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KATHERINE R. KRUSE

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I wish to thank Professor La Torre and the University Magna Graecia for inviting me to speak to you today about a subject of increasing interest and importance in theoretical legal ethics: the role that jurisprudential theory plays in shaping our understanding of the professional duties that lawyers owe to their clients and to the legal system. Today, I will talk about two jurisprudential questions and explain how the jurisprudential debates about those question implicate questions about lawyers' professional ethics:

- One is a definitional question: What is law?
- The other is a question about why we should respect the rule of law: What makes law legitimate?
- For reasons I will explain later, I think the second question — about what makes law legitimate — is the more fundamental question for legal ethics.

But for the moment, I want to focus on the importance for legal ethics of the question of "what is law?" I will address the question of "what is law?" from three different jurisprudential perspectives: Legal Realism; Natural Law theory; and Legal

* Professor of Law at the William S. Boyd School of Law, University of Nevada Las Vegas.

Positivism. I will address them in that order because that is the order in which they have unfolded in the field of legal ethics. Then I will turn to what I will argue is the more important question that underlies the jurisprudential debate: what makes law legitimate?

Finally, I will lay out a model for how I think this question shapes and should shape the field of theoretical legal ethics, in which lawyers play an intermediate role between the law and those whom law seeks to govern. I argue that lawyers play an important role, not simply in enforcing legitimate law, but in creating law's legitimacy.

The Bounds of the Law

The question of "what is law?" is important in legal ethics because law creates a boundary that lawyers may not cross in representing their clients. Imagine a client who comes to a lawyer because the client wants to accomplish something. Suppose the client owns some property along a river and wants to start a new business renting canoes to tourists. This project might be shaped and limited in several ways by the law.

- The law will shape her options in the legal formation of her business.
- There will be environmental regulations limiting how close she can build a boathouse to the river, or how large of a structure she can build.
- There will be tax and employment laws that affect the way she structures her relationship with any workers she decides to hire.

We can assume that these laws are complex, and that she lacks the expertise to navigate the complexity of this legal landscape on her own. So she comes to a lawyer for advice and assistance.

Under the traditional model of legal ethics, lawyers have an ethical duty to pursue the interests of their clients "zealously within the bounds of the law." This means that when a client comes to a lawyer, the law sets boundaries on what the lawyer is permitted to do for the client. The lawyer may not counsel or assist the client in disobeying the law. But the law also opens up possibilities. Ethically, the lawyer must inform the client about all of the options that are legally available to the client, even if the lawyer finds some of those options morally distasteful.

In advising clients, lawyers thus become instruments in upholding the rule of law. As David Wilkins explained, the directive to "represent a client zealously within the bounds of the law" strikes a balance between private and public interests. It promises clients that the pursuit of their ends will be limited only by objective external constraints rather than by their lawyers' personal moral or political views. At the same time, it promises the public that the lawyer's pursuit of the client's private ends will not unduly frustrate the public purposes represented in the law[1].

But, this formulation begs an important question: "what is law"? If law sets an important boundary, we need to understand how to more fully define that boundary. That is why the first jurisprudential question — "what is law?"— is important to legal ethics. It is important because "law" defines the ethical boundaries around lawyers' pursuit of their clients' interests and strikes an important balance between private and public interests.

[1] D. B. WILKINS, *Legal Realism for Lawyers,* in *Harvard Law Review*, 104/1990, 468-524, 471.

Legal Realism

The balance between private and public ends is disrupted by a Legal Realist definition of law. Legal Realists are famous for describing law in terms of "the law in action." Karl Llewellyn explained, for example, that the "real rules" that govern society must include the study of the way that "paper rules" are interpreted and applied in practice[2].

In Llewellyn's words, the business of law is carried out by a variety of legal officials, and "What these officials do about disputes is [...] the law itself"[3]. Or, as Oliver Wendell Holmes said, "a legal duty is nothing more than a prediction" of how legal officials will act[4].

This Legal Realist conception of law as the prediction of what lower-level legal officials are likely to do is an important part of the operating jurisprudence of lawyers in practice. When advising clients, lawyers look not only to what the law on the books says, but to how the law is likely to be enforced in action. There is a good reason for this. Most clients will be affected directly by the actions of the lower-level officials who will enforce the law. A lawyer who did not predict for her client of how those lower-level officials were likely to behave would not provide sound counsel and advice to his or her client.

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[2] K. N. LLEWELLYN, *A Realistic Jurisprudence - The Next Steps*, in *Columbia Law Review*, 30/1930, 447-457.

[3] K. N. LLEWELLYN, *The Bramble Bush: The Classic Lectures on the Law and Law School*, New York, Oxford University Press, 1930, 5.

[4] O. W. HOLMES, *The Path of the Law*, in *Harvard Law Review*, 10/1897, 457-478, spec. 458.

However, if the Legal Realist conception of law comes to define the "bounds of the law" that limit a lawyer's pursuit of his client's interests, the limitation loses its capacity to strike a balance between public and private interests. Lawyers are no longer advising clients about what the law says or what the law is intended to mean; they are advising clients about what the clients can get away with. Lawyers come to look at the law only, as Holmes would put it, from the perspective of a "bad man, who cares only for the material consequences which such knowledge entails him to predict"[5].

The Legal Realist conception of law opens the door, for example, to manipulative interpretations of the law, as long as the interpretations are not likely to be challenged in a legal tribunal. This was the criticism in the United States of the memo that the Office of Legal Counsel's prepared for the George W. Bush administration. That memo used twisted legal logic to interpret the laws against torture to conclude that waterboarding and other extreme interrogation techniques did not amount to torture because they did not cause severe bodily harm or organ failure. Going even further, the "bounds of the law" would permit a lawyer to advise a client to bribe a corrupt local official, as long as the bribery was unlikely to be detected.

The Moral Correction

When legal ethics first emerged as a field of academic study in the United States, scholars simply accepted that the Legal Realist conception of law as the operating jurisprudence of practicing

5 *Ivi,* 459.

lawyers. Legal ethics scholars simply assumed that lawyers had an "amoral professional role morality" that obligated them to pursue a client's objectives up to the limits of the law, and a bit past the limits of the law, if they could get away with it. As a result, the important questions for legal ethics were defined in terms of what lawyers should do about the conflicts between this professional role morality and ordinary morality. The important question for legal ethics was whether one could be both a "good lawyer" and also be a "good person"[6].

For nearly three decades, the theoretical debates in legal ethics stayed within these terms. In a famous exchange between David Luban and Stephen Pepper, Luban argued that lawyers did not have a duty to provide clients with legal assistance to do anything that the law allowed. Rather, they should "break professional role" to prevent their clients from committing moral harm[7].

In response, Pepper argued that clients have a right to the assistance of lawyers in gaining "access to the law" even if that meant that they could use the law to pursue immoral ends. For a lawyer to deny or limit that access to the law based on the lawyer's moral judgments would replace the rule of law with the rule of an "oligarchy of lawyers"[8].

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[6] C. FRIED, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, in *Yale Law Journal*, 85/1975, 1060-1089, spec. 1960; M. H. FREEDMAN, *Personal Responsibility in a Professional System*, in *Cath. U. L. Rev*, 27/1978, 191-205, spec. 192.

[7] D. LUBAN, *Lawyers and Justice: An Ethical Study*, Princeton, Princeton University Press, 1988, 127.

[8] S. L. PEPPER, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, in *American Bar Foundation Research Journal*, 1986, 613-635, spec. 617-618.

This debate saw only two alternatives, neither of which was entirely satisfactory. Merely accepting the Legal Realist conception of law undermines respect for law and increases its cost as a mechanism to coordinate and structure the common life of society. It also raises the troubling prospect that in advising clients, lawyers might encourage otherwise law-respecting citizens to view the law instrumentally. As Stephen Pepper has put it, the lawyer can avoid moral responsibility for the client's decisions by perceiving those decisions to be outside the realm of legal advice. The client can avoid moral responsibility by perceiving the lawyer's advice as authority or permission to do whatever they can get away with under the law[9].

As a result, most legal ethicists came to agree that lawyers have a professional duty to give moral advice to their clients. In other words, the lawyer should say to a client: "The law permits you to do this bad thing (or, you could get away with doing this and not be detected), but this bad thing is something you should not do because it would be morally wrong."

This idea of robust moral counseling into legal representation has its own problems, however. It creates what I call a client counseling paradox: a lawyer's moral advice is least likely to be effective in shaping moral outcomes in the situations in which it is the most necessary. A lawyer's moral management of legal representation is least appropriate for vulnerable clients who are relatively powerless, lack sophistication, or lack the capacity to seek a second opinion from another lawyer. In such cases, lawyers run the risk of imposing their personal moral views on their clients' life choices. Yet legal ethicists acknowledge that more sophisticated and powerful clients are less likely to accept moral advice from a lawyer,

[9] S. L. PEPPER, *Lawyers' Ethics in the Gap Between Law and Justice*, *in S. Tex. L. Rev.*, 40/ 1999, 181-205, spec. 190.

either by brushing off moral advice as irrelevant or by seeking legal representation from a lawyer who will provide representation free of moral challenge[10].

So to summarize, by mid-1990s, the academic field of theoretical legal ethics had settled into a sort of deadlock. The professional role of lawyers was assumed to permit — if not require — lawyers to take an amoral, instrumentalist view of the law. The Legal Realist jurisprudence, that law was nothing more than predictions about its likely enforcement, defined the "bounds of the law" that defined how far lawyers could go in pursuing their clients' interests. Because this jurisprudence brought no normative content to the law, it was not effective in balancing private and public interests. Therefore, legal ethicists searched for a way for lawyers to reign in the rampant self-interest of clients. They settled in one way or another on a moral role for lawyers—that lawyers should incorporate ordinary morality considerations as a constraint on their professional role.

The Jurisprudential Turn

Beginning in the 1990s, legal ethics scholars began to turn from moral theory to jurisprudential theory, challenging the idea that the "bounds of the law" were necessarily defined by Legal Realist jurisprudence. Instead, legal ethicists began to argue that law has a moral content. In some cases, the moral content is built right into the definition of law. The ethical duty of lawyers is not to incorporate

[10] K. R. KRUSE, *The Jurisprudential Turn in Legal Ethics*, in Ariz. L. Rev, 53/2011, 493-531, 505.

their personal morality into their advice to clients, but to properly interpret the law. Rather, proper interpretation of the law will include public values.

This "jurisprudential turn in legal ethics" presents an attractive alternative to the moral values approach to legal ethics because it provides limits that spring directly from lawyers' professional duties rather than from appeals to personal morality. The interpretation of law is a matter of professional expertise task; it falls squarely within the scope of lawyers' decision-making authority in the lawyer-client relationship. By appealing the public norms within the law, the lawyer can both avoid the dangers of moral overreaching with vulnerable clients and also gain traction with more powerful clients.

Natural Law Theory

William Simon was the first theorist to articulate a jurisprudential argument that lawyers' pursuit of their clients' interests were limited, not by their personal moral beliefs, but by the public morality inherent in the law. Simon argued that the basic guiding principle of legal ethics was that "lawyers should take those actions that, considering the relevant circumstances of the particular case, are most likely to promote justice." Justice, in Simon's theory, is not a moral judgment of the lawyer about what was fair or right. Rather, it is an interpretation of what the law requires, drawing on traditional legal sources and methods. For that reason, he says that "justice" is synonymous with "legal merit"[11].

[11] W. H. SIMON, *The Practice of Justice: A Theory of Lawyers' Ethics*, Cambridge, Harvard University Press, 1998, 138.

The idea that law is synonymous with justice suggests a natural law jurisprudence. Simon's theory of legal ethics leans heavily on the jurisprudential theory of Ronald Dworkin, who argues that the law consists not only of rules, but includes the underlying principles that weave the rules together. Dworkin argues that the rules of positive law are held together by a coherent set of underlying principles of justice and fairness is immanent in the law. Dworkin sees the interpretation of law as the writing of an unfolding narrative account of underlying principles that provide the most coherent explanation for the rules of law and the best justification for those rules[12].

According to Dworkin, even if the law is silent on its face about how it should apply in a particular case, it is possible for jurists to discover a "right answer" about what the law says by reference to the underlying principles that form the substructure on which the system of laws is built. When judges decide cases, they participate in "constructive interpretation" of the principles that explain and justify the law. They "assume that the law is structured by a coherent set of principles of justice, fairness, and procedural due process," and they choose interpretations that both fit past decisions and "form part of a coherent theory justifying the network as a whole"[13].

Dworkin distinguishes this type of legal interpretation — which he calls "law as integrity"— from both positivism and from a more pragmatic style of reasoning that looks only to what decision would make good public policy.

William Simon's reliance on Dworkin's jurisprudence fulfills the promises that legal ethics makes to both the public and to clients: that the "bounds of the law" will protect the public interest by

[12] R. DWORKIN, *Law's Empire*, Cambridge, Harvard University Press, 1986.

[13] *Ivi*, 243-245

limiting over-zealous partisanship; and that the limits on partisanship will reflect objective criteria rather than the personal or political views of lawyers. Under Simon's view, lawyers who refuse to advance unjust claims or refrain from over-zealous tactics do not impose their personal moral views on their clients; they simply judge such claims and tactics to be legally invalid. Because clients are not entitled to pursue legally invalid claims, lawyers remain consistent with rule-of-law values. Lawyers do not risk moral overreaching with vulnerable clients. And, lawyers can gain traction with more powerful clients by advising their clients that the law – interpreted according to its background values and underlying principles – simply does not permit the lawyers to pursue morally questionable claims.

However, the capacity to deliver on these promises rides on the ability of the Dworkian conception of law to determine true or correct answers. Without the premise that Dworkian interpretation yields a "right answer" or "best interpretation" of law most of the time, the implications are troubling. If there really is a right or best interpretation of the "bounds of the law," lawyers' judgments should roughly converge, and clients should get the same answer no matter which lawyer they hire. However, if law does not form a coherent system of justice capable of delivering "right" or "best" answers, there remains substantial leeway for lawyers to exercise personal judgment as they contemplate the question of what justice requires of them in each case.

The competing jurisprudential camp that has emerged within legal ethics — which relies on legal positivism — rejects the premise that the law is woven together in a coherent system of underlying principles of justice and fairness. Rather, it views society as being characterized by deep and irreconcilable moral pluralism.

Legal Positivism

Legal scholar Brad Wendel and philosopher Tim Dare have each advanced a positivist jurisprudence of lawyering. They rely on a professional duty to respect the authority of positive law because law provides a framework for coordinated social activity in the face of deep and persistent normative disagreement in society[14]. They argue that positive law deserves respect — even from those who disagree with its substance — because neutral lawmaking procedures transform the competing demands of underlying moral controversy into agreed-upon criteria of legality. Under the interpretive criteria of legal positivism, the important feature of law is not that it is necessarily fair or just. Members of a morally pluralistic society will remain in hopeless disagreement about questions of justice and fairness. What matters is that law can be identified as authoritative by features that are independent of its moral content — what H.L.A. Hart would call "rules of recognition."

The "rules of recognition" for lawyers include the shared interpretive practices of the legal community, which preclude gamesmanship and sharp practices that toy with the ordinary meaning of law. They reject the Legal Realist idea that law is whatever you can get away with, or whatever a corrupt local official is likely to do. Lawyers, in their view, are enforcers of the plain and intended meaning of the law. Wendel, for example, would reshape lawyers' duties to their clients around clients' *legal entitlements* —

[14] W, B. WENDEL, *Lawyers and Fidelity to Law*, Princeton, Princeton University Press, 2010; T. DARE, *The Counsel of Rogues?: A Defence of the Standard Conception of the Lawyer's Role*, Burlington, Ashgate Publishing Company, 2009.

defined as "what the law, properly interpreted, actually provides" for a client, rather than pursuit of client interests[15]. Dare rejects the idea that lawyers have a professional duty to "hyper-zealously" pursue every advantage for a client, including looking for ways to get around the law. Instead, he focuses professional duty on the "mere-zealous" pursuit of legal interests[16].

The positivists would also preclude lawyers from inserting their moral judgments into legal representation by "dress[ing] up moral advice as a judgment about what the law permits"[17].

The legal positivists criticize the Dworkian style of interpretation as providing lawyers with too much license to interpret the underlying principles of justice and fairness and to substitute their personal morality for what law actually says.

The two most prominent legal ethicists in the legal positivist camp provide slightly different takes on the authority of positive law. Philosopher Tim Dare relies on a purely functionalist argument for the authority of law. For Dare, the authority of law is analogous to the authority of a coin toss in settling a dispute. After the coin toss, the loser has an authoritative reason accept the outcome of an agreed-upon process for making a decision. Analogously, the fact that something has been enacted as law is said to provide a sufficient and exclusionary reason for citizens to obey the authority of law[18].

Because law does something that a morally pluralistic society cannot do for itself — which is settle intractable moral controversy — law has practical authority. Law's settlement of normative controversy provides us with a reason to comply with law that is

[15] W. B. WENDEL, *op.cit.,* 59.

[16] T. DARE, *op.cit.,*76.

[17] W. B. WENDEL, *op.cit.,* 159.

[18] T. DARE, *op.cit.,* 62-63.

independent of whether the law got the resolution of the controversy right.

For legal ethicist Brad Wendel, law's authority is more complicated. In Wendel's view, the functional argument is underwritten by a normative argument that law's authority is entitled to respect because the democratic law-making process through which law is enacted respects the equality and dignity of citizens. The mere settlement of normative controversy can't be the only answer, Wendel argues, because there are ways to settle controversy that are not normatively attractive. For example, you can settle controversy by installing a dictator, but it would not provide citizens with a firm enough basis for citizens to respect the outcome of lawmaking processes with which they morally disagreed. Citizens must have a level of respect for the fairness of the lawmaking process, and the authority of positive law to settle deep and persistent normative controversy is derivative of that respect for the lawmaking process.

So, here is where the debate in theoretical legal ethics in the United States stands today. We have moved past the moral question of how lawyers can balance their professional role with their personal morality. And we have moved into a jurisprudential question of how to define "the bounds of the law" that limit lawyers' pursuit of their clients' interests. Simon argues for a Dworkian style of natural law interpretation, which would define law as co-extensive with the underlying principles of justice and fairness that justify and explain law as a coherent system. Wendel and Dare argue for a positivist definition of law, which separates legality from morality and identifies law through rules of recognition that accord to law its ordinary meaning as understood within the interpretive community of legal professionals.

Legitimacy not Legality

I would argue that what divides the positions in this debate are not really arguments about how to define law. They are arguments over the second question I mentioned at the outset of this talk: what makes law legitimate? The question of legitimacy is not a question about the concept of law. It is a question of why we should respect the rule of law.

The reasons we give for respecting the rule of law affect the role that we believe lawyers should properly play when they stand — as they do — between citizens and the law. Remember, from the beginning of the talk, the client who wants to start a business renting canoes on a river and needs to know what the law says about what she can and cannot do. When lawyers interpret the law to their clients, they are fine-tuning and shaping the law as it applies in the lives of citizens. When lawyers advise clients about what the law does and does not allow, they play an important political role as intermediaries between the legal system and the citizens who are governed by that system. So, let's look back again at these three jurisprudential theories: Legal Realism, Natural Law, and Legal Positivism, and see what they say about the legitimacy of law — the reasons we should respect the rule of law and think how those accounts of law's legitimacy might shape the way a lawyer provides legal advice that shapes the law for his client.

First, with respect the Legal Realism, we can picture again the Holmesian "bad man" who cares only to know how law will impede his progress toward his goals. He respects only to the force of law. That is why he wants only a prediction about the probability that this force will be used against him. A lawyer who approaches her role as a

legal advisor with this attitude toward law does not demonstrate respect for the rule of law. She treats the law as simply an obstacle to be overcome for her client. And she will tend to use what Tim Dare calls "hyper-zealous" tactics of legal representation.

The Dworkian style of interpretation respects law because law establishes a coherent system of justice and fairness. For Dworkin, law is legitimate because it is just, and law becomes more just as jurists shape and improve the law. Dworkin was thinking primarily about the role that judges play in deciding hard cases. But Simon extends Dworkin's theory to the role of lawyers advising clients. In Simon's view, lawyers participate in the larger project of legitimizing law by applying their legal knowledge, training, and expertise to discern what the underlying principles justice require in the circumstances at hand. Sometimes this will require advising clients to adhere to formal law and sometimes it will justify advising them to deviate from formal law. That will depend on the lawyer's assessment of where a particular legal regulation stands in relation to the larger principles of justice that explain and justify the system of laws.

The positivists in legal ethics view law as legitimate primarily because law provides an authoritative settlement of normative controversy in society. The positivists view the settlement of normative controversy as a significant achievement in a morally pluralistic society that is deserving of respect because it helps people in society get along despite intractable moral disagreement. The legal positivists are primarily concerned with maintaining the stability of law's settlement of normative controversy. They care less whether society has reached a just or fair result, and see significant danger in lawyers and clients second-guessing the results on substantive grounds. Instead, lawyers uphold the legitimacy of law by ensuring that their clients stay within the boundaries of the settled law and do

not attempt to undermine law's settlement through distorted interpretation or covert nullification of the law.

When we re-frame the jurisprudential question "what is law?" into a question of "what makes law legitimate?" we open up a broader field of inquiry about the role that lawyers play in the relationship between citizens and the state. My own view is that the legitimacy of law is deeply connected to the process through with law is developed and created. I follow Wendel's instinct that law gains authority not just because it settles controversy in society, but because it settles controversy through processes that are fair. However, I depart from Wendel's view that legitimacy is a static characteristic that is inherent in law once it is enacted. Rather, legitimacy is a fluid and dependent characteristic that is earned by law as citizens understand and gain respect for the law.

As a result, I see a large role for lawyers in actually creating the legitimacy of law. Because lawyers explain the law to their clients, they can be ambassadors for the law, communicating not only what the law says, but articulating why the law is worthy of respect. And, because lawyers see how the law interacts with and affects the lives of ordinary citizens, they are in a position to assess whether the law is meeting its intended purposes and whether it is, in fact, worthy of respect in the circumstances at hand. This role is more political than it is jurisprudential. So I am looking forward to the next turn in legal ethics, which I anticipate will be a more conscious and studied application of political theory to legal ethics.