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Article

*1335 THE CITIZEN LAWYER AND THE ADMINISTRATIVE STATE

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*1336 Introduction

A **citizen lawyer** is an ethical **lawyer**, that is, a **lawyer** who represents a client's interest without counseling the client to ignore the norms that enable society to function in an equitable and efficient manner. Despite a lively academic debate about the ethically acceptable approach to legal counseling, [\[FN1\]](#) a moderate position on this issue that most practicing **lawyers** would accept can be readily delineated. To say that the **citizen lawyer** follows the spirit as well as the letter of the law goes too far; law is typically a matter of language, and the **lawyer** is generally entitled to treat that language as determinative. [\[FN2\]](#) Much of the value that a client derives from legal representation lies in the **lawyer's** ability to interpret legal rules creatively in order to advance the client's interest. But the **citizen lawyer** also recognizes limits to this creative interpretation of the law. He or she will avoid interpretations that are manifestly wrong and that violate legal rules. Alternatively, the **citizen lawyer** can be described as someone who will avoid interpretations of the law that prevent society from achieving its democratically defined, legally enacted goals, thus linking the ethical ideal to more general conceptions of public citizenship. The **citizen lawyer** should try to persuade the client to adopt that **lawyer's** ethical perspective, or at least to recognize that the short-term gain derived from rejecting that perspective will be counteracted by long-term reputational loss. If the client cannot be persuaded, then the **lawyer** should withdraw from the representation.

All of this is familiar enough, but it is nothing more than a set of empty bromides unless the norms that are supposed to guide the **citizen lawyer** can be identified with some degree of specificity. The *1337 Model Rules of Professional Conduct purport to identify such rules, [\[FN3\]](#) and law school legal ethics courses purport to teach them. Even a cursory examination of the Model Rules and published teaching materials, however, reveals that these rules are conceived and presented with the paradigm of common law, and specifically common law litigation, in mind. [\[FN4\]](#) The Rules thus conform to our traditional notions about the nature of legal practice, notions that are perpetuated by the traditional law school curriculum. [\[FN5\]](#) The difficulty is that our legal system and our understanding of law have changed during the course of the previous century. [\[FN6\]](#) The most important change is the advent of administrative governance, a wide-ranging transformation of the nature of the state and its relation to the **citizen**. [\[FN7\]](#) With increasing frequency, the role of counseling clients about whether, and to what extent, they should obey the law arises in an administrative context. [\[FN8\]](#)

This Article explores the obligations of the **citizen lawyer** and the content of an effective legal ethics course in that regulatory context. Part I discusses the new ethical status of law, **lawyers**, and legal education that has resulted from the advent of the administrative state. Part II identifies some of the unique problems that confront the **citizen lawyer** in this context, and Part III offers one example of these problems, taken from the field of banking regulation. Finally, Part IV explores some of the implications of these new complexities for the legal ethics courses that law schools offer.

The scope of this Article is limited in that it does not address the many other legal and conceptual developments that have occurred simultaneously with the rise of the administrative state, such as globalization, the advent of the large

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law firm, and our increasingly interdisciplinary conception of the legal system. Moreover, the Article focuses only on lawyers representing individuals or profit-making organizations, and thus ignores both government and public interest lawyers. Its arguments, therefore, are exemplary, not *1338 comprehensive. Finally, the Article's principal goal is to raise issues rather than reach conclusions; the topic of this Article, even when limited in the manner just described, is simply too complex to be resolved in a discussion of this length. But even this limited and indeterminate discussion is sufficient to demonstrate that our concept of legal ethics, and thus of a citizen lawyer, is seriously out of date.

I. Law, Lawyers, and Legal Education in the Regulatory State

A. Law

In the traditional or premodern European state, kings promulgated positive law and limited it to a relatively narrow range of issues, such as maintaining civil order, promoting mercantile activities, and collecting revenue, all of which the medieval state attempted with only intermittent success. [FN9] In many states, legislative approval of some or all laws was required. [FN10] The kings of England, France, and Spain could not impose new taxes without the approval of Parliament, the Estates General, and the Cortes, respectively, but the latter two institutions were systematically circumvented by the absolutist monarchies of the sixteenth and seventeenth centuries. [FN11] In France, all laws had to be approved by the Parlement of Paris, which was a court rather than a legislature, but the requirement became pro forma or lapsed entirely during this era. [FN12] The English Parliament, in contrast, steadily gained *1339 authority, but its legislative actions were largely limited to the same narrow ambit as the royal actions they had superseded. [FN13]

Life was highly regulated in the premodern era—in many ways more highly regulated than it is today—but most of this regulation was carried out by private parties or was the product of tradition. The most important private regulator, of course, was the Church, which not only established moral norms, but also prescribed rituals that controlled the rhythms of ordinary people's lives. [FN14] Guilds promulgated detailed rules for manufacturing and trade, which they enforced by monopolistic domination of their respective fields. [FN15] Tradition, or local rules that claimed the stature of tradition, controlled other aspects of life, including such quotidian matters as getting dressed, speaking to one's superiors or inferiors, milling one's grain, or grazing one's animals, as well as such extraordinary matters as protecting oneself and one's family. [FN16] There were many exceptions, of course, but these exceptions usually fit within the general pattern; the sumptuary rules of Tudor England, for example, were promulgated by Parliament but were actually a codification of traditional understanding that the legislature wanted to preserve. [FN17]

Disputes between private parties were also subject to legal rules. [FN18] These rules were generally made or adopted by the authority that had jurisdiction to decide the dispute. [FN19] In the early Middle *1340 Ages, the authority was typically the local lord, and the specific rules were based on local tradition. [FN20] The rediscovery of Roman law and the growth of the centralized monarchy during the high Middle Ages led to the creation of national courts, which asserted authority over wealthy people and people whose activities reached past their immediate locality. [FN21] The common law of England is a product of this process. [FN22] For common people, however, many disputes and offenses remained subject to purely local adjudication, at least when they were not deemed to have breached the king's peace. [FN23]

Much of this has changed with the advent and development of the administrative state. Positive law now covers a vast range of activities, not only in the political and economic realms, but in the realm of civil society as well. [FN24] Some of this law, particularly in traditional areas such as the maintenance of civil order or the collection of revenue, is promulgated by the legislature, but the great bulk is produced by administrative agencies. [FN25] These agencies are generally authorized by legislative enactments, but the enactments are what I have previously described as intransitive; they do not consist of rules governing the populace, but rather they provide instructions to administrative agencies, which then issue the actual or operative rules. [FN26]

***1341 B. Lawyers**

The legal profession in the western world is a product of the Middle Ages. [\[FN27\]](#) It resulted from a number of interconnected developments, notably the rediscovery of Roman law and the evolution of royal courts, as just described. [\[FN28\]](#) By the end of the Middle Ages, a person who appeared before a royal court to adjudicate a civil dispute was regularly represented by a specialist in law, and often someone who had been trained for that role. [\[FN29\]](#) Wealthy and even middle-class people also used lawyers for transactional matters such as transfers of land, inventory, or expensive chattels; for inheritance instruments; and for complex financial transactions. [\[FN30\]](#) Organizations, particularly the state and the Church, used lawyers extensively for a variety of roles, not always strictly legal ones. [\[FN31\]](#) In England, however, lawyers were not allowed to appear in criminal trials for ordinary felonies or treason, although they were allowed, and did in fact appear, at misdemeanor trials. [\[FN32\]](#) In addition, and most importantly for present purposes, lawyers do not seem to have represented private parties very often in matters of the state's positive law because there was very little positive law that directly ***1342** affected private parties, other than the laws affecting the conduct of trials. Certainly, the sources describing the role of lawyers in the pre-modern era make few if any references to representation of this kind.

With respect to representation when dealing with the government, the oddities of premodern English criminal procedure are worth noting. The explicit rationale for not permitting defense counsel at criminal trials, as John Langbein describes, was that the trial involved issues of fact, not law; if a legal issue was raised, such as the sufficiency of the indictment, defense counsel was permitted to argue for the accused. [\[FN33\]](#) But this rationale was undermined by the rule that counsel was allowed to represent the accused in misdemeanor trials, including those that turned on questions of fact. [\[FN34\]](#) In response, it was argued that the real reason for not allowing counsel in felony trials was that counsel could distort the truth and that the truth was particularly crucial when a serious charge such as felony or treason was involved. [\[FN35\]](#) Conscientious observers at the time, however, noted the oddity of providing the accused with more protection in misdemeanor cases where there was less at stake. [\[FN36\]](#) A deeper motivation for the differential treatment of felonies and misdemeanors may have been that a felony case was brought by the Crown, and the machinations of a lawyer were regarded as inappropriate in that context. To be sure, the prosecution of felonies was the province of the victim prior to the ***1343** eighteenth century, [\[FN37\]](#) but as Langbein notes, "[t]he victim, although he served as the prosecutor, was merely a witness." [\[FN38\]](#) In contrast, misdemeanors, although described as criminal, typically involved civil or regulatory matters. They were designed to obtain compensation rather than to impose punishment and generally functioned as civil suits. [\[FN39\]](#) The result was to support the pattern that lawyers were used extensively in premodern times to resolve private disputes between parties, but relatively rarely to represent private parties in their dealings with the government. [\[FN40\]](#)

In the modern state, disputes between private parties continue to be resolved by courts, although the rules governing these disputes have been fully codified by legislative enactment on the Continent, and partially codified in the United States. [\[FN41\]](#) If the disputes involve significant sums of money, people continue to retain lawyers to represent them, and many people—the much expanded middle class as well as the wealthy—use lawyers for a variety of transactions, such as contracting and inheritance. But private firms, and sometimes individuals, also retain lawyers to deal with the vast array of administrative regulations to which virtually every business entity in the western world is subject. In this role, lawyers are asked to interpret positive law, to find ways of obeying or circumventing its provisions, to negotiate with the agencies that administer it, and to carry out a variety of related functions.

This is a new, or at least newly recognized role for lawyers, one that has become as extensive as representation in private negotiations or disputes since the development of the modern administrative state. It raises a significant number of questions for the citizen lawyer, questions about the proper ethical stance to adopt when representing private parties in this situation. But the novelty of this role, the fact that it is tied to the advent of a new form of governance, means that our traditional notions of ethical ***1344** behavior do not necessarily apply. The great bulk of the material in the Model Rules relates to the traditional role of lawyers as advocates in disputed cases: the client-lawyer relationship, [\[FN42\]](#) confidentiality, [\[FN43\]](#) conflicts of interest, [\[FN44\]](#) the limits of advocacy, [\[FN45\]](#) relationships within law firms, [\[FN46\]](#) public service by lawyers, [\[FN47\]](#) advertising by lawyers, [\[FN48\]](#) and misconduct. [\[FN49\]](#)

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Most of the rules seem to be drafted with the litigator as the paradigm case. The role of advisor is addressed rather briefly, without any reference to the problem of advising clients about compliance with administrative regulations. [\[FN50\]](#)

Those references to administrative government that do appear in the Model Rules generally concern peripheral issues, or indicate an uncertainty about the proper mode of conduct. [\[FN51\]](#) Rule 3.9, "Advocate in Nonadjudicative Proceedings," refers to representation of a client "before a legislative body or administrative agency in a nonadjudicative proceeding," which, as the Comment explains, includes rulemaking or policymaking activities. [\[FN52\]](#) The role that Rule 3.9 addresses is certainly an important one for lawyers in the modern state, but it is not the central one of representing clients subject to regulatory supervision. It is somewhat odd to address the lawyer's role in formulating legislation and not their role in representing *1345 clients who are subject to that legislation, or other legislation produced by a similar process. Moreover, Rule 3.9 does not embody any effort to conceptualize the lawyer's ethical obligations in the area it covers; instead, it simply borrows some of the rules that the Code establishes in the litigation context. [\[FN53\]](#)

A second rule that deals with the administrative state, Rule 1.11, is directed to lawyers who leave government service and go to work for private clients or leave private practice to work for the government. [\[FN54\]](#) This is an important problem in the modern state, although it is one that arises, to a lesser extent, in the pre-administrative context. But the rule does not quite address the most important and complex version of this problem: when a firm hires a former government attorney because of the attorney's familiarity with the enforcement strategy of a particular administrative agency. By its own terms, the rule applies to the attorney's role in a "matter." [\[FN55\]](#) This is defined as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy[,] ... investigation, charge, accusation, arrest or other particular matter involving a specific party or parties," [\[FN56\]](#) an expansive definition which nonetheless fails to make clear whether it includes legal advice about compliance with administrative regulations. Despite the broad wording and the unfortunate use of the term being defined in the body of the definition, the drafters seemed to be thinking of some sort of adversary proceeding. [\[FN57\]](#) Even if the drafters meant to include compliance advice, that would only highlight the fact that the Model Rules state certain limits on former government attorneys in that context, but no limits or guidance regarding the context as a whole.

C. Legal Education

The available evidence suggests that law school instruction on legal ethics suffers from a similar lacuna. The American Bar *1346 Association requires a law school to provide instruction in legal ethics before it can be accredited. [\[FN58\]](#) Most schools meet this requirement through a mandatory upper-division course on legal ethics and the Model Rules. [\[FN59\]](#) It is difficult to determine what is actually being taught in these courses without a systematic survey. Published materials are more readily assessed because four companies, Aspen, Foundation, LexisNexis, and Thomson/West, dominate the market, and each offers a limited number of teaching texts in this area. A survey of the topics covered by thirteen current books identified by these publishers' lists as falling within the category of legal ethics reveals that there are some nine topics covered by a majority of these casebooks: Limits on Advocacy, Conflicts of Interest, Confidentiality, the Lawyer-Client Relationship, the Regulation of the Profession, Provision of Legal Services, Negotiation, Alternative Dispute Resolution, and Judicial Behavior. [\[FN60\]](#) This list is hardly *1347 unexpected, since the Model Rules emphasize all these topics and the Multistate Professional Responsibility Examination (MPRE), which nearly all students are required to take, tests knowledge of the Model Rules. [\[FN61\]](#) In addition, many of the books cover one or more additional topics, such as Discrimination in the Legal Profession, the Structure of Law Firms, and the Role of Government Lawyers. [\[FN62\]](#) Several of the casebooks also deal with the role of lawyers in particular fields. [\[FN63\]](#)

The point of these rather rudimentary observations is not to demonstrate the similarity among the books, given that the coverage under each of the broad headings varies considerably, but rather to indicate the wide range of topics that each book addresses. It is from this perspective that the absence of discussions of ethics in the regulatory context appears most notable. Even when the books discuss ethics in particular practice contexts, regulatory law is typically

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not included. In fact, only one of the casebooks-Hazard, Koniak, Cramton, and Cohen-gives significant coverage to this topic. [FN64] This is the only book that includes a section explicitly labeled "Regulatory Law," [FN65] but that is not the main reason why the book is an exception. The "Regulatory Law" section of the Hazard, Koniak, Cramton, and Cohen book deals exclusively with tax law, a topic also covered by three other casebooks. [FN66] The book's more significant treatment of the regulatory context is the substantially *1348 longer section that follows, which deals with the policies of the Securities Exchange Commission (SEC) regarding corporate fraud. [FN67] I will discuss each of these two sections of the book in turn.

Tax law is certainly regulatory law, [FN68] in the sense that the statutes are implemented by an administrative agency and supplemented by regulations, but that is true of a great many areas of law these days. Discussions in legal ethics texts typically address issues other than the uniquely regulatory aspect of the situation, that is, the ways in which regulation is qualitatively different from the judicially created and administered rules of the preceding era. For example, the "Regulatory Law" section of the Hazard, Koniak, Cramton, and Cohen book centers on an article about tax shelters by Joseph Bankman. [FN69] A tax shelter, as Bankman describes it, is a sham transaction designed to take advantage of a flaw in the structure of the tax laws by attributing fictitious losses to a corporation-losses which can then be offset against income to reduce the corporation's tax liability. [FN70] A combination of statutory and regulatory rules establishes an attorney's opinion letter as a safe harbor against the penalties that the IRS might otherwise impose for use of this device. [FN71] As a result, Bankman notes, the opinion letter has *1349 been transformed from a legal judgment into a commodity. [FN72] The ethical issue that Bankman discusses, and that the text's writers who excerpt his article explore, is that a lawyer should not give false or dubious advice, even if the inducement to do so is substantial and the risk of being sanctioned is slight. [FN73] That is not a particularly difficult rule to articulate, although its application may be difficult in complex situations. The more controversial issue is whether Congress should draft safe-harbor rules that offer such inducements, and the thrust of Bankman's recommendations in the article is to counsel Congress against doing so. [FN74] Although this is a valuable point, it does not address the basic question of compliance with more ordinary, better-drafted regulations, and the ethical dilemmas that lawyers face in giving advice about this subject.

The extensive discussion of corporate fraud in the Hazard, Koniak, Cramton, and Cohen casebook addresses a more truly regulatory situation, that is, one where the operative issue is the advice a lawyer gives to his or her client about compliance with a prevailing regulatory rule. [FN75] The material focuses on three of the more spectacular corporate frauds in recent history: Lincoln Savings Bank, National Student Marketing Corporation, and Enron Corporation. [FN76] The material not only discusses some of the dilemmas that lawyers confront in this situation, but also deals with the enforcement strategy that the agency, in this case the Securities Exchange Commission (SEC), has adopted, and the resulting complexity of the lawyer's situation. [FN77] Despite these innovative features, the materials tend to move toward more traditional legal ethics questions because the underlying issues are both familiar and extreme. The Lincoln Savings, National Student Marketing, and Enron situations all involved outright fraud, which is both a legal crime and a widely recognized moral wrong. [FN78] The ethical obligations in this situation, however complex, are matters that lawyers struggled with long before the advent of the administrative *1350 era. As the casebook effectively demonstrates, these dilemmas remain with us today. The difficulty is that they have been joined by new dilemmas, dilemmas that are much less familiar and often even more complex.

II. From Obedience to Compliance [j5[A. Obedience

The basic ethical dilemma that the regulatory state poses for a lawyer involves the level of compliance with prevailing regulations that her client must achieve. How scrupulously must a factory follow the EPA's air pollution controls, or OSHA's rules for workplace safety? Is it ethical to take advantage of a drafting error in the regulation to help a client avoid the regulation's obvious intent? Is it ethical to counsel a client to violate the regulation because the agency does not have the resources to monitor enforcement, or because any possible sanction will be less expensive than compliance, particularly when the official amount of the sanction is discounted by the probability of detection? The starkness of these questions, moreover, is frequently softened and obscured by the difficulties of interpretation. If it seems wrong to counsel outright violation of a regulation, perhaps it is not unethical to counsel that the client follow an interpretation that imposes lower costs. But if that is ethically acceptable, then it should also be acceptable, and per-

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haps obligatory, to warn the client that it will be subject to sanctions if the agency adopts the opposite interpretation. And then, if it is ethical to counsel the more favorable interpretation while warning of possible sanctions, how different is that from counseling an outright violation because the client is willing to bear the cost of the sanctions?

The scholarly literature regarding counseling has highlighted the dichotomy between telling a client that it should follow the underlying purpose of the law and telling a client what it can do to avoid legal liability, or in the more extreme case, telling a client how to avoid legal liability that exceeds the benefit it can derive from disobedience. In a seminal article, William Simon characterizes the *1351 first approach as purposivist and the second as positivist. [FN79] In a later article, Simon draws essentially the same distinction, but describes the first as regulatory and the second as libertarian. [FN80] What is implicit in these distinctions is the idea that the lawyer's advice consists largely of interpreting a legal rule, whether common law or statutory. In fact, the two distinctions parallel the two prevailing approaches to statutory or constitutional interpretation by judges, that is, whether one should read a particular provision in light of its presumed intent or purpose, [FN81] versus reading that provision according to its explicit language. [FN82] As Michael Dorf has *1352 observed with respect to the Supreme Court, "When the Justices divide over interpretive methodology, they usually do so along a fault line between textualists and purposivists." [FN83]

One way to challenge this parallelism between legal counseling and judicial interpretation is to note that the prevailing rationale for constructing a theory of judicial interpretation is that courts are supposed to act as the faithful agents of the Founders or the legislature in our democratic system, [FN84] whereas lawyers do not necessarily serve this function. This argument, however, is not fully convincing because one rationale for Simon's purposivist or regulatory approach to counseling is precisely that the lawyer is "an officer of the legal system." [FN85] The more serious problem with the analogy resides in the difference between law, as it is conceived in the faithful agent model, and regulatory rules. Our cultural experience with legislation extends back at least 600 or 700 years, [FN86] but the administrative state is a new development, [FN87] and our experience does not serve as a guide to the ethical issues that arise in this contemporary context.

Several factors render previous experience an unreliable source of guidance for contemporary ethical dilemmas. First, neither the lawmaker nor the law carries the same social significance, or majesty, that the king, the legislature, or the statutes of the realm possess. This is not merely a matter of atmospherics, but embodies a pragmatic issue about the nature of political authority. To disobey the king or the legislature is to set oneself in opposition to the *1353 highest authority of government. That is simply not true when one disobeys a regulation; the legislature remains the primary policymaker of the state, and its statutes not only authorize the agency to issue regulations, but ultimately to control the content of those regulations. In counseling a client to disobey a regulation, therefore, the lawyer might have recourse to the notion that the legislature did not authorize, or would not approve, that regulation. Perhaps this will turn out to be a winning argument if the client decides to challenge the agency's interpretation in a court. Even if the client loses and is subject to the sanction, the lawyer can argue, as an ethical matter, that it might have won and therefore had a colorable claim that rescues its course of action from the charge of outright illegality. And, if the firm, for pragmatic, cost-related reasons, chooses not to challenge the agency, the lawyer can argue that it might have won and that the counseled course of action was within the ambit of ethical behavior. In short, disobeying the orders of a subordinate governmental institution seems more like an act of disputation than of disobedience.

A second and perhaps deeper difference between the premodern and contemporary situations involves the changing significance of law itself in the modern regulatory state. The premodern West regarded law as a rational, coherent body of rules, that is, a body of rules unified by an internal logic. [FN88] This somewhat fantastic conceit was rendered plausible by the law's relatively delimited extent and its immediate connection to the maintenance of civil order. [FN89] The perceived rationality of the law lent it an intrinsic moral value; rationality was seen in the medieval era as the distinguishing feature of human beings and the most important way in which they had been created in God's image. [FN90] In a regulatory state, this concept of law becomes attenuated to the point where the term "law" no longer serves as a coherent or usable descriptor. The regulations that pullulate from contemporary government cannot conceivably be treated as possessing some internal logic or coherence; rather, they are pragmatic, contingent, and often purely instrumental *1354 responses to specific political concerns. Their extent is virtually unlimited, and they

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reflect much wider and less urgent governmental aspirations than achieving peace within society. They certainly cannot claim any inherent rationality, even if that feature were still regarded as carrying the same moral force that it did during the Middle Ages. [\[FN91\]](#)

Third, the nature of regulatory law places the lawyer and the regulatory agency in a dialogic relationship with one another that is qualitatively different from a court's relationship to the legislature. Legislation is enacted once, at a given time, and remains in effect in perpetuity unless rescinded by subsequent legislative action. [\[FN92\]](#) Regulations, although they have the same form, are continually reinterpreted by the agency itself, and that interpretation is expected to control the regulated parties' conduct. [\[FN93\]](#) To translate this conceptual distinction to a physical setting, it would be considered inappropriate for a judge to ask a legislator about the meaning of a statute because the statute, having been enacted, is treated as a disembodied pronouncement. In contrast, lawyers representing regulated parties frequently speak with regulators. These contacts can be initiated by the regulator, through inspections, requests for information, or investigatory inquiries; or they can be initiated by a lawyer asking the agency what its enforcement strategy will be. [\[FN94\]](#)

To describe all regulatory law as distinct from prior law on the basis of the attributes just listed—its social significance, its conceptual coherence, and its temporal stability—overstates the case somewhat. A more precise account of legally binding rules in the modern state is that there is a continuum ranging from traditional law to ad hoc instructions. Some statutory rules or, more rarely, administrative regulations, although implemented by a regulatory agency, embody basic moral principles whose long history and *1355 widespread recognition within our society confers a sense of coherence and stability. [\[FN95\]](#) From that end of the continuum, we can proceed through regulations that implement specific policies, that rely on technical rules divorced from anyone's intuitive sense of morality, and that can be expected to change—and do in fact change—with changing circumstances. As these features become increasingly pronounced, we reach the advice that an agency gives to a particular regulated party—advice that it may expect the party to attend to, although not necessarily to obey.

Corporate fraud—consciously and deliberately misleading people for personal gain—falls on the more traditional, law-like side of this regulatory continuum. Few people in our society would have trouble identifying such activity as a moral wrong, akin to outright theft. Because it is a planned activity, often planned by people who went to the very best schools and have extensive resources at their disposal, it can be highly complex in its design, and thus difficult to detect and demonstrate. Thus, despite its obviously reprehensible character, a specialized agency such as the SEC is required to police it. This is quite different, however, from the more instrumental, technical matters that administrative agencies are assigned to address. As we move along the continuum in this direction, away from the more traditional rules, we lose the moral compass that guides our intuitions and we enter the sui generis administrative region that, despite its vast extent, remains a land of mystery for legal ethics.

What does it mean to be a **citizen lawyer** in this realm? Clearly, the **lawyer** has some ethical obligations that emerge directly from the underlying statute and that correspond to our traditional ideas about obedience to law. Regulatory statutes almost always have a *1356 recognizable purpose, although their specific provisions are just as frequently contestable. This is not to say that the core meaning of a statute can be unambiguously determined from its language, but rather that this meaning is established by the common cultural understandings that the statutory language represents. Over time, of course, these understandings may deteriorate, but for a relatively recent statute they can serve as a very general guide for action. An attorney may not ethically counsel a client to adopt a course of action that violates the basic understanding of an applicable statute. Whether a factory subject to the Clean Air Act must reduce its output of pollutants may be an open question, but the factory must not increase that output, and its lawyer may not counsel it to do so.

But the statute itself is rarely the issue in a modern administrative context; the real issue is obedience to the regulations and other administrative actions that implement the statute. Indeed, many regulatory statutes do not even become operative until implementing regulations are adopted. Thus, the question that a modern lawyer must confront involves the client's level of obedience to a complex multiplicity of administrative regulations, guidances, precedents, and

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advice. This requires a microanalysis of the situation's ethical demands. [FN96] Democratic, capitalist states assume and accept the idea that each individual tries to maximize his or her own utility, which is altruistic or public-oriented in some circumstances and self-interested in many others. [FN97] Complete obedience can never be expected; complete agreement that obedience is desirable can only be expected when a statute enacts some basic, widely accepted moral principle, such as the prohibition against murder, or perhaps corporate fraud, but not when a regulation running dozens or hundreds of pages states technical rules for reducing air pollution. It is equally a premise of democratic, capitalist societies that those subject to regulation are entitled to retain lawyers who will represent their position, even if that position is based on self-*1357 interest rather than altruism or public spirit. [FN98] To assert that these lawyers are acting unethically if they fail to counsel obedience to regulations in every case is a claim that conflicts with the essential norm that a lawyer is supposed to represent the client's interests, as well as ignoring the essential character of regulations as different from premodern statutes.

In short, neither disobeying the rulemaker nor disobeying the applicable rules means the same thing in the modern administrative state as it did in the premodern one. This is reflected in the attitude of those charged with the enforcement of enacted provisions. In the premodern world, enforcement authorities perceived their task as one of obtaining obedience; for their modern analogues, the task is seen as achieving a certain level of compliance. The point of modern regulations is not to establish civil order—that is taken for granted in the modern state—but to shape the economic and social system in ways that decision makers for the collectivity deem desirable. It is understood that these regulations are too extensive, detailed, and mundane to be universally obeyed, and it is also understood that the failure to obey does not signal a potential rejection of government authority but merely the effort to increase profits by avoiding the substantial expenses that the regulations entail. Thus, the starkly dichotomous choice between obedience and rebellion has been replaced by an intricate adjustment of the extent to which private parties will comply with regulations whose purposes are merely to obtain enough compliance to produce desired social goals.

*1358 B. Compliance

In the administrative realm, the level of compliance depends heavily on the governmental resources that are devoted to the task. Although statutes and regulations are still drafted in absolute terms, this discourse is a holdover from the premodern era. Once the budget allocation to the enforcing agency is taken into account, the regulations and their authorizing statutes can be seen as an instruction to an administrative agency to achieve a certain level of compliance. The purpose of the Clean Air Act is not to establish the federal government's authority, but to reduce pollution to an acceptable level. [FN99] To do so, industrial producers must comply with the implementing regulations to a particular extent, and this depends on the number of inspectors that the agency charged with enforcement of the statute—the EPA in this case—can afford to deploy, as well as the strategy that EPA planners devise to make use of their resources.

In these circumstances, the agency must develop an enforcement strategy that optimizes the level of compliance it achieves at a given level of resources. A citizen lawyer can be regarded as one who counsels a client in a manner that conforms to this optimal strategy. To take one familiar and widely applicable example, the process of obtaining compliance can be modeled as a repeat Prisoner's Dilemma game. [FN100] The optimal strategy for the agency to adopt under these circumstances is tit for tat, that is, the agency trusts that the regulated parties will comply, but as soon as it obtains evidence that a particular party has defected, or disobeyed the regulations, it responds with a sanction, and as soon as it learns that the defecting party has come back into compliance, it ceases to apply the sanction. [FN101] If one is thinking in traditional terms, this seems obvious and trivial; of course the enforcing agent should sanction disobedience, and of course it should not sanction a party who is no longer disobeying.

*1359 The complexity and significance of tit for tat emerges when it is placed in a complex administrative context. An administrative agency cannot expect regulated parties to conform to the most stringent interpretation of every detail of a complex regulation. If it attempts to impose such a standard, it will squander its resources on whichever regulated party it happens to inspect—whether on the basis of random choice, received complaint, or suspected violation—and thereby fail to achieve the optimal level of compliance. [FN102] Instead, it must decide what constitutes a reasonable effort to comply, approve the efforts of any party that seems to meet that general standard, and offer

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suggestions about any matters that it would like to see improved. It must save its resources by sanctioning only those parties who seem committed to a consistent policy of frustrating or circumventing the general policy of the regulations. [\[FN103\]](#)

Having identified such a party, the agency cannot rely on official sanctions, such as issuing a cease and desist order or, at the federal level, asking the Solicitor General to bring a lawsuit. Sanctions of that sort are too unwieldy; they would quickly exhaust the agency's resources on the first few cases it encountered and involve delays that may render the party's course of conduct economically advantageous. [\[FN104\]](#) Instead, the agency must rely on informal sanctions, such as subjecting the recalcitrant party to multiple inspections, threatening sanctions for minor violations, publicizing the party's refusal to comply, cautioning other regulated parties against dealing with it, and denying benefits that the agency is authorized to confer by other regulations on a discretionary basis. [\[FN105\]](#) These sanctions, although they do not appear in the authorizing statute, are usually implicit in a regulatory scheme; because they are not subject to judicial review, however, their potential for oppression is apparent. The primary control is that an agency that uses such sanctions in an unfair manner, that is, against parties who are generally willing to *1360 cooperate, will elicit resistance among regulated parties, fail to identify and sanction the truly recalcitrant ones, and ultimately subject itself to political retaliation.

Tit for tat, under these circumstances, involves identifying truly recalcitrant parties, imposing informal sanctions on those parties, and lifting the sanctions as soon as those parties adopt a cooperative stance. [\[FN106\]](#) In other words, it is a complex strategy that is specific to the regulatory context, and that is discordant, or perhaps more accurately, orthogonal to traditional notions of governance, law, and public morality. It is just such strategies that a modern lawyer representing a regulated party will confront. In fact, this particular strategy is one that they will confront when they are dealing with a well-managed, conscientious regulator, not only because tit for tat is an optimally effective strategy in many situations, but because it is what game theorists describe as a "nice" strategy. [\[FN107\]](#) Nice, in this context, means that the party in question does not defect from its cooperative behavior until the opposing party defects, and that it returns to its cooperative stance as soon as its opponent does. [\[FN108\]](#) Lawyers counseling clients whose regulator is less benign may find themselves dealing with non-nice strategies, such as tit before tat, or "massive and remorseless retaliation for tat." [\[FN109\]](#)

These considerations about the agency's enforcement strategy provide some guidance as to the role of a citizen lawyer in a regulatory environment. The lawyer is not obligated to counsel strict obedience with the most expansive interpretation of each and every regulation that is applicable to her client. This is not only an impractically demanding standard, but a theoretically inaccurate one. A fair and effective, that is, a reasonable agency does not expect this level of compliance, and has not drafted its regulations with such a standard in mind. Regulations are not law in the traditional sense, and efforts by a regulated party to avoid the full impact of those regulations are not disobedience to law. Rather, the reasonable agency expects that the regulated party will avoid interpretations of its regulations that are clearly indefensible and are adopted *1361 merely because the regulated party believes that the agency lacks the resources to detect its defection, or that it cannot impose a sanction that would eliminate the economic benefit of that defection. [\[FN110\]](#) The agency also expects that the regulated party will comply with specific recommendations, assuming that those orders are themselves defensible interpretations of the statute. [\[FN111\]](#) In other words, the agency expects those that it regulates to be reasonably cooperative. A citizen lawyer will counsel such cooperation with a well-managed agency. To do so, the lawyer must make complex judgments about the nature of cooperative behavior and the quality of the agency's enforcement strategy.

To be more specific, consider an agency that has adopted a strategy of tit for tat. [\[FN112\]](#) Because there is a wide range of opinion that this strategy will lead to an optimal level of enforcement, the lawyer representing a regulated party is virtually compelled to conclude that the agency is acting reasonably, that its approach is fair and effective. [\[FN113\]](#) But if this is deemed an appropriate approach for the agency, then it is appropriate for the client as well; that is what makes tit for tat an optimal strategy in a two-player Prisoner's Dilemma situation. [\[FN114\]](#) Thus, the lawyer should counsel the client to adopt behaviors that the agency will consider cooperative. In other words, the regulated party should not be the first to defect-it should be nice. [\[FN115\]](#) This does not mean maximum obedience; it

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means a conscientious effort to comply with the basic thrust of the regulations. To put this in operational terms, the client is entitled to interpret the regulations to its benefit, but if it senses that its interpretation is verging on noncompliance with the agency's basic goal, it must ask the agency for a determination, or at least indicate *1362 to the agency that it wants to adopt this particular approach. [\[FN116\]](#) A cooperative agency may well allow the regulated party to proceed, but if it indicates that it considers the proposed approach unacceptable, the regulated party should be advised to alter that approach.

The connection between the citizen lawyer and ethical conduct in this situation can be established at the specific as well as the general level. The public interest, in most regulatory situations, is to achieve a collectively defined goal at minimum cost to both private and public actors. [\[FN117\]](#) The cooperative approach outlined above achieves this goal. Maximum obedience imposes excessive costs on private parties, whereas an uncooperative stance imposes excessive costs on the agency and perhaps the regulated parties as a group. [\[FN118\]](#) To be sure, an agency faced with widespread defection can respond, using a tit for tat strategy, by imposing informal sanctions on each party in turn. [\[FN119\]](#) This is obviously more expensive for the agency than dealing with a largely cooperative group of regulated entities and reserving its informal sanctions for the occasional defector. Even if it is not more expensive for the defecting parties-and it may be, if the defectors are irrationally recalcitrant-the agency is likely to respond to widespread defection by adopting a non-nice strategy such as the imposition of informal sanctions in advance, or by seeking formal sanctions, that is, the maximum penalties that it can impose. [\[FN120\]](#) The result is additional costs for both the agency and the regulated parties. [\[FN121\]](#)

The Office of Thrift Supervision (OTS), which is an agency that faces particularly complex compliance problems, has recently issued regulations declaring that it can bar an attorney from practicing before it if that attorney has "engaged in dilatory, obstructionist, egregious, contemptuous ... or other unethical or improper professional conduct" [\[FN122\]](#) The sweep of this language could indicate that *1363 the agency is demanding a level of compliance that it cannot expect, and would in fact be counterproductive; any bank examiner can unearth a variety of technical violations of the applicable regulations, impose sanctions for each one, and demand its remediation, but the exercise will not contribute to the basic purpose of the regulations. If, however, the OTS is being reasonable, then its regulation could be seen as a codification of something akin to tit for tat. Do not defect, the agency is saying. If a lawyer counsels or countenances such behavior, the agency will respond with the semiformal sanction of compelling the institution to change lawyers and excluding the offending lawyer from a crucial component of his practice. [\[FN123\]](#)

III. The Citizen Lawyer's Stance in a Compliance Environment: An Example

Illustrative examples of the connection between cooperation and compliance will tend to be somewhat technical because they necessarily involve the details of administration in a particular field. A relatively simple example involves the securitization of credit card debt, a well-established practice that was not implicated in the recent financial crisis. [\[FN124\]](#) Certain banks market a large number of credit cards, and thereby generate high levels of debt because the bank pays the merchant and the cardholder's obligation to pay becomes a debt, or a receivable, of the bank. [\[FN125\]](#) This is a lucrative business because of the fees that banks can charge for the service, and because relatively few cardholders default. [\[FN126\]](#) It *1364 has the disadvantage, however, of greatly increasing the bank's capital requirements because the outstanding debt against which capital must be reserved is so high. The card-issuing banks have responded by securitizing the credit card debt-that is, selling an instrument on the financial markets that is secured by the income stream that results from their customers' obligations to pay. [\[FN127\]](#) Because the bank continues to service the credit card debt-send out the bills, collect the money, take precautions against fraud, and so forth-and because the default rate is low, the securitized debt is an attractive investment. [\[FN128\]](#) This mechanism allows the bank to continue issuing cards and collecting the fees it obtains from servicing them while getting the debt that results from this activity off its books. [\[FN129\]](#) Because the bank is no longer the owner of the debt, it no longer suffers the risk of default, and therefore does not need to reserve capital against that debt's amount. [\[FN130\]](#)

In some sense, the securitization of credit card debt is a means of circumventing the reserve requirement, an important regulatory control on banks, but it is a perfectly legitimate means of doing so because the bank is truly not at risk. Reducing reserve requirements in this manner comports with the Generally Accepted Accounting Practices (GAAP)

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that bank regulators use as the basis of their own regulations. [\[FN131\]](#) The securitization of credit card debt *1365 produces a social benefit because it enables banks to continue offering a product that customers want, at a significantly lower price than they could if they had to reserve capital against the resulting debt. At the same time, it adds a new, desirable investment vehicle to financial markets. [\[FN132\]](#) As a result, regulators have raised no objections to the securitization of credit card debt. [\[FN133\]](#) It is thus ethically unproblematic for lawyers to participate in the development of this mechanism and provide counsel about its operation. This would be true even if the reserve requirements were entirely statutory, and not a statute interpreted and enforced by a complex set of regulations. In securitizing debt, the bank is in full compliance with the social policy that motivates the statute.

Complexity arises, however, when the bank offers purchasers of secured credit card debt recourse against the bank in case of default. [\[FN134\]](#) The logic of this is that the bank creates and manages the debt, and is thus in control of the default rate. Its underlying motivation is that providing recourse makes the debt a more attractive investment, and enhances the bank's ability to sell its credit card debt on the financial market in the future. [\[FN135\]](#) But this type of recourse violates GAAP regarding the transfer of debt because the seller, in this case the bank, remains subject to the default risk on the debt. [\[FN136\]](#) Of course, banks do not allow recourse in explicit terms, as this would lead their regulators to treat the debt as remaining with the bank and demand that the bank provide reserves against it. [\[FN137\]](#) Rather, bank officers and lawyers have devised a variety of mechanisms that are generally described as *1366 implicit recourse. [\[FN138\]](#) One mechanism is for the bank to exchange nonperforming assets in the pool of securitized debt for performing assets currently held by the bank, or to purchase nonperforming assets from the pool at par. [\[FN139\]](#) A second is to sell assets to the securitization trust at a discount from the price specified in the securitization agreement, which is typically par. [\[FN140\]](#) Still a third is to reclassify credit losses, which are supposed to remain with the transferee, as fraud losses, which GAAP allows the bank to absorb because they are associated with management, rather than ownership, of the debt.

Bank attorneys, serving as both in-house and outside counsel, often provide their greatest value to the bank by developing mechanisms of this sort or becoming sufficiently familiar with them to carry out the associated legal work efficiently. In our increasingly competitive world, creativity and expertise of this sort is the way in-house counsel obtain raises or promotions, and the way law firms obtain or retain valuable clients. But can legal work of this nature be considered ethical? Is it the sort of behavior in which a citizen lawyer should engage? It certainly seems to violate the spirit of the statute as well as the letter of the regulations. New mechanisms of implicit recourse, moreover, can proliferate rapidly; a single experienced banking attorney, in the course of a year, could probably devise dozens of different devices of this sort. The cost that this imposes on regulatory agencies, which must monitor these devices, decide on their effect, and respond with rules or adjudications, is apparent. Even allowing for the difference between statutes and regulations, the actions of an attorney in this case would appear to exceed the bounds of professionally acceptable behavior.

This conclusion, however, is not as obvious as it may appear. To begin with, regulators have not prohibited implicit recourse, although they probably have the authority to do so. The Comptroller, *1367 the Federal Reserve, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision have issued a joint guidance statement indicating that implicit recourse violates GAAP, and thus can be regarded as a device for circumventing the banks' capital requirements. [\[FN141\]](#) A guidance, however, has no binding legal effect; if the regulatory agencies were determined to prohibit implicit recourse, they could issue a regulation enacting their conclusions as a definitive requirement. Regulations, like statutes, can be politically costly to enact, of course, which is one reason why voluntary compliance is an important part of ethical behavior. In this case, however, the regulatory agencies have an option that they can exercise at a much lower political cost, which is simply to reclassify securitized debt as the bank's own debt during the examination process. They could do so by simply relying on their own interpretation of their existing regulations, a low-profile approach which would be more difficult for the banking community to mobilize against. Precisely why the regulators have not taken this approach is hard to tell. For present purposes, however, the important point is that bank lawyers, observing the apparent ambivalence of the regulators, may well conclude that the regulators are not as opposed to implicit recourse as they seem.

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Secondly, there is at least a colorable argument that implicit recourse is not simply an effort to circumvent the reserve requirements, but rather an efficient contracting device that regulators should be reluctant to disrupt. The argument is advanced by Charles Calomiris and Joseph Mason in a study funded, although not necessarily endorsed, by the Federal Reserve Bank of Philadelphia. [FN142] According to Calomiris and Mason, card-issuing banks, in a world with no regulatory constraints such as reserve requirements, might still prefer implicit recourse to explicit recourse as a means of making their securitized debt more financially attractive. [FN143] The reason is that the bank has more information about the risk profile of its credit card debt than other parties, *1368 largely because it created the debt and thus knows the means it used to attract its customers. [FN144] As a result, a lemons problem, as described by George Akerlof, [FN145] arises where banks that have generated higher quality credit card debt must find a means to signal that fact to the market. One effective way to do so is to provide implicit recourse, such as the repurchase of nonperforming debt, the exchange of nonperforming debt for performing debt, or the sale of assets to the securitization trust below par. [FN146] Because these mechanisms, unlike explicit recourse, are voluntary, they will only be undertaken by a bank that knows that its future securitization offerings are likely to be of a higher quality than the market will assume. Implicit recourse thus serves as one of a general class of mechanisms by which financial intermediaries provide voluntary benefits to their customers to preserve their reputations and their ability to sell their products in the future. [FN147]

If this argument is correct, then it suggests that the implicit recourse mechanisms are not designed to avoid capital requirements, but rather to achieve efficiencies in the market for securitized credit card debt. [FN148] Is this sufficient for a citizen lawyer to justify the endorsement of implicit recourse by credit card-issuing banks? Is it sufficient for the lawyer to conclude that similar considerations have motivated the regulators to be so circumspect about enforcing GAAP-based rules against bank securitization practices? At what point does an argument that circumvention of a regulation comports with larger social policy become too Ptolemaic to be reasonably maintained by an ethical attorney? At what point does the interpretation of agency nonenforcement become an unethical effort to take advantage of the agency's limited resources, rather than an ethically acceptable interpretation of the agency's enforcement strategy?

Although these questions are too complex to be answered in an Article of this scope, the foregoing considerations suggest at least a tentative response. An ethical lawyer is not required to counsel *1369 complete obedience to administrative regulations; he or she may participate in the development of strategies such as implicit recourse that enable the client to avoid a regulation's impact. What ethics demands, however, is that the attorney be cooperative with the agency. Strategies for avoiding the impact of a regulation must be disclosed upon demand, or left open to inspection. If the agency specifically declares the client to be in violation of a legally binding regulation, the lawyer must counsel compliance. This does not leave the client without options, of course; it can seek a declaratory judgment from a court, or it can appeal to the legislature for either an amendment to the statute or a more informal declaration that the agency may decide to honor. More often, however, the lawyer will be negotiating with the agency and will invoke the meaning of the statute as a rhetorical strategy in this argument. The question will be the precise level of resistance that is acceptable to the agency, the extent to which the client must affirmatively disclose its actions, the interpretation of the agency's general statements, and a variety of similar matters. It is at this fine-grained, microanalytic level that the concept of the **citizen lawyer** in the modern administrative state necessarily resides. Sweeping generalizations about obedience to law, or the **lawyer** being an officer of the court, simply will not work in the administrative context.

IV. Educating the Citizen Lawyer

Legal ethics courses are widely disparaged by both law students and legal educators. [FN149] Part of this is no fault of the course itself, but rather can be ascribed to its unfortunate structural position. Law students resent legal ethics because it often stands in lonely isolation as the only required course in the upper-class curriculum. [FN150] Faculty members are resentful because that lonely *1370 isolation results from the fact that the requirement was forced down their throats by the American Bar Association, using its accreditation power. [FN151] But these highly salient irritants provide only a partial explanation for that great edifice of educational malaise that constitutes the standard legal ethics course. A further explanation is that standards of behavior are intrinsically difficult to teach, perhaps because they are highly contextual and experiential. [FN152] Moreover, it is the one subject that the state bar examiners have chosen to test separately, [FN153] and this purported effort to increase the course's importance has given teachers the difficult

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choice of either teaching to the exam, which makes the subject matter seem duller than necessary, or pointedly refusing to do so, and thus earning the resentment of students who must not only sit through a required upper-class course they do not want to take, but also take-and pay for-a separate bar preparation course.

There are, however, several even more basic problems with the standard legal ethics course. One is that it lacks a recognized intellectual foundation. There is, of course, a well-developed discipline called ethics, to which some of the West's greatest thinkers have contributed, and law school courses could usefully explore the relevance of this great tradition to the subjects that the students are confronting in their other courses. [\[FN154\]](#) But legal ethics is not *1371 ethics. [\[FN155\]](#) The standard course covers the formal and informal rules that govern certain aspects of legal practice, mainly centered on the relationship between the lawyer and client. [\[FN156\]](#) That may sound refreshingly pragmatic in the context of professional education, but, in fact, it leads directly to the second problem. Nearly all the other courses in the law school curriculum are designed to confer a sense of mastery, and thus to be empowering. It is this quality that gives legal education its charm, and has enabled it to continue dishing out obsolete material for the last century without eliciting an insurrection from the students. At the end of the first year, the student can declare: "I can think like a lawyer," even if it is a common law lawyer, or "I can read a case," even if cases are only one of many sources that modern lawyers need to know about. At the end of a typical upper-class course, students can feel that they have a rudimentary grasp of some substantive field. In contrast, however, many students perceive legal ethics courses as constraining, rather than empowering. [\[FN157\]](#) These courses necessarily convey a kind of finger-wagging preachiness that strikes today's ambitious, somewhat cynical law students more as an impediment than as an assistance to success, [\[FN158\]](#) particularly when they know that the course was imposed on them by practicing lawyers who have already *1372 demonstrated to the students, through their hiring practices, a notable disregard for the very principles the class is preaching. [\[FN159\]](#)

A partial solution to the dilemma of teaching legal ethics can be found in the considerations discussed in this Article. To convey ethical principles to students in a convincing manner, the ethics course must connect with the realities of modern practice, and do so in a way that tells students something new and useful about that practice. In place of formulaic, Langdellian-based platitudes, the students must be given a sense that they are being introduced to the real constraints that practicing lawyers encounter. At the outset, students must be exposed to the regulation-related issues that have been sketched out above, however preliminarily. [\[FN160\]](#) Students know, and will certainly know after their summer jobs, that they will be practicing in regulatory environments. An ethics course must acknowledge the realities of that practice—the effort to avoid the impact of regulations, the assiduous search for loopholes, the gamesmanship of dealing with a regulatory agency. [\[FN161\]](#) At the same time, the course should communicate the way in which a lawyer who pushes these strategies too far, and induces retaliatory behavior by the agency, does the client a serious disservice. Beyond these instrumental considerations, the course should communicate the positive advantages that accrue to society when lawyers push back against administrative regulations, and the positive burdens that are imposed on society when their aggressiveness verges into genuine recalcitrance—in other words, when they stop being "nice."

Students also need to understand the complex structure of modern government in order to be taught the meaning of ethical behavior. The difference between legislative statutes and administrative regulations, discussed above, [\[FN162\]](#) must be made clear to them. They need to understand the various strategies that agencies use to achieve compliance as well as the difference between advice and command, between guidance and regulation. They must know the complex process by which agencies negotiate the level of compliance *1373 with their regulations, the reason why they are sometimes willing to allow delimited amounts of disobedience in exchange for increased levels of cooperation, the way that an agency can be induced to tolerate behaviors that appear to be outright violations of their regulations, and the point at which the agency has signaled that such disobedience is no longer tolerable. Students must understand the relationship among the legislature, the courts, and the agencies, so that they know when it is ethical to disobey a regulation and seek a declaratory judgment from a court, or obey a regulation but lobby the legislature for revision of the authorizing statute. The simplicity of the dyadic relationship between plaintiff and defendant in a common law suit provides an unsatisfactory model for the polycentric interactions that characterize our modern administrative state, and the ethical rules designed for the first situation are likely to be of limited relevance in the second.

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It should be immediately apparent that this concept of legal ethics demands that students understand the legal aspects of modern administrative governance, at least in a rudimentary way. The traditional law school curriculum, still in thrall to Langdell's common law orientation, fails to provide this understanding. [\[FN163\]](#) As I have written elsewhere, this is a serious defect. [\[FN164\]](#) Regulatory law is the dominant form of law in the modern state, and understanding its basic features is what it means, in that modern state, to "think like lawyers." [\[FN165\]](#) Students should be introduced to regulatory law in their first semester, at the same time that they learn the less important and less foundational method of reading common law cases. The basic, albeit rudimentary understanding that they acquire at that time should then be supplemented by upper-class courses that build explicitly on this introductory material. Students will not be ready to take the sort of legal ethics course suggested here until fairly late in their law school career, perhaps as late as the third year.

This delay has its advantages. The common view is that ethical learning of any kind is highly contextual. [\[FN166\]](#) By their third year, ***1374** students not only have a more developed sense of what practicing law entails, but many know where they are going to work after graduation, and have had some exposure to that environment apart from their job interview. The concrete immediacy of their actual employment setting will not only have the salutary effect of focusing their minds, but it also allows portions of the ethics course to be differentiated on the basis of those settings. Those students who will not have contact with the regulatory apparatus—perhaps the ones entering the large and lucrative practice of representing craftspeople who work in their own homes with nonenvironmentally sensitive materials—can be offered an ethics course that does not delve into the intricacies of the regulatory state. The students who will be involved in the regulatory state can be divided among different categories of employers, such as large firms, boutique firms, corporations, and government agencies, and can be given either different versions of the course or different sessions within the framework of a single course.

Delaying ethical education to the students' third year, and perhaps even their final semester, also involves some obvious disadvantages. Ethical behavior is an orientation, a general mood, as well as a contextualized set of understandings. [\[FN167\]](#) However good the rationale for delaying the study of legal ethics to the final year, that delay inevitably communicates the implicit message that ethics is nonfoundational, that law is essentially an instrumental subject, and ethics merely a constraint. One way to counteract this message is to teach ethics twice, once at the beginning of the student's legal education and once at the end. Better still, because too much instruction of this sort can be cloying, is to split the course in two, teaching one part in the first semester and the second part in the last.

***1375** If the last semester of ethics can avoid sanctimonious preaching by exploring the realities of legal counseling in the modern state, then how can a first-semester course avoid this fate? One possibility is to use the need to develop an ethical orientation in students at the beginning of their education as the organizing theme of the course, a commitment to practicing law without violating the norms that enable society to function in an equitable and efficient manner. [\[FN168\]](#) When students arrive in law school, they are immediately subjected, in either a traditional or a revised curriculum, to intense substantive instruction in a morally ambiguous profession. Medicine's general goal of curing illness is relatively uncontroversial, however many ethical issues may surround this goal. Law is controversial in its entirety and the ethical status of the lawyer is always open to question. [\[FN169\]](#) For this and other reasons, the first-year curriculum comes festooned with implicit messages and unspoken assumptions. Its stated goal, in either a traditional or a revised curriculum, is to teach students a particular mode of thinking—in other words, to mess with their heads. [\[FN170\]](#) Given this situation, it would be useful to have one course in which students could discuss these issues, one arena where the implicit, disconcerting content of the curriculum could be brought to light and opened to discussion. In other words, if the goal of the last-semester ethics course is to confront the moral complexities that confront modern lawyers, then the goal of the first-semester course would be to confront the moral complexities that plague modern law students.

A second advantage of this bifurcated approach is that it would be developmentally structured; that is, it would provide two different experiences that would be relevant to the different stages of professional development that students experience as they progress from their first year to their third. Ever since Dewey, educators have recognized that the

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sequencing of instruction should be learner-centered; that is, organized according to the changing capacities and developmental level of the student over time. [FN171] The *1376 widely recognized work of Lawrence Kohlberg centers on the insight that morality is the product of a developmental process as well. [FN172] Teaching all of legal ethics at the same time necessarily violates these basic principles of modern education; it either delays too long the development of an ethical consciousness in students, allowing an essentially instrumental conception of law to dominate by default, or it confronts students with complex, situation specific issues that they are not ready to absorb or comprehend.

A bifurcated approach has the additional advantage of connecting the legal ethics course to the subject that everyone outside of law school regards as "ethics." The traditional ethics course, as previously noted, is not a course in ethics but in the enacted standards of a particular profession. [FN173] These are worth knowing, but they are not particularly complex; most students learn them studying for the Multistate Professional Responsibility Examination (MPRE). Perhaps they should be presented in a third component of an ethics course. But knowledge of these rules may only make the attorney more adept at violating them unless he or she possesses a general orientation toward ethical behavior, toward being a citizen lawyer. A discussion-based course in the first semester will be much more effective in alerting students to the ethical issues involved in being an attorney and giving them the opportunity to relate those issues to their own experience as beginning law students. That is the only way to produce the integration of general principles and personal *1377 commitment on which ethical behavior, in the generally accepted meaning of this concept, necessarily depends.

Conclusion

Ethical behavior can be said to involve two components—a general orientation toward following the norms that enable society to function in an equitable and efficient manner, and a deep knowledge, at the microanalytic level, of the specific behaviors that this orientation should produce in a given social situation. It is impossible to be ethical unless one has a genuine commitment to some set of general principles that go beyond the insistent demands of one's personal self-interest. Rational actor theory suggests that people never act in this manner and that the ethical behavior we observe is the result of either internalized norms that the person cannot change or external constraints that channel behavior on the basis of self-interest. [FN174] But, this view is now widely viewed as over stated, [FN175] a conclusion any individual can confirm by personal introspection. What does seem to be true, however, is that the commitment to general principles will dissolve unless one has a genuine understanding of the precise dynamics that prevail in a particular social situation. Without such knowledge, one must engage in ethically over-cautious behavior that demands too great a sacrifice of one's effectiveness—one's ability to act in one's self-interest—or one must make fine distinctions that will inevitably be drawn in the wrong places.

This view of ethical behavior may sound like the meta-ethical position of cultural relativism, which most theorists reject, [FN176] but that is not the case. It may be that there are universal principles of ethics that can be translated into rules of conduct at a general level ("take care of those who are dependent on you," "don't be cruel," *1378 "don't eat other people"). But to apply universal principles to most events of daily life, and particularly to professional roles like being an attorney, a person must be deeply knowledgeable about the situation in which those rules apply. Everyone knows that a great deal of cruelty can be inflicted by a well-meaning but oblivious person, and a moment's reflection will reveal that a person cannot act ethically within a given professional role unless one has a great deal of knowledge about what that role requires, no matter how good one's intentions and how universal the principles on which those intentions are based.

In short, ethical behavior in a given situation, whatever its wellsprings, requires a deep knowledge of that situation. The situation for modern lawyers is our highly developed, complex system of governance, the administrative state. [FN177] This means that we need to rethink our understanding of ethical behavior for that new and qualitatively different context. Traditional rules or standards are unlikely to be applicable. The repetition of them may seem reassuring, but it must be remembered that they too were disconcerting innovations at one time. [FN178] We do not need to alter our guiding principles all the time, of course; the twentieth century, if nothing else, has taught us that the principle of constant revolution can be almost as bad as the principle that nothing should ever be changed. But we must

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be willing to reassess our ethical standards when we are confronted with a dramatically new and different situation. That situation has arrived in many different forms—globalization, the Internet, biological engineering, and the possibility of catastrophic environmental degradation. One of those forms, the one most relevant to lawyers, is the modern administrative state. We do ourselves and our students a disservice if we fail to take this situation seriously and fail to redefine our notions of ethical behavior in response to it.

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[FN1]. See, e.g., Robert Gordon, [The Independence of Lawyers](#), 68 B.U. L. Rev. 1, 6-7 (1988) (arguing that a lawyer should counsel his client according to the purpose of the law); Stephen Pepper, [The Lawyer's Amoral Ethical Role: A Defense, A Problem and Some Possibilities](#), 1986 Am. B. Found. Res. J. 613, 634 (arguing that a lawyer should tell his client the limits of legal action without imposing moral judgment); discussion *infra* pp. 1350-60. See generally William Simon, [Ethical Discretion in Lawyering](#), 101 Harv. L. Rev. 1083 (1988) (describing the approaches to legal counseling as regulatory and libertarian, respectively).

[FN2]. See discussion *infra* pp. 1350-53.

[FN3]. Model Rules of Prof'l Conduct (2007).

[FN4]. See *infra* notes 42-57 and accompanying text.

[FN5]. See Edward Rubin, [What's Wrong with Langdell's Method, and What To Do About It](#), 60 Vand. L. Rev. 609, 610 (2007).

[FN6]. See *infra* Part I.

[FN7]. See *infra* Part I.A.

[FN8]. See discussion *infra* pp. 1352-53.

[FN9]. See 1 Marc Bloch, *Feudal Society: The Growth of Ties of Dependence* 109-20 (L.A. Manyon trans., 1961); 2 Marc Bloch, *Feudal Society: Social Classes and Political Organization* 359-437 (L.A. Manyon trans., 1961); Roger Collins, *Early Medieval Europe, 300-1000*, at 291-300 (2d ed. 1999); Heinrich Fichtenau, *Living in the Tenth Century: Mentalities and Social Orders* 381-90 (Patrick Geary trans., 1991).

[FN10]. See James Collins, *The State in Early Modern France* 16-22 (1995); J.H. Elliot, *Imperial Spain: 1469-1716*, at 86-93 (1990); Thomas Ertman, *Birth of the Leviathan: Building States and Regimes in Medieval and Early Modern Europe* 83-88 (1997).

[FN11]. See sources cited *supra* note 10.

[FN12]. See Albert N. Hamscher, *The Parlement of Paris After the Fronde 1653-1673*, at viii-ix (1976); J.H. Shennan, *The Parlement of Paris* 3-5 (1968). The Parlement's authority was partially restored under Louis XV. See John Rogister, *Louis XV and the Parlement of Paris, 1737-1755*, at xvii-xviii (1995).

[FN13]. See generally Charles McIlwain, *The High Court of Parliament and Its Supremacy: An Historical Essay on the Boundaries Between Legislation and Adjudication in England* (1962).

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[FN14]. See Fichtenau, *supra* note 9, at 303-32, 391-97; Joseph Gies & Frances Gies, *Life in a Medieval City* 120-34 (1981); Frances Gies & Joseph Gies, *Life in a Medieval Village* 155-71 (1990); Emmanuel Le Roy Ladurie, *Montaillou: The Promised Land of Error* 306-26 (Barbara Bray trans., 1979). For a specific social policy implemented by the Church, see generally *The Peace of God: Social Violence and Religious Response in France Around the Year 1000* (Thomas Head & Richard Landes eds., 1992).

[FN15]. See Steven Epstein, *Wage Labor and Guilds in Medieval Europe* (1991); see also Gies & Gies, *Life in a Medieval City*, *supra* note 14, at 89-93; Barbara Hanawalt, *Growing Up in Medieval London: The Experience of Childhood in History* 129-72 (1993); Ruth Mazo Karras, *From Boys to Men: Formations of Masculinity in Late Medieval Europe* 109-50 (2003); George Unwin, *The Guilds and Companies of London* (4th ed. 1963).

[FN16]. See 1 Bloch, *supra* note 9, at 123-42; Fichtenau, *supra* note 9, at 30-97; Gies & Gies, *Life in a Medieval Village*, *supra* note 14, at 88-154; Ladurie, *supra* note 14, at 231-76.

[FN17]. See Jasper Ridley, *A Brief History of the Tudor Age* 132-35 (2002).

[FN18]. See *infra* note 20 and accompanying text.

[FN19]. See *infra* note 20 and accompanying text.

[FN20]. See 1 Bloch, *supra* note 9, at 113-16; Paul Brand, *The Origins of the English Legal Profession* 5-9 (1992); Richard Mortimer, *Angevin England, 1154- 1258*, at 52-53, 83-84 (1994); Sir Frank Stenton, *The First Century of English Feudalism, 1066-1166*, at 42-57 (2d ed. 1961).

[FN21]. See 1 Bloch, *supra* note 9, at 116-20; Norman F. Cantor, *The Civilization of the Middle Ages* 306-18 (1994); Lucien Karpik, *French Lawyers: A Study in Collective Action, 1274 to 1994*, at 13-16 (Nora Scott trans., 1999); Mortimer, *supra* note 20, at 53-63.

[FN22]. See Brand, *supra* note 20, at 14-32; Paul Brand, *The Making of the Common Law* 1-20 (1992); Sir Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I* 136-37 (2d ed. 1996); W.L. Warren, *Henry II* 317-61 (1977).

[FN23]. See 2 Bloch, *supra* note 9, at 367-70; Gies & Gies, *Life in a Medieval City*, *supra* note 14, at 183-90.

[FN24]. On the positivization of law in the modern world, see 1 Jürgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society* 243-71 (Thomas McCarthy trans., 1984); Niklas Luhmann, *A Sociological Theory of Law* 159-264 (Elizabeth King & Martin Albrow trans., 1985); Max Weber, *Economy and Society* 217-26, 839-76 (Guenther Roth & Claus Wittich eds., 1978).

[FN25]. See *infra* note 26 and accompanying text.

[FN26]. See Edward Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* 210-18 (2005) [hereinafter Rubin, *Beyond Camelot*]; Edward Rubin, [Law and Legislation in the Administrative State](#), 89 *Colum. L. Rev.* 369, 373 (1989).

[FN27]. The English legal profession arose in the thirteenth century, and was large and flourishing by the end of the medieval era. The same is true for France, although the profession developed a bit later there. See J.H. Baker, *An Introduction to English Legal History* 133-42 (2d ed. 1979); Michael Birks, *Gentlemen of the Law* (1960); Brand, *The Making of the Common Law*, *supra* note 22; Karpik, *supra* note 21, at 19-35; Harry Kirk, *Portrait of a Profession: A*

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History of the Solicitor's Profession, 1100 to the Present Day 1-9 (1976); David Bell, Barristers, Politics and the Failure of Civil Society in Old Regime France, in *Lawyers and the Rise of Western Political Liberalism* 65, 68-70 (Terrence Halliday & Lucien Karpik eds., 1997).

[FN28]. See supra notes 9-23 and accompanying text.

[FN29]. The fact that the judges in these courts were specialists, in contrast to the judges in the manor or customary courts of the early Middle Ages, was a major impetus to the development of the profession. See Brand, supra note 20, at 33-49.

[FN30]. Kirk, supra note 27, at 1-21.

[FN31]. See Baker, supra note 27, at 142-43; Brand, supra note 20, at 143- 57.

[FN32]. John Langbein, *The Origins of Adversary Criminal Trial* 10-66 (2003). This rule did not change until the very end of the seventeenth century, when the Treason Trials Act allowed defendants accused of treason to be represented by counsel. *Id.* at 93-95. Representation for defendants accused of other felonies followed in the early eighteenth century. *Id.* at 106-77.

[FN33]. *Id.* at 26-28. This rule does not seem quite so peculiar, or sinister, in light of the precursors of English jury trials. Before the thirteenth century, parties would state their case to a judge, but prove its truth by ordeal or by combat. See generally Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (1986). In the ordeal, they would be required to hold a piece of hot iron in their hand, which was subsequently examined to see how it healed, or be lowered into water to determine whether they floated or sank. *Id.* Combat involved a fight from morning until night, typically on foot with a club or on horseback with a sword. See generally George Nielson, *Trial by Combat* (1890); 1 William S. Holdsworth, *A History of English Law* 305-11 (7th ed. 1956). In trials of this nature, a law-trained person was clearly of no use to the defendant.

[FN34]. The contradiction was emphasized by the rule that defendants in misdemeanor trials, like defendants in felony trials, were allowed to testify on their own behalf. Langbein, supra note 32, at 36-38. In contrast, parties to a civil trial were not permitted to testify, on the theory that they had an interest in the outcome. *Id.*

[FN35]. *Id.* at 38-40, 62-63.

[FN36]. The typical penalty for felony or treason was death. *Id.* at 39.

[FN37]. *Id.* at 109-36.

[FN38]. *Id.* at 38.

[FN39]. *Id.* at 36-37. In other words, although official doctrine combined felonies and misdemeanors as criminal actions, the procedures regarding assistance of counsel distinguished between them, grouping misdemeanors with civil actions, that is, disputes between individuals rather than breaches of the king's peace. *Id.*

[FN40]. See supra notes 32-39 and accompanying text.

[FN41]. See generally Fed. R. Civ. P.; Fed. R. Evid.

[FN42]. Model Rules of Prof'l Conduct R. 1.2-1.5 (2007).

[\[FN43\]](#). Id. R. 1.6.

[\[FN44\]](#). Id. R. 1.7-1.11.

[\[FN45\]](#). Id. R. 3.1-3.7, 4.1-4.4.

[\[FN46\]](#). Id. R. 5.1-5.7.

[\[FN47\]](#). Id. R. 6.1-6.5.

[\[FN48\]](#). Id. R. 7.1-7.6.

[\[FN49\]](#). Id. R. 8.1-8.5.

[\[FN50\]](#). Id. R. 2.1 (appearing under the heading "Advisor"). Two other rules that appear under the heading of "Counselor," Rules 2.3 and 2.4, deal with the separate topic of giving opinions to third parties or serving as a mediator. Id. R. 2.3-2.4. Rule 2.1 is largely permissive, and imposes few restrictions. The lawyer's role of negotiator is also under-emphasized in the Model Rules.

[\[FN51\]](#). As stated at the outset, this Article focuses on lawyers for private clients. See discussion *supra* pp.1337-38. Different issues apply in the case of lawyers who represent the government. No rule other than 1.11 addresses this matter directly, but the Comments to various rules make reference to it. See, e.g., Model Rules of Prof'l Conduct prml. cmt.18 (2003); R. 1.13 cmt.9; R. 4.2 cmt.4.

[\[FN52\]](#). Id. R. 3.9. Rule 3.9 reads in its entirety as follows: "A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5." Id.

[\[FN53\]](#). Id.

[\[FN54\]](#). Id. R. 1.11.

[\[FN55\]](#). Id. R. 1.11(a)(2).

[\[FN56\]](#). Id. R. 1.11(e)(1).

[\[FN57\]](#). Id.

[\[FN58\]](#). 2007-08 Standards for Approval of Law Schools, A.B.A. Sec. Legal Educ. & Admissions to the Bar, Standard 302(a), at 19-20 ("A law school shall require that each student receive substantial instruction in: ... (5) the history, goals, structure, values, rules and responsibilities of the legal profession and its members.").

[\[FN59\]](#). A Survey of Law School Curricula, A.B.A. Sec. Legal Educ. & Admissions to the Bar, 15-16 (2004) [hereinafter ABA Curriculum Survey]. The ABA Curriculum Survey found that nearly all law schools-142 of the 152 schools responding, or 93.4 percent-taught a required upper division course on professional responsibility. Id.

[\[FN60\]](#). A current book will be defined, for present purposes, as one that was published, in either an original or sub-

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sequent edition, during the last decade. The books surveyed are Robert F. Cochran, Jr. & Teresa S. Collett, *Cases and Materials on the Legal Profession* (Thompson/West, 2d ed. 2003); Nathan M. Crystal, *Professional Responsibility: Problems of Practice and the Profession* (Aspen, 3d ed. 2004); James Devine, William Fisch, Stephen Easton & Robert Aronson, *Problems, Cases and Materials in Professional Responsibility* (Thompson/West, 3d ed. 2004); Stephen Gillers, *Regulation of Lawyers* (Aspen, 7th ed. 2005); Paul Hayden, *Ethical Lawyering: Legal and Professional Responsibilities in the Practice of Law* (Thompson/West, 2d ed. 2007); Geoffrey C. Hazard, Jr., Susan P. Koniak, Roger C. Cramton & George M. Cohen, *The Law and Ethics of Lawyering* (Foundation, 4th ed. 2005); Lisa Lerman & Philip Schrag, *Ethical Problems in the Practice of Law*, (2d ed. 2008); James E. Moliterno, *Cases and Materials on the Law Governing Lawyers* (LexisNexis, 3d ed. 2008); Thomas D. Morgan & Ronald D. Rotunda, *Problems and Materials: Professional Responsibility* (Foundation, 9th ed. 2006); Deborah L. Rhode, *Professional Responsibility: Ethics by the Pervasive Method* (Aspen, 2d ed. 1998); Deborah L. Rhode & David Luban, *Legal Ethics* (Foundation, 4th ed. 2004); Mortimer Schwartz, Richard Wydick, Rex Perschbacher & Debra Lyn Bassett, *Problems in Legal Ethics* (Thompson/West, 8th ed. 2007); Richard Zitrin, Carol M. Langford & Nina W. Tarr, *Legal Ethics in the Practice of Law* (LexisNexis, 3d ed. 2007). The number of editions that many of these books have run indicates that they are widely adopted.

[FN61]. All jurisdictions, with the exceptions of Maryland, Washington, Wisconsin, and Puerto Rico, require the MPRE. See Nat'l Conference of Exam'rs & A.B.A. Section of Legal Educ., *Comprehensive Guide to Bar Admission Requirements* 21 (Erica Moeser & Margaret Fuller Corneille eds., 2008). For the subject matter of the MPRE tests, see National Conference of Bar Examiners, *Description of the MPRE*, <http://www.ncbex.org/multistate-tests/mpre/mpre-faqs/description/> (last visited Mar. 1, 2009).

[FN62]. See, e.g., Crystal, *supra* note 60, at 599-622; Hazard, Koniak, Cramton & Cohen, *supra* note 60, at 708-16, 1054-1115; Morgan & Rotunda, *supra* note 60, at 268-80, 548-76; Rhode, *supra* note 60, at 50-59; Zitrin, *supra* note 60, at 577, 685, 737-38, 746.

[FN63]. See, e.g., Crystal, *supra* note 60, at 310-37, 497-545 (dealing with real estate, estate planning, tax, criminal law, insurance, and family law); Rhode, *supra* note 60, at 459-510, 595-654, 681-788 (dealing with constitutional law, criminal law, family law, real estate, and tax, all in the context of the pervasive method); Rhode & Luban, *supra* note 60, at 515-20, 521-40, 548-67 (dealing with criminal law, family law, and tax).

[FN64]. See Hazard, Koniak, Cramton & Cohen, *supra* note 60, at xvi-xvii.

[FN65]. *Id.* at 116-42.

[FN66]. See *id.* at 116-42; see also Crystal, *supra* note 60, at 533-45; Rhode, *supra* note 60, at 755-88.

[FN67]. Hazard, Koniak, Cramton & Cohen, *supra* note 60, at 143-254.

[FN68]. See Anuj C. Desa, [Filters and Federalism: Public Library Internet Access, Local Control, and the Federal Spending Power](#), 7 *U. Pa. J. Const. L.* 1, 85 (2004) (citing [Sonzinky v. United States](#), 300 U.S. 506, 513 (1937)).

[FN69]. Hazard, Koniak, Cramton & Cohen, *supra* note 60, at 188-223; see also Joseph Bankman, *The New Market in Corporate Tax Shelters*, 83 *Tax Notes* 1775 (1999).

[FN70]. Bankman, *supra* note 69, at 1777.

[FN71]. The risk that the corporation takes is that the IRS will successfully attack the shelter, and thus require the corporation to return its tax savings and the interest on them, plus a 20 percent penalty for substantial understatement of tax liability. [I.R.C. § 6662\(a\)](#) (2006). But the corporation can avoid this penalty if it "reasonably relies in good faith

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on the opinion of a professional tax advisor[] ... [which] unambiguously states that there is a greater than 50-percent likelihood that the tax treatment of the item will be upheld if challenged." [Treas. Reg. §§ 1.6662-4\(g\); 1.6664-4\(f\)](#) (2008). Ordinarily, business people want legal advice so that they can know whether they are violating the law, or more cynically, how likely they are to be punished for a violation of the law and how severe the punishment will be. An opinion letter addressing the likelihood that the client's tax exemption will be denied and that a penalty may be imposed would typically serve that purpose. See Bankman, *supra* note 69, at 1782. But, by making the opinion letter itself a protection against liability, the IRS regulations have given it a market value that is largely separate from its substantive accuracy. To be sure, the lawyer giving the opinion may be subject to liability, or the safe harbor may be disallowed because the firm's reliance on the opinion letter was not reasonable, but Bankman notes that this virtually never occurs. *Id.* at 1782.

[\[FN72\]](#). Bankman, *supra* note 69, at 1782.

[\[FN73\]](#). *Id.* at 1791; Hazard, Koniak, Cramton & Cohen, *supra* note 60, at 117.

[\[FN74\]](#). Bankman, *supra* note 69, at 1793.

[\[FN75\]](#). Hazard, Koniak, Cramton & Cohen, *supra* note 60, at 143.

[\[FN76\]](#). *Id.* at 149-52, 171-91, 203-32.

[\[FN77\]](#). *Id.* at 179-81.

[\[FN78\]](#). *Id.* at 143-44; see also *id.* at 149-52, 171-91, 205-32.

[\[FN79\]](#). William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *Wis. L. Rev.* 29, 41, 63.

[\[FN80\]](#). Simon, *supra* note 1, at 1085-86.

[\[FN81\]](#). Of course, intentionalism and purposivism are not the same, particularly in the constitutional context. Intentionalists argue that the Constitution should be interpreted in accordance with the Framers' intention at the time of the Constitution's drafting. See, e.g., Gregory Bassham, *Original Intent and the Constitution: A Philosophical Study* 1 (1992); Michael J. Perry, *The Constitution in the Courts: Law or Politics* 32 (1994); Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 3 (1999); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *Loy. L. Rev.* 611, 620-21 (1999); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 *Nw. U. L. Rev.* 226, 234-35 (1988); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 *Va. L. Rev.* 947, 1101 (1995); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. Cin. L. Rev.* 849, 862 (1989). Purposivists argue that the Constitution should be interpreted in light of changing circumstances. See, e.g., Sotirios A. Barber & James E. Fleming, *Constitutional Interpretation: The Basic Questions*, at xiii (2007); Philip Bobbitt, *Constitutional Interpretation* 182-85 (1991); Robert C. Post, *Constitutional Domains: Democracy, Community, Management* 49 (1995); Akhil Reed Amar, *Intratextualism*, 112 *Harv. L. Rev.* 747, 794 (1999); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 *N.Y.U. L. Rev.* 875, 936 (2003); Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relationship Between Principle and Prudence*, 43 *Duke L.J.* 1, 12-13 (1993); Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 *Stan. L. Rev.* 1259, 1284-85 (2001); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 *U. Chi. L. Rev.* 1127, 1175-76 (1987).

Although these two positions are based on important philosophical differences, the pragmatic distinction between them often results from the passage of time between the creation and application of the provision, and is thus less dramatic regarding regulatory statutes, which are often recently drafted or amended.

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[FN82]. With respect to constitutional interpretation, see Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 23-25 (1997); Gary Lawson, On [Reading Recipes ... and Constitutions](#), 85 *Geo. L.J.* 1823, 1823-24, 1834- 36 (1997); Adrian Vermuele & Ernest A. Young, [Hercules, Herbert, and Amar: The Trouble with Intratextualism](#), 113 *Harv. L. Rev.* 730, 774-77 (2000). With respect to statutory interpretation, see Frank H. Easterbrook, [Text, History, and Structure in Statutory Interpretation](#), 17 *Harv. J.L. & Pub. Pol'y* 61, 62-65 (1994); Frank H. Easterbrook, [Statutes' Domains](#), 50 *U. Chi. L. Rev.* 533, 544-48 (1983); John F. Manning, [Textualism and the Equity of the Statute](#), 101 *Colum. L. Rev.* 1, 105-07 (2001); Kenneth A. Shepsle, [Congress Is a "They," Not an "It": Legislative Intent as Oxymoron](#), 12 *Int'l Rev. L. & Econ.* 239, 250-52 (1992). See generally William N. Eskridge, Jr., [The New Textualism](#), 37 *UCLA L. Rev.* 621, 624-25 (1990).

[FN83]. Michael C. Dorf, [Foreword: The Limits of Socratic Deliberation](#), 112 *Harv. L. Rev.* 4, 4 (1998).

[FN84]. See Kay, *supra* note 81, at 227-28; Sherry, *supra* note 81, at 1134, 1167, 1176-77; Cass R. Sunstein, [Interpreting Statutes in the Regulatory State](#), 103 *Harv. L. Rev.* 405, 414-15 (1989); Nicholas S. Zeppos, [Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation](#), 76 *Va. L. Rev.* 1295, 1296, 1298 (1990). Both textualists and purposivists invoke this rationale; the debate between them is whether one is being a more faithful agent by reading the text literally or by attempting to discern its purpose.

[FN85]. Model Rules of Prof'l Conduct pmb1.

[FN86]. See Baker, *supra* note 27, at 177-83; McIlwain, *supra* note 13, at 103-05.

[FN87]. See Rubin, *Beyond Camelot*, *supra* note 26, at 29-36.

[FN88]. *Id.* at 191-97.

[FN89]. *Id.* at 194.

[FN90]. 1 St. Thomas Aquinas, *Summa Theologica* 363-408 (Fathers of the English Dominican Province trans., 1981).

[FN91]. In fact, the conception of human beings as inherently rational was undermined during the Reformation, and was completely gone by the Romantic Era. See William J. Bouwsma, *The Waning of the Renaissance, 1550-1640*, at 20-34 (2000).

[FN92]. See generally H.L.A. Hart, *The Concept of Law* (1961). Of course, a law can also be rescinded in the judicial review process, but this is rare, and the court's decision can be viewed as declaring that the enactment in question was never a law in the first place.

[FN93]. See Rubin, *Beyond Camelot*, *supra* note 26, at 140.

[FN94]. See *id.* at 131-43.

[FN95]. See generally Susan P. Koniak, [When the Hurlyburly's Done: The Bar's Struggle with the SEC](#), 103 *Colum. L. Rev.* 1236 (2003). Koniak attributes the SEC's failure to discipline lawyers who participate in corporate fraud in part to a mistaken analogy between a lawyer representing a client in litigation and a lawyer representing a client in a business context. *Id.* The zealous advocacy and one-sided assessment of the law that is appropriate in the former case, she suggests, is inappropriate in the latter. *Id.* This Article suggests another false analogy: that between a legal prohibition

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linked to basic moral principles, like the prohibition against fraud, and a legal prohibition based on purely instrumental regulatory concerns. The failure to make this distinction, combined with the pragmatic demands of governance, is likely to produce the excessive leniency in the corporate fraud context that Koniak documents in her article.

[FN96]. Regarding the idea of microanalysis, see Edward L. Rubin, [The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions](#), 109 *Harv. L. Rev.* 1393, 1425-38 (1996).

[FN97]. See Douglas G. Baird, Robert H. Gertner & Randal C. Picker, *Game Theory and the Law* 11 (1994).

[FN98]. In the case of corporations, this is a matter of economic policy, not basic rights. A premise of totalitarian regimes is that the individual is a creature of the state. See Hannah Arendt, *The Origins of Totalitarianism* 323-26 (3rd ed. 1976); Jung Chang & John Halliday, *Mao: The Unknown Story* 503-25 (2005); Sheila Fitzpatrick, *Everyday Stalinism* 1-4, 15-21 (1999); William L. Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany* 231-76 (1960). This position is anathema in democratic systems. But those systems also establish corporations precisely as creatures of the state and thus subject to whatever rules the state chooses to impose. See Meir Dan-Cohen, *Rights, Persons and Organizations: A Legal Theory for Bureaucratic Society* 55-84 (1986). The idea that a corporation is entitled to maximize its economic status is an instrumental policy designed to achieve the collective economic goals of the society at large.

[FN99]. Clean Air Act § 101, [42 U.S.C. § 7401](#) (2000).

[FN100]. See Baird, Gertner & Picker, *supra* note 97, at 165-78.

[FN101]. John T. Scholz, *Cooperation, Deterrence, and the Ecology of Regulatory Enforcement*, 18 *Law & Soc'y Rev.* 179, 202-06 (1984). See generally Robert Axelrod, *The Evolution of Cooperation* (1984).

[FN102]. See Scholz, *supra* note 101, at 183-84.

[FN103]. See Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* 19-53 (1992); Eugene Bardach & Robert A. Kagan, *Going By the Book: The Problem of Regulatory Unreasonableness* 58-62 (1982); Keith Hawkins, *Environment and Enforcement: Regulation and the Social Definition of Pollution* 106-07, 114 (1984).

[FN104]. See Bardach & Kagan, *supra* note 103, at 117-19.

[FN105]. *Id.* at 163-65.

[FN106]. See Scholz, *supra* note 101, at 192.

[FN107]. *Id.*

[FN108]. See *id.* at 189, 192.

[FN109]. *Id.*

[FN110]. See Sanford N. Greenberg, [Who Says It's a Crime? Chevron Deference to Agency Interpretations of Regulatory Statutes that Create Criminal Liability](#), 58 *U. Pitt. L. Rev.* 1, 28 (1996) (stating that "regulated parties are likely to have had an input in an agency's initial interpretations," thus suggesting that regulated parties generally interpret regulations in a reasonable manner).

[FN111]. See generally Margaret Pak, [An IQ Test for Federal Agencies? Judicial Review of the Information Quality Act Under the APA, 80 Wash. L. Rev. 731, 739-40 \(2005\)](#) (indicating the importance of regulated parties following specific recommendations).

[FN112]. See Scholz, *supra* note 101, at 188-91.

[FN113]. *Id.*

[FN114]. See Axelrod, *supra* note 101, at 112-13; Scholz, *supra* note 101, at 188-93.

[FN115]. See Axelrod, *supra* note 101, at 113-14.

[FN116]. See Scholz, *supra* note 101, at 188 (indicating the cost of an information disparity between the parties).

[FN117]. *Id.* at 198.

[FN118]. See Axelrod, *supra* note 101, at 118-20 (stating that reciprocity, not absolute cooperation or absolute defection, is the best strategy).

[FN119]. See *id.* (implying that the best results only occur when both parties cooperate).

[FN120]. See *id.* at 113 (explaining the cost of possible modes of retaliation).

[FN121]. See *id.*

[FN122]. [12 C.F.R. § 513.4\(a\)\(3\)](#) (1992).

[FN123]. *Id.*

[FN124]. See Lewis Mandell, *The Credit Card Industry: A History* 87-89 (1990) (explaining securitization).

[FN125]. For a general description of the credit card market, see David S. Evans & Richard Schmalensee, *Paying with Plastic: The Digital Revolution in Buying and Borrowing* 1-7 (1999) [hereinafter Evans & Schmalensee, *Paying with Plastic*]; Mandell, *supra* note 124, at 28-32. For a discussion of the economic aspects of the industry, see David Evans & Richard Schmalensee, *The Economics of the Payment Card Industry* (1993).

[FN126]. See Evans & Schmalensee, *Paying with Plastic*, *supra* note 125, 164- 67 (describing fees); Mandell, *supra* note 124, at 89 (describing defaults as "charge-offs"). Moreover, the number of cardholders is so large, and the experience with this instrument so extensive, that the bank can determine exactly what the default rate will be for a given economic and demographic group to which it chooses to offer cards.

[FN127]. See Evans & Schmalensee, *Paying with Plastic*, *supra* note 125, at 76.

[FN128]. See Mandell, *supra* note 124, at 88.

[FN129]. *Id.* at 87-89.

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[\[FN130\]](#). Id.

[\[FN131\]](#). Financial Accounting Standards Board, Statement of Financial Accounting Standards No. 140, at 4 (2000) [hereinafter FAS 140], available at www.fasb.org/pdf/fas140.pdf. GAAP are established by a private not-for-profit body called the Financial Accounting Standards Board (FASB). FAS 140 governs the transfer and services of financial assets and provides, in part, as follows:

A transfer of financial assets in which the transferor surrenders control over those assets is accounted for as a sale to the extent that consideration other than beneficial interests in the transferred assets is received in exchange. The transferor has surrendered control over transferred assets if and only if all of the following conditions are met:

a. The transferred assets have been isolated from the transferor-put presumptively beyond the reach of the transferor and its creditors, even in bankruptcy or other receivership.

b. Each transferee (or, if the transferee is a qualifying special-purpose entity (SPE), each holder of its beneficial interests) has the right to pledge or exchange the assets (or beneficial interests) it received, and no condition both constrains the transferee (or holder) from taking advantage of its right to pledge or exchange and provides more than a trivial benefit to the transferor.

c. The transferor does not maintain effective control over the transferred assets through either (1) an agreement that both entitles and obligates the transferor to repurchase or redeem them before their maturity or (2) the ability to unilaterally cause the holder to return specific assets, other than through a cleanup call.

Id.

[\[FN132\]](#). See Mandell, *supra* note 124, at 87-89.

[\[FN133\]](#). See FAS 140, *supra* note 131.

[\[FN134\]](#). See *id.* at 57.

[\[FN135\]](#). See Mandell, *supra* note 124, at 87-89.

[\[FN136\]](#). FAS 140, *supra* note 131, at 9.

[\[FN137\]](#). Id.

[\[FN138\]](#). See Office of the Comptroller of the Currency, OCC Guidance 2002- 20: Interagency Guidance on Implicit Recourse in Asset Securitizations 1 (2002) [hereinafter OCC Guidance 2002-20], available at www.comptrollerofthecurrency.gov/ftp/bulletin/2002-20a.pdf (advisory document issued jointly by the Comptroller, the Federal Deposit Insurance Corporation, the Federal Reserve Board, and the Office of Thrift Supervision explaining "implicit recourse").

[\[FN139\]](#). Id. at 3.

[\[FN140\]](#). Id.

[\[FN141\]](#). Id. at 4.

[\[FN142\]](#). Charles W. Calomiris & Joseph R. Mason, Credit Card Securitization and Regulatory Arbitrage 3 (Federal Reserve Bank of Philadelphia Working Paper No. 03-7, 2003), available at <http://www.phil.frb.org/files/wps/2003/wp03-7.pdf>.

[\[FN143\]](#). Id. at 11.

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[\[FN144\]](#). Id.

[\[FN145\]](#). George A. Akerlof, The Market for "Lemons": Qualitative Uncertainty and the Market Mechanism, 84 Q. J. Econ. 488, 488-89 (1970).

[\[FN146\]](#). See OCC Guidance 2002-20, *supra* note 138, at 3.

[\[FN147\]](#). See Arnoud W. A. Boot, Stuart S. Greenbaum & Anjan V. Thakor, Reputation and Discretion in Financial Contracting, 83 Am. Econ. Rev. 1165, 1172-73 (1993).

[\[FN148\]](#). Id.

[\[FN149\]](#). Stephen Gillers, "[Eat Your Spinach?](#)", 51 St. Louis U. L.J. 1215, 1218 (2007) ("[L]egal ethics, by whatever name, is the Cinderella of the law school curriculum."); David A. Logan, [Upping the Ante: Curricular and Bar Exam Reform in Professional Responsibility](#), 56 Wash. & Lee L. Rev. 1023, 1024- 25 (1999).

[\[FN150\]](#). See ABA Curriculum Survey, *supra* note 59, at 15-17. According to the survey, 142 of the 152 schools responding, or 93.4 percent, required professional responsibility in the upper division. The only other courses that were required by a significant number of schools were Constitutional Law (eighty schools or 52.6 percent) and Evidence (seventy one schools or 46.7 percent). In all likelihood, there are many more students who would choose to take these courses if they were not required than would choose to take professional responsibility. See generally Bruce A. Green, [Teaching Lawyers Ethics](#), 51 St. Louis U. L.J. 1091, 1097 (2007); Gillers, *supra* note 149, at 1218; Deborah L. Rhode, [Teaching Legal Ethics](#), 51 St. Louis U. L.J. 1043, 1047 (2007); Alan M. Weinberger, [Some Further Observations on Using the Pervasive Method of Teaching Legal Ethics in Property Courses](#), 51 St. Louis U. L.J. 1203, 1204 (2007).

[\[FN151\]](#). See ABA Curriculum Survey, *supra* note 59, at 15 (stating that ABA Standard 302(b) requires that a law school provide all students with instruction in professional responsibility).

[\[FN152\]](#). See Gillers, *supra* note 149, at 1219 (stating that Professional Responsibility "does not lend itself to broad pronouncement that can explain everything").

[\[FN153\]](#). See E. Michelle Rabouin, [Walking the Talk: Transforming Law Students into Ethical Transactional Lawyers](#), 9 DePaul Bus. L.J. 1, 20 (1996).

[\[FN154\]](#). Only a law review would require a citation to Plato, Aristotle, Aquinas, Kant, and Nietzsche here, and this one fortunately does not. But a glance at the table of contents of any general ethics text reveals the enormous overlap in subject matter between legal education and philosophic ethics. For example, in the ethics volume of the Blackwell Companion to Philosophy series, the "Applications" section consists of chapters entitled World poverty; Environmental ethics; Euthanasia; Abortion; Sex; Personal relationships; Equality, discrimination and preferential treatment; Animals; Business ethics; Crime and punishment; Politics and the problem of dirty hands; and War and peace. A Companion to Ethics 271-395 (Peter Singer ed., 1991) [hereinafter Companion]. In other words, every topic that Singer chose to cover in this section of the book has direct relevance to law, and most deal with issues that are central to a standard upper-class subjects such as Poverty, Environmental Law, Bill of Rights (often called Constitutional Law II), Family Law, Employment Law, Corporate Law, Criminal Justice, Administrative Law, and International Law. Only the chapter on animals deals with a subject that is frequently, but not always, omitted from the upper-class curriculum. (The relatively brief chapter on personal relationships actually does not deal with marital or child raising issues, but it should have. Id. at 327-32.) In fact, given this overlap, one might expect a more extensive discussion of philosophic ethics in law school courses than is actually the case. Perhaps the brooding omnipresence of the Legal

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Ethics course has discouraged this development.

[FN155]. The Blackwell volume, for example, contains no discussion of the rules that regulate any profession. See generally Companion, *supra* note 154. In general, these rules do not seem to have occupied the attention of very many contemporary ethicists. MacIntyre, for example, does not discuss the subject, although his concept of a practice could readily generate a theoretically grounded account of professional rules. See generally Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (2d ed. 1984).

[FN156]. See *supra* text accompanying notes 60-63.

[FN157]. See Gillers, *supra* note 149, at 1219.

[FN158]. See *id.*

[FN159]. See, e.g., Akshat Tewary, [Legal Ethics as a Means to Address the Problem of Elite Law Firm Non-Diversity, 12 Asian L.J. 1, 28 \(2005\)](#) (arguing that hiring processes that unfairly disadvantage minorities are counter to the principles of ethical lawyering).

[FN160]. See *supra* Part II.

[FN161]. See *supra* Part II.

[FN162]. See *supra* text accompanying notes 24-26.

[FN163]. Rubin, *supra* note 5, at 610.

[FN164]. *Id.* at 649.

[FN165]. *Id.* at 651-52.

[FN166]. See, e.g., Thomas B. Metzloff, [Seeing the Trees Within the Forest: Contextualized Ethics Courses as a Strategy for Teaching Legal Ethics, 58 Law & Contemp. Probs. 227, 228 \(1995\)](#) (explaining that Duke Law School adopted contextualized advanced ethics courses under the assumption that ethical issues vary in different contexts).

[FN167]. The insight that ethical behavior is a matter of habitual behavior goes back to Aristotle. See Aristotle, *Nicomachean Ethics*, reprinted in 9 Great Books of the Western World, *The Works of Aristotle: Volume II* 339, 348- 50 (Robert Maynard Hutchins ed., W.D. Ross trans., 1952); see also Milton C. Regan, Jr., [Moral Intuitions and Organizational Culture, 51 St. Louis U. L.J. 941, 944 \(2007\)](#) (arguing that noncognitive and emotional reactions shape morality and generate institutional culture).

[FN168]. Regan refers to this orientation as moral awareness. Regan, *supra* note 167, at 951-52.

[FN169]. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *Colum. L. Rev.* 809, 840 (1935).

[FN170]. Jane Kent Gionfriddo, [The "Reasonable Zone of Right Answers": Analytical Feedback on Student Writing, 40 Gonz. L. Rev. 427, 428 \(2004-2005\)](#).

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[FN171]. See generally John Dewey, *Lectures in the Philosophy of Education* (Reginald D. Archambault ed., 1966); John Dewey, *The Child and the Curriculum and the School and Society* (4th ed. 1959); John Dewey, *Experience and Education* (1938); John Dewey, *The Way Out of Educational Confusion* (1931); John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (1916). John Piaget's logical research subsequently supported Dewey's insight. See Jean Piaget, *The Language and Thought of the Child* (3d ed. 1971); Jean Piaget, *The Construction of Reality in the Child* (Margaret Cook trans., 1954); Jean Piaget, *The Child's Conception of the World* (Joan Tomlinson & Andrew Tomlinson trans., 1929).

[FN172]. See generally Lawrence Kohlberg, Charles Levine & Alexandra Hower, *Moral Stages: A Current Formulation and a Response to Critics* (1983); Lawrence Kohlberg, *The Philosophy of Moral Development: Moral Stages and the Idea of Justice* (1981); F. Clark Power, Ann Higgins & Lawrence Kohlberg, *Lawrence Kohlberg's Approach to Moral Education* (1989).

[FN173]. See Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 *Am. B. Found. Res. J.* 247, 248 (indicating that the American Bar Association's purpose in requiring ethics education was initially to promote professional responsibility).

[FN174]. See Lisa Kern Griffin, [Compelled Cooperation and the New Corporate Criminal Procedure](#), 82 *N.Y.U. L. Rev.* 311, 343 n.162 (2007).

[FN175]. See, e.g., Paul Schiff Berman, [Seeing Beyond the Limits of International Law](#), 84 *Tex. L. Rev.* 1265, 1277 (2006) (book review) (explaining the view that states are not just rational actors, but are influenced by norms of international law).

[FN176]. See, e.g., Padideh Ala'i, [The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption](#), 33 *Vand. J. Transnat'l L.* 877, 904-05 (2000).

[FN177]. See supra text accompanying notes 24-26.

[FN178]. See supra Part I.

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