., the articles cited by Judith Jarvis Thomson and Philippa Foot in *supra* n. 15.

do suggest that this usually benign neglect of ordinary empirical fact impairs philosophers' judgment when they venture to speak about subjects that require knowledge of it. It leads them to believe that discovering the facts relevant to moral controversies is easy, that, e.g., by browsing through a few books and law review articles on legal ethics, they can learn everything that they need to know about the practical situation of practicing lawyers to enable them to make informed judgments about lawyers' moral obligations. Moreover, it exposes philosophers to the risk that they will uncritically accept any factual allegation about lawyers they might read that supports their previously-formed judgments as to the worth of lawyers' lives. Being perhaps more accustomed than are most kinds of scholar to relying upon "intuition" in framing their views – upon their subjective feeling of how probative is an argument or of whether a proposition is true –, philosophers are apt mistakenly to rely upon this epistemic technique in empirical studies as well, where their intuition is unschooled by any relevant experience or training.

Lawyers who read through *The Good Lawyer* will, I am confident, find these surmises richly corroborated. To consider but one example, Luban's own essay imputes to the legal profession an attitude of official approval for hyperadversariality, i.e., for a lawyer's fixed intention to advance her clients' interests without care or concern for what happens to any other. His evidence is fragmentary and anecdotal – as indeed it must be, for there is no rigorous relevant social science research which could either confirm his view or disprove it. And he overlooks that this description of what the profession approves is inconsistent with many provisions of the approved statements of lawyerly ideals (which also serve as the legal basis for professional discipline): the *Model Code of Professional Responsibility*, which still governs in most states, or the new *Model Rules.*[18]

[18] For the history of the *Model Code* and *Model Rules*, see A. Kaufman, *Problems in Professional Responsibility*, (Boston: Little, Brown, 1989), pp. 15–20. For persuasive argument that these two model statutes do not encourage hyperadversariality, see T. Schneyer, 'Moral Philosophy's Standard Misconceptions of Legal Ethics', *Wisconsin L. R.* (1984): 1529, 1550–66. Under pressure from Schneyer, Luban

What sort of evidence does Luban adduce? He offers examples of legal practice, which he apparently believes to be both morally questionable and recurrent in lawyers' lives. He cites the practice of "greymailing", in particular that occasion on which the famous Washington attorney, Edward Bennett Williams, is reported to have obtained a mere misdemeanor conviction for his client, former CIA director, Richard Helms, by the tactic of threatening disclosure of classified information at trial.[19] He also mentions the famous Lake Pleasant bodies case.[20] But then, wishing to turn from "spectacular examples", he asserts "The rules of discovery . . . are used nowadays to delay trial or to impose added expense on the other side". Immediately thereafter, he asserts, on the basis of three law journal articles, that "rules barring lawyers from representations involving conflicts of interest are now regularly used by lawyers to drive up the other side's legal costs by having their [sic] counsel disqualified".[21] The foregoing does not exhaust Luban's proposed empirical data, but it does capture its character.

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now concedes that "the Code and the Rules do not require hyperzeal", but that ". . . even the permission to use hyperzeal raises . . . troubling issues . . ." D. Luban, *Lawyers and Justice* (Princeton: Princeton U. Press, 1988) 397 n. 3, hereinafter *Luban(2)*. This is a weak argument. Every legal system fails to forbid many kinds of bad behavior, because to enforce prohibitions against it would compromise other important values. Hence, one makes no substantial negative criticism of any particular body of law merely to point out that it fails to reach some bad behavior: one must also show that the behavior can be prohibited without some worse ill effect. Since it is plausible to suppose that many lawyers would be deterred from much ordinary zealous representation were there effective sanctions against all hyperadversariality, Luban cannot make the empirical showing that might make his criticism good.

[19] 'The Adversary System Excuse', in *Luban(1)* at 83.

[20] The case concerns the propriety of two lawyers' conduct, who on the basis of information received from their client had discovered and photographed the bodies of two additional murder victims, and who kept this information confidential, even in the face of a direct inquiry by one of the victim's parents. See, Kaufman, *supra* n. 18 at 221–26, and M. Freedman, *Lawyers' Ethics in an Adversary System* (Indianapolis: Bobbs Merrill, 1975), pp. 1–8.

[21] *Supra* n. 19 at 88.

Few lawyers chancing to read Luban's essay will recognize it as a description of their professional lives. They very infrequently have occasion to contemplate greymail or the concealment of a client's additional murder victims. (Comparatively few lawyers do criminal defense work; and not many of that number ever defend a murder case.) As for conflicts of interest, these do not often arise in the practice which I have experienced and observed. When they have, the lawyer with the conflict has virtually always been first to raise the issue. Lastly, the lawyers whom I have faced in practice have virtually never used the rules of discovery in ways that I believed to be harrassing or abusive. Certainly these and other procedural rules can be so used, but only at the risk that opposing counsel will act reciprocally, to the detriment, wasted effort and increased expense of everyone concerned, including oneself and one's own client.[22] There is strong peer pressure among lawyers to act reasonably towards one another, which influences the behavior of all but the most insensitive or obtuse. I have attempted no survey among the lawyers with whom I practice as to whether they approve of hyperadversariality, but it seems to me their behavior indicates disagreement: they simply don't act as through they believe that this is an effective strategy for advancing their clients' interests. Moreover, judges are not pleased, and are increasingly ready to impose sanctions, when unreasonably adversarial lawyerly behavior is called to their attention.[23] Undoubtedly, there are hyperadversarial lawyers, some famous and successful. Clients seem often to believe that hyperadversariality is effective, and both desire and admire this in

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[22] For persuasive argument that hyperadversariality works against client interests, is contrary to the ideals of the profession, and is against the long term interest of lawyers who practice it, see R. Sayler, 'Rambo Litigation: Why Hardball Tactics Don't Work', *Am. Bar. Assn. J.* **79** 1988. The author is a litigation partner in a leading Washington, D.C. law firm.

[23] E.g., lawyers who practice in the federal courts are acutely aware and fearful of the severe sanctions which, since 1983, have been imposed on lawyers under Rule 11 of the Federal Rules of Civil Procedure, for filing groundless claims or defenses. For an entirely typical recent case, see, e.g., *Muthig, et al. v. Brant Point Nantucket, et al.,* 838 F.2d. 660 (CCA 1, 1988), which upheld the trial court's sanction of $18,335 against plaintiff's counsel, to pay one defendant's legal fees.

their advocates. But other lawyers aren't impressed, nor do these often receive such honors as the profession bestows.

However, the primary factual shortcoming of philosophers who write on legal ethics is not that they overemphasize the combative element in most lawyers' lives, but that they wholly ignore clients, except as persons who have wicked desires which lawyers can help to satisfy or who have legal rights which morally ought not be secured.[24] One might suppose from reading philosophers' accounts that clients' ends are always well formed before they seek legal advice, and that the lawyer's task is merely to find an effective means towards their fulfillment. And perhaps in some practices such clients predominate. But in general practice they're rare, at least among clients who are actually embroiled in a dispute. The typical divorce client, for example, is under extreme stress, feels much bitterness and resentment, and has scant knowledge of his legal rights. Hence, before a lawyer can seek to achieve her client's ends, she must help him to determine what ends he has, in view of the various practical possibilities which he confronts. In this phase of representation, she will be both a legal and a moral counselor to him, for she will exert strong pressure upon him to be reasonable, to be attentive not merely to his rights, but also to his obligations (e.g., to support his children both economically and emotionally). She will do so not because she is legally bound to aim directly at his moral improvement, but (if for no other reason) because it is in her interest. Courts tend to favor proposals which are fair and reasonable. If she can persuade him to adopt a position that is morally sound, she will be much more likely to obtain a result with which he can rest fairly content.

This very typical scenario also exemplifies the truism that lawyers

[24] This criticism does not hold good of R. Wasserstrom, 'Lawyers as Professionals', *Human Rights* **6** (1975): 1, which was the first philosopher's scrutiny of lawyerly behavior and which largely has inspired the rest. Wasserstrom was there acutely aware of client helplessness, and he warned lawyers equally against moral risk from unjust injury to opposing parties and from bad behavior towards their clients. Philosophers have taken up the first criticism, and have largely ignored the second. Wasserstrom does not return to the second in his article in *Luban(1), supra* n. 12.

have enormous influence over the attitudes and actions of their clients. Most persons who face being party to a lawsuit, even the most highly educated, are under substantial stress, and are confused about their legal rights. They are helpless, needy, and dependent upon their lawyer's good judgment and will. Every lawyer knows that he is potentially a much greater risk to his client than he is to any third person with whom the client may have a dispute or grievance. It is easy to neglect a client's interests, but often hard to promote them against skillful and determined opposition. And the complexity of law, especially that of procedure, is such that a layman has little effective means of checking whether his lawyer is doing a good job.[25] Moreover, the lawyer's role as a confidential and trusted advisor offers obvious scope for abuse and fraud. It is surely for these and similar reasons that the *Model Code* and the *Model Rules* are primarily concerned to police behavior that places clients' interests in jeopardy, rather than that which threatens third persons.

Philosophers tend to believe that this is mistaken, that the public good (justice, or whatever other moral value they may think advanced) would be better served were lawyers under stronger duties to third parties. And perhaps this is true. But it might equally be true that such change would interfere generally with effective representation of clients, particularly if these duties were very stringent, so that the public which consumes legal services would not be made better off.[26] What the precise effects of change would be is matter of empirical fact, albeit contrafactual fact, which is extraordinarily difficult to

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[25] Philosophers tend to believe that lawyers exaggerate the complexity of law, and so client helplessness. See, e.g., Baumrin & Haber, *supra* n. 11 at 3. I believed this, too, before I entered practice, and saw how badly lay pro se litigants fare.

[26] E.g., imposition of sanctions on attorneys pursuant to Rule 11, discussed *supra* n. 23, has been criticised on the ground that it tends to chill lawyers' willingness to press novel, yet meritorious claims or defenses. Philosophers eager to strengthen lawyers' duties to third parties may wish to take note of a recent statement by U.S. Magistrate Michael Ponsor (D. Mass.) that "A disproportionate number of civil rights cases seem to get sanctions". 'Bench and Bar Discuss Rules on Sanctions', *Mass. Lawyers Weekly* **16** (1988): 1097, 1135. Cf., 'Note, Plausible Pleadings: Developing Standards for Rule 11 Sanctions', *Harvard L. R.* **101** (1987): 630.

ascertain with any certainty.[27] We have neither the data nor a conceptual research model which we could use to measure even roughly what the present situation is, and how it will or might change. Such facts must inevitably be matters of conjecture, informed by experience.[28]

But then, why should philosophers' conjectures be credited at all, informed as they are by no relevant experience? Most philosophers are academics; their "clients" are either graduate or undergraduate students. Based upon my experience in teaching philosophy and in practicing law, it is my firm belief that there are scant similarities between the student-teacher relationship and that of lawyer-client. There are many important differences; but perhaps the most crucial is that students are virtually never terribly vulnerable to their teachers, whereas extreme vulnerability to their lawyers is the norm among clients who seek out general practitioners.

Unfortunately, paucity of relevant experience has not deterred philosophers from making very detailed empirical claims as to what commonly occurs in legal practice and what practitioners can reasonably expect to achieve. For example, most lawyers in criminal practice believe that unless clients know that lawyers are bound not to reveal their confidences, they will be deterred in significant numbers, both the innocent and the guilty, from revealing information which is

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[27] Because of theoretical difficulties in discovering the truth value of contrafactuals, some philosophers have been sceptical about whether truth can be ascribed to them. However, neither morality nor the law can afford such scepticism: every ascription of agent causation, which is one of the bases of both moral and legal responsibility, requires that we can recognize what lawyers call "but-for causation" and philosophers a "necessary causal condition". Application of this concept presupposes that we have an ability to determine what would have been true, had some act under scrutiny not occurred.

[28] Luban suggests that such conjectures are "nonempirical, a mix of *a priori* theories and armchair psychology". *Supra* n. 19 at 94 n. 32. Strangely, he accords no weight to lawyers' practical experience in assessing whether their conjectures might be worthy of belief, nor does he note that philosophers have no basis upon which to offer rival ones. Baumrin and Haber make use of Luban's remark, but also fail to note that it impugns the authority of philosophers' opinions upon legal ethics. *Supra* n. 11 at 7.

relevant and helpful to their defense. But Alan Donagan, who is a very capable philosopher,[29] pooh-poohs this belief, calling a law professor "reckless" for having so said, and styling it a "dogma cherished by the National Association of Criminal Defense Lawyers".[30] He expresses doubt that what is feared "will generally be the case", and that "It seems more probable that a lawyer of ordinary competence would be able to discern the nature of the fears that might prompt a client to lie or to conceal the truth, and that it would be enough to explain what the law in fact is".[31] Donagan's argument is curiously abstract – as though pure reason unaided by experience can discern the typical anxieties and truth-telling behavior of persons charged with crime, and can fathom what ordinary competent lawyers may reasonably be expected to accomplish in advising those who are so afflicted. Of course, Donagan doesn't really believe this – no competent philosopher would, upon reflection. But upon what else is Donagan's confidence based? And why does he call "mere dogma" the opinion of ordinary competent lawyers on this question of empirical fact, which undoubtedly lacks scientific support (as does his), but which is at least based upon their experiences with the wide variety of troubled clients who have sought their aid? More to our present point: why should lawyers pay any attention whatsoever to Donagan's conjectures; indeed why should they heed the conjectures of anyone who has never had a client, who has never observed legal practice from any closer vantage than the philosophical or legal academies?

II.

Still, the burden of the scolding philosophers' complaint against lawyers does not really rest upon any detailed knowledge of their professional activities or typical traits of character. Rather they proffer

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[29] See: A. Donagan, *The Theory of Morality* (Chicago: U. of Chicago Press, 1977).

[30] A. Donagan, 'Justifying Legal Practice in the Adversary System' in *Luban(1)* at 145, 146. His criticism is directed against Monroe Freedman, *supra* n. 22 at 5. The philosophers in *Luban(1)* generally treat Freedman very roughly.

[31] *Id.* at 145.

the somewhat abstract argument that because lawyers must find themselves fairly often representing clients who are on the wrong side of particular disputes, their professional role inevitably exposes them to great moral risk by requiring that they work zealously towards unjust outcomes.[32]

Many lawyers will contest the application of this argument to their particular practices, particularly those who work in areas of the law that are not normally adversarial, e.g., conveyancing, estate administration, or planning, etc. It's rare in such practice that there are two "sides"; the lawyer's task is usually only that of realizing the lawful desires of her client. Moreover, even in adversarial situations, fairly frequently neither side will advance an unjust claim, e.g., as in bankruptcy, when two equally innocent creditors dispute as to whose claim has priority to the assets in the bankrupt estate. Nonetheless, litigators and lawyers in general practice will have to admit that (at least unwittingly) they will spend a portion of their professional lives working towards legal outcomes which are unjust. One may have a policy of turning down causes which one finds morally distasteful, but that cannot wholly eliminate the moral risk (if indeed that is what the situation poses). For there is the practical difficulty that it is often very hard to know whether a cause is just: the facts, e.g., of a contested divorce and custody case, are often obscure even at its end; and of course the actual facts make all the difference to objective justice. So it appears at least that many lawyers must admit that sometimes in their professional lives they will be bound by their role to work zealously towards morally untoward results. What of moral substance follows from this fact?

In his pioneering article on the subject, Richard Wasserstrom drew from it the conclusion that "at best the lawyer's world is a simplified moral world; often it is an amoral world; and more than occasionally, perhaps, an overtly immoral one".[33] However, in his later article in Professor Luban's collection – and unlike most of its contributors –

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[32] See e.g., Alan Donagan's formulation of the philosopher's indictment (which he moves to dismiss) in *supra* n. 30 at 125–6.

[33] *Supra* n. 24 at 2.

he appears to allow that lawyers are morally justified in acting within their traditional role.[34] I endorse Wasserstrom's change of heart; but I do not think that he has sufficiently recanted, for he fails yet to recognize that the moral world which lawyers inhabit is extraordinarily rich and complex.

To speak of my own: the Disciplinary Rules of the *Model Code* (with some changes) have been incorporated into Massachusetts law, and its Ethical Considerations are expressly recognized as a body of principles which govern interpretation of the Disciplinary Rules.[35] Let us suppose that lawyers are subject to a strong *prima facie* moral obligation to comply with the body of law that regulates legal practice.[36] If this be so, then puzzling out what it requires of us is not merely a problem of legal analysis, but is also an exercise in determining what we ought morally to do. Now, Ronald Dworkin has taught contemporary jurisprudence that in every area of the law hard cases will often arise, i.e., cases about which superb lawyers may sincerely hold strongly divergent opinions as to which result the law requires.[37] Hard cases will therefore arise fairly frequently in the law governing lawyering; when this is so a lawyer will find it difficult to know exactly what professional obligation requires of her. Moreover, supposing that her role obligation is clear, further difficulty may arise if, in some concrete situation, a lawyer has some conflicting strong *prima facie* obligation.[38] A lawyer's moral universe is evidently exceedingly

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[34] *Supra* n. 12 at 30–33. He considers three arguments purporting to justify lawyers' acting within their traditional role: firstly, that this produces better moral outcomes overall; secondly, that their agreements with clients require this; and thirdly, that client's (and other parties') expectations are better satisfied thereby. He expresses some dissatisfaction with these arguments, but does not reject them.

[35] Mass. Rules Supreme Judicial Ct. 3:07(1)–(2).

[36] See: K. Greenawalt, *Conflicts Between Law and Morality* (New York: Oxford U. Press, 1988), pp. 77–85.

[37] R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard U. Press, 1977), esp. ch. 4.

[38] The Lake Pleasant Bodies case, *Supra* n. 20, is an example of conflict between lawyers' role and non-role *prima facie* moral obligations. It also suggests a rough

complex, if our suppostion be correct about the moral weight of her professional obligations.

But do lawyers have any moral obligation to obey this body of law? Luban appears to deny this.[39] After a lengthy discussion of possible "justifications" for the adversary system, he concludes that the best to be said for it is that no other system of adjudication is clearly superior, so that there is no good reason to replace it.[40] One might suppose this to be high praise, for it implies that there is no practicable alternative that is more just. But he is grudging, calling this but a "weak" and "pragmatic" justification. And from the proposition that no stronger justification of the adversary system is possible, he concludes that "since [its] force is more inertial than moral, [it] creates insufficient counterweight to resolve dilemmas in favor of the role obligation".[41] And again, "This implies . . . that when professional and moral obligation conflict, moral obligation takes precedence. When they don't conflict, professional obligations rule the day . . . When moral obligation conflicts with professional obligation, the lawyer must become a civil disobedient".[42]

Luban does not offer lawyers any concrete guidance as to when

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gauge for the strength of lawyers' role obligations: If one concedes that those particular lawyers were in an extraordinarily difficult moral situation, then regardless of one's final assessment of what they did, one implicitly holds that their role obligation of confidentiality had great weight. Were this not so, their moral situation would have been easy, because their conflicting non-role obligations had obvious great force.

[39] Oddly, in *Luban(2)*, ch. 3, he argues that citizens generally have a *prima facie* moral obligation to obey the law. Apparently he must not have understood that versions of the *Model Code* or the *Model Rules* are part of every state's law, else he would have drawn the obvious conclusion that lawyers are *prima facie* bound by them.

[40] *Supra* n. 19 at 116–18. He repeats these arguments in *Luban(2)*, ch. 5.

[41] *Supra* n. 19 at 118. He repeats the point in Luban(2) at 154. To accord the adversary system such little moral force, Luban apparently must believe that the establishment and maintenance of a reasonably just adjudicative system is an insignificant moral achievement. I suggest to the contrary that this requires the constant diligent effort of morally serious women and men.

[42] *Supra* n. 19 at 118.

exactly they must be disobedient, nor does he speculate as to how often such situations are likely to occur. However, his position seems to imply that these will be frequent. He holds that lawyers' role requirements have no moral weight at all, that these are always outweighed by any nontrivial conflicting moral reason. And this implies, e.g., that if asked by a landlord to represent her in a summary eviction proceeding against an impoverished tenant, and if he holds some background political conviction that poor people have a moral right never to be evicted solely because they lack funds to pay rent,[43] an advocate is absolutely obligated to try to frustrate his client's attempt to regain possession.[44] Now, perhaps Luban really does believe that something like this is true; but every practicing lawyer will find the supposition outrageous; and I am confident most laypersons would believe such an advocate to be guilty of grave moral error. My conjecture (again I know of no reliable relevant empirical evidence) is that most laypersons would agree that the moral weight of lawyers' role obligations is quite substantial. Since Luban offers neither clarification nor supporting argument for his contrary position, it is hard to see why lawyers may not ignore it, following both common moral opinion and their own inclination.

Moreover, there are persuasive arguments towards this conclusion that rely upon some of the classic philosophical arguments that purport to prove that citizens of reasonably just societies have (at least) a

[43] I here make use of Dworkin's distinction between background rights and institutional rights: the former are those which citizens possess independently of the institutional history of their legal system; the latter, those which flow from that history and what it has previously offered to other citizens. *Supra* n. 37 at 93. I suppose with Dworkin that both kinds are genuine moral rights.

[44] The argument in the text supposes that, if a person sincerely believes that another has a particular background right and that he can secure it for her, he has at least some moral reason to try to make the attempt. In rejoinder, it perhaps may be said that the lawyer ought to decline representation. But then the impoverished tenant will be deprived of her supposed background right, because the landlord will find someone else to evict her. If declension is obligatory, lawyers' role obligations must have substantially more weight than Luban allows, since they here outweigh moral reasons flowing both from the lawyer's conscience and from the poor tenant's misfortune.

prima facie obligation to obey the law. These latter arguments have recently drawn much fire: many contemporary philosophers, including myself, deny that citizens generally are under any such obligation.[45] The crux of much of this criticism is that, even in just societies, most citizens fail to satisfy the factual conditions which trigger the principles of obligation on which the traditional arguments rest. No one denies, e.g., that consenting or promising to obey the laws of Massachusetts would establish a *prima facie* obligation to obey its laws; rather, with Hume we deny that most citizens of any state have performed acts which clearly constitute genuine consent or a promise always to obey.[46] But unlike private citizens, lawyers in every jurisdiction have taken an oath of office, which is plausibly interpreted as containing a promise to obey at least that part of the law governing their actions as lawyers. Hence, their oath may reasonably be held to ground a *prima facie* obligation to discharge legal obligations incurred in practice.[47] Another promising argument, which fails with respect of citizens generally, but which clearly applies to lawyers, is one based upon John Rawls' principle of fair play, according to which "a person is under an obligation to do his part as specified by the rules of a [just] institution, whenever he has voluntarily accepted the benefits of the scheme or has taken advantage of [its] opportunities . . . to advance his interests . . ."[48] Yet another argument is that in accepting remunera-

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[45] M. Smith, 'Is There a Prima Facie Obligation to Obey the Law?', *Yale L. J.* **82** (1973). The most comprehensive recent statement of this position may be found in K. Greenawalt, *supra* n. 36; but see also, J. Raz, 'The Obligation to Obey: Revision and Tradition', *Notre Dame J. of Law, Ethics & Pub. Policy* **1** (1984): 19, and J. Feinberg, 'Civil Disobedience in the Modern World', *Philosophy of Law* (Belmont: Wadsworth, 3rd ed. 1986), p. 129.

[46] "We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master, though he was carried on board while asleep and must leap into the ocean and perish the moment he leaves her". D. Hume, 'Of the Original Contract', in H. Aiken, ed., *Hume's Moral and Political Philosophy* (Darien: Hafner, 1948), p. 356, 363.

[47] See, Greenawalt, *supra* n. 36 at 82–85.

[48] J. Rawls, *supra* n. 15 at 343. Lawyers clearly satisfy Rawls's conditions. And I assume that the sundry legal institutions in United States are reasonably just, including their requirements for lawyerly behavior. Moreover, at *supra* n. 40,

tion lawyers implicitly promise to clients that they will furnish beneficial services, which promise surely includes *inter alia* an undertaking to safeguard a client's interests no less than the law requires. Much work remains to be done in spelling out these arguments, and in assessing the weight of the *prima facie* obligations which they yield. Still, even before this is fairly begun, we may believe that there are a variety of persuasive arguments to the conclusion that lawyers' professional obligations are strong prima facie moral obligations, which must ordinarily carry the day, except when a lawyer is confronted with the gravest of moral reason to the contrary.

III.

Thus far we have found little reason for lawyers to expect useful advice from philosophers about the practical moral problems which they confront in their daily professional lives. This is primarily because philosophers have no basis upon which to form reasonable beliefs about the relevant empirical facts; but it is also because they have failed to appreciate the moral weight upon lawyers of the body of law that governs practice. Still, nothing as yet shown excludes the possibility that lawyers may gain useful advice from philosophers about the moral principles they ought to adopt, which they may themselves apply to the empirical circumstances of legal practice. And indeed, some philosophers have proposed that lawyers be required to take courses in ethics taught by professional philosophers, either in law school or in postgraduate continuing education.[49] What should lawyers make of this?

Luban seems to concede as much in allowing a "pragmatic" justification for the adversary system: surely any system of adjudication would be worth replacing were it not reasonably just.

[49] See, e.g., A. Goldman, 'Confidentiality, Rules, and Codes of Ethics', *Criminal Justice Ethics* 3 (1984): 8, 12–13. Baumrin and Haber enthusiastically take up his suggestion. *Supra* n. 19 at 9. For similar intimation by a law professor, see S. Pepper, 'A Rejoinder to Professors Kaufman and Luban', *Am. Bar Foundation Research J.* (1986): 657, 658. None explicitly suggests that philosophy courses be made mandatory for lawyers in practice. But a precatory program isn't worth consideration, since practitioners assuredly won't sign up voluntarily.

As one who has taught philosophical ethics for many years and who loves the subject, I must confess to a visceral enthusiasm for the suggestion. But it is tempered by a realization that the law school curriculum is already quite crowded, and that busy practitioners will justifiably demand strong argument for the practical benefit of the proposal, before they commit themselves and their colleagues to any rigorous program of continuing philosophical education. I doubt that any probable benefit can be shown; and I think there is some good reason to fear an ill effect.

My first reason for doubt is *ad hominum*: if training in philosophical ethics is efficacious in improving moral character, one would expect that those most highly trained would be notably more virtuous than the ordinary run of well-educated person. However, my experience fails to confirm the hypothesis. Philosophers who specialize in ethics seem to me to be much like other philosophers, and like academics generally: most are well meaning and conscientious, some are often mean and petty, and a few are paragons of virtue. My years as an academic and a teacher of ethics have very much inclined me to an Aristotelian view of moral education: good character is built by the formation of good habits of action; and it is foolish to suppose that courses in philosophy can remedy defective moral training.[50]

But perhaps it may be replied that the point of the proposal is not to improve lawyers' character, but to give them specific guidance in discovering moral truth. And the reader will remember that some philosophers, the Platonic elitists, do claim that they are especially qualified by their training to pronounce upon which set of moral principles modern societies ought to adopt. But once again, lawyers have rich ground for doubt.[51] First, they will demand to know what is to be the content of the mandatory ethics courses: what body of knowledge will there be purveyed? Philosophers will be embarrassed

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[50] Aristotle, *supra* n. 2 at 1103a26–1105b19; *Melden* at 101–5. For explication of Aristotle's concept of habituation in right action as a process of moral induction, see: R. Sorabji, 'Aristotle on the Role of Intellect in Virtue', in A. Rorty, ed., *Essays on Aristotle's Ethics* (Berkeley: U. of California Press, 1980), pp. 201, 214–18.

[51] See Smith, *supra* n. 3, for criticism of Platonic elitism in metaethics.

to give any determinate answer. Like other fields in philosophy, normative theory comprises a set of recognized salient questions, together with competing sets of answers which are widely thought to have promise or plausibility; but it has reached no agreement as to which of these answers is correct. Moreover, philosophers' habits of mind make it exceedingly doubtful that any consensus will soon emerge. Unlike the natural sciences or the law, philosophy does not aspire to agreement, to an institutional consensus. Though deeply subject to intellectual fashion, its practitioners' aspirations are individualistic: viz., to stake out and to defend some new position — or at least some new wrinkle on an old one. They are encouraged in their training to be remorseless critics; and early success in the field is most often obtained by savaging one's predecessors and contemporaries.[52] Or success may be gained by bringing back into fashion some long-neglected doctrine. A lasting consensus is simply not to be expected among contemporary philosophers.

Therefore, lawyers cannot expect that philosophers' attempts to teach them ethics will contain any determinate guidance on matters of moral principle. If professionally respectable, their courses will be like most undergraduate courses in medical or business ethics: they will present a variety of normative theories, e.g., contractarianism, act utilitarianism, rule utilitarianism, some version of deontology, etc., together with some of the stock criticisms of each; and they will then invite discussion as to what difference in practical guidance results from these theories. Lawyers may reasonably doubt whether such

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[52] Cf., the dyspeptic description offered by the British philosopher and historian, R. G. Collingwood: "Philosophers, especially those with an academic position, inherit a long tradition of arguing for the sake of arguing; even if they despair of reaching the truth, they think it a matter of pride to make other philosophers look foolish. A hankering for academic reputation turns them into a kind of intellectual bravoes, who go about picking quarrels with their fellow philosophers and running them through in public, not for the sake of advancing knowledge, but in order to decorate themselves with scalps." R. Collingwood, *The Principles of Art* (London: Oxford U. Press, 1938), pp. 106–7. Collingwood no doubt exaggerated, but his remark contains sufficient truth to support the point made in the text.

courses made mandatory will confer any practical benefit on the profession. And they may reasonably fear a probable consequence: viz., that when lawyers are dragooned into classrooms, and there made to reflect upon the variety of normative theories – and upon the fact that there are powerful, unanswered objections to them all – a sizable fraction of every class will respond by embracing some version of moral scepticism.[53] It is impossible to forecast with any certainty what the effect upon the legal profession would be were moral scepticism to become widespread among lawyers; once again, available empirical information allows us only to conjecture. (So far as I am aware, no one has ever conducted an empirical study to determine how many lawyers are moral sceptics – and such a study could only tell us how many there were at some particular time.) But there are familiar premises from widely-held arguments in ethics and jurisprudence which tend to suggest that the upshot would be unfortunate.

To begin, I take it to be probable that, like most people, lawyers generally are not moral sceptics, and that most inchoately hold some form of moral objectivism.[54] Indeed, even contemporary philosophical sceptics should concede this to be true of most philosophically unsophisticated lawyers, since often they criticise "common sense" beliefs about morality on the ground that these include a commitment to objectivism.[55] Moreover, as many scholars have noted, the language of the law is suffused with moral content: a great many otherwise dis-

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[53] I have taken this point from A. Baier, *Postures of the Mind* (Minneapolis: U. of Minnesota Press, 1985) 207–8. I understand moral scepticism to deny moral objectivism (defined *infra* at n. 54), and to hold that morality is merely a matter of individual or collective preference, group convention, and the like. See *supra* n. 7 for references to prominent contemporary sceptics.

[54] I here understand moral objectivism to comprise both the metaphysical belief that at least some moral judgments have an objective truth value, and the epistemological belief that, despite frequent reasonable disagreement, we fairly often can know what these values are.

[55] Mackie, *supra* n. 7 at 30–35. For argument by contemporary objectivists that the phenomenology of ordinary moral experience reveals a commitment to this metaethical stance, see: R. Dworkin, 'The High Cost of Virtue', *N.Y. Review of Books* **33** (Oct. 24, 1985): 37; D. Brink, *Moral Realism and the Foundations of Ethics* (New York: Cambridge U. Press, 1989), pp. 33–36.

similar legal standards (e.g., the contract doctrine of promissary estoppal[56] and the standard in criminal procedure for granting a new trial[57]) expressly require judges to determine what is just, in order to resolve disputes before them. Now, a lawyer who was a moral objectivist, but who becomes a sceptic after being made to study philosophical ethics, is likely too to become a cynic about legal standards couched in such terms. Indeed, he will be likely to become cynical about the very legitimacy of law. For, basic to most persons' attitude towards the law is a conviction that, in a reasonably just society, government enjoys not only the power to rule, but the right. And the natural way of understanding the notion of a right to rule is that it is a moral notion. Hence, moral scepticism appears *prima facie* to collapse the distinction between governments which possess legitimate authority over their subjects and those which merely hold power. A Massachusetts lawyer convinced of moral scepticism could not believe that he can make any moral distinction of legitimacy between his legal system and those, e.g., of South Africa or Nicaragua, except on the basis of that which he happens personally to favor. It is hard to believe that the consequences would be benign, were such cynicism to become widespread among lawyers.

This is not to say that sceptical belief must inevitably corrupt lawyers' characters. As is well known, some of our greatest judges, e.g., Holmes and Learned Hand,[58] have been inclined towards moral scepticism; and of course, variants of this philosophical stance in the guise of neo-legal realism are currently fashionable in some quarters of the legal academy. Still, despite the renown of some of its apostles,

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[56] "A promise which the promisor should reasonably expect to induce action . . . and which does induce such action . . . is binding if injustice can be avoided only by enforcement of the promise. The remedy for breach may be limited as justice requires". *Restatement, Contracts (2d)*, § 90(1).

[57] "The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done". Rule 30(b) Mass. Rules of Criminal Procedure.

[58] O. Holmes, 'Ideals and Doubts', 'Natural Law', in M. Lerner, ed., *The Mind and Faith of Justice Holmes* (New York: Modern Library, 1943), pp. 391–98; L. Hand, *The Bill of Rights* (Cambridge: Harvard U. Press, 1958), pp. 2–3, 70–77.

moral scepticism does tend to promote psychological dispositions that are potentially dangerous when held by lawyers and judges. Belief in the doctrine tends most obviously to breed moral indifference: it surely must weaken many persons' incentive to work towards outcomes which they have held to be just, if they come to believe that what is just is merely a matter of what they happen to approve and that contrary disapprovals are equally justified and reasonable. But scepticism also has the opposite tendency of encouraging an undue stubbornness, which is perhaps the greater danger to our legal institutions, which aim at consensus: In denying the possibility of moral truth, scepticism leaves no room for the notion of moral error; and so it affords its adherents little incentive ever to ponder whether they might in some instance be morally mistaken or whether they ought morally to defer to the judgment of others. Hence, unless curbed by a reverence for the law (which surely was Holmes's and Hand's salvation), moral scepticism encourages lawyers and judges so persuaded to ride roughshod over opposing views and to act vigorously in pursuit of whatever goal they find themselves to favor, save only when this is imprudent or politically inexpedient.[59] Even moral sceptics should be chary of this consequence of their belief finding widespread acceptance in the legal profession.[60]

IV.

We must therefore return a negative answer to our title question. Lawyers cannot expect useful advice from philosophers about the

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[59] For a penetrating and suggestive discussion of how Justice Douglas's legal realism and moral scepticism corrupted his judicial practice, see R. Dworkin, 'Dissent on Douglas', *N.Y. Review of Books* **28** (Feb. 19, 1981): 3.

[60] Philosophically unsophisticated moral sceptics sometimes warn against belief in moral objectivism, insinuating that objectivists must be dogmatists, who must in turn be so convinced of their own rectitude that they will persecute all who disagree. See: e.g., A. Schlesinger, Jr. 'The Opening of the American Mind', *N.Y. Times Book Review* (July 23, 1989): 1, 26–27. The fallacy is evident: One may believe that moral questions have right answers without believing that one knows the right answers to most moral questions. For more extensive exposure of the fallacy, see: Brink, *supra* n. 55 at 90–95.

practical moral problems which they encounter in their daily professional lives, and so cannot expect useful advice from them concerning legal ethics. Moreover, we found no probable benefit from lawyers being trained in moral philosophy: to the contrary, we found reason to believe that this would disturb lawyers from their inchoate moral objectivism, and that this probably would have some ill result. Therefore, if it be important to raise the moral sensibilities of practicing lawyers – if raising, rather than maintaining, be what really is required – the legal profession is undoubtedly best advised to rely yet even more intensively upon its own very considerable resources of moral exhortation and education. It should perhaps ignore philosophical ethics altogether, except for whatever inspiration or intellectual diversion the study can bring to those individual attorneys who have the inclination, and sufficient free time, to pursue a demanding curriculum.

But there are also lessons here for moral philosophers. Even if Plato and his intellectual heirs are right to believe that moral philosophy's proper task is to correct humanity's faulty moral conceptions, it does not follow that philosophers have useful moral advice to offer non-philosophers about their actual duties and rights, which flow from the heterogeneous concrete circumstances in which they live. Philosophers can be professionally qualified to offer such advice only if their training is calculated to develop the capacity for "sympathetic judgment about certain [particular] facts", which Aristotle held prerequisite to practical wisdom.[61] Aristotle emphasized the factual and particular, because he believed that the ability to identify and discover the facts relevant to particular moral controversies is at least as important a component of practical wisdom as is articulate reasoning from such facts.[62] He took excellence in demonstration to be the mark of philo-

[61] *Supra*, n. 2 at 1143a19–30; *Melden* at 125.

[62] C.f., "Therefore we ought to attend to the undemonstrated sayings and opinions of experienced and older people or of people of practical wisdom not less than to demonstrations; for because experience has given them an eye they see aright". *Id.* at 1143b11–14; *Melden* at 126. For a useful supplement to Aristotle's account of practical reason, see: A. Kronman, 'Practical Wisdom and Professional Character', *Social Philosophy and Policy* **4** (1986): 203.

sophical wisdom, not practical wisdom; and he drew a very sharp distinction between these capacities.[63] And although his account of this distinction is at places problematical, he was surely right to have insisted upon it: For, as we noted above, philosophical education traditionally has scorned factual inquiry (as distinct from speculation upon its nature and meaning). There is no reason to believe that conversance with metaphysics or epistemology, or with the various abstract normative theories, will sharpen one's capacity to discover (or even to imagine) those practically-possible facts that determine where truth lies in important contemporary moral disputes.[64] Therefore, philosophers *qua* philosophers ought not to attempt authoritative comment upon questions of practical morality, although of course *qua* citizens they may have much that is valuable to say, depending upon their breadth of experience and practical education. But in their professional moments, moral philosophers would do well to stick to demonstration and theory, and to leave political controversy well enough alone.

There is some exception to be made from this last general rule. The facts relevant to some controversial moral problems are uncontroverted and well known, e.g., with respect to civil disobedience, abortion, or animal rights. One needs no special experience or training to know that human activity causes immense amounts of avoidable animal suffering, which is the primary fact upon which animal rights advocates base their criticism of prevailing moral attitudes towards the treatment of animals. Neither is special expertise required to know that an effective legal system is practically indispensable in any society for securing the public weal, which is a premise from which many political theorists have urged that citizens generally have some sort of strong moral obligation to obey the law. The biological facts of human conception are well understood; but people continue to disagree

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[63] *Id.* at 1141a1–2; *Melden* at 121. See also, *id.* 1141b2–8; *Melden* at 122.

[64] See: Kronman, *supra* n. 62, for insightful discussion of the importance to practical wisdom of the ability to imagine the practically-possible, and for persuasive argument that legal training and experience are useful towards developing this imaginative capacity. Apart from an overly imagistic account of imagination, I endorse his conclusions.

vehemently upon whether abortion is morally permissible. It is plausible to suppose that philosophers' expertise in framing arguments and in close conceptual analysis might help to clarify what really is at issue in such disputes.[65] But moral philosophers should otherwise be modest: as Wittgenstein famously remarked (albeit in a very different connection), "Whereof one cannot speak, thereof one must be silent."[66]

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[65] Judith Thompson's classic article on abortion is a sterling example of work in this genre. *Supra* n. 15 at 1. I think it beyond doubt that this paper, and its numerous responses and rejoinders, have greatly advanced our knowledge of those principles that are plausibly supposed relevant to the morality of abortion, and of how these principles relate to other parts of our moral conception. However, it's worth noting that the value of her paper stems not from discovery of hitherto unnoticed facts, but rather from the richness of her philosophical imagination – from her capacity to devise fantastic, yet illuminating, examples.

[66] L. Wittgenstein, *Tractatus Logico-Philosophicus* (New York: Harcourt, Brace, 1922), p. 189.