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Recommended Citation

Susan P. Koniak, *Law and Ethics in a World of Rights and Unsuitable Wrongs*, in 9 Canadian Journal of Law and Jurisprudence 11 (1996).

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Citations:

Bluebook 21st ed.

Susan P. Koniak, Law and Ethics in a World of Rights and Unsuitable Wrongs, 9 CAN. J. L. & Jurisprudence 11 (1996).

ALWD 7th ed.

Susan P. Koniak, Law and Ethics in a World of Rights and Unsuitable Wrongs, 9 Can. J. L. & Jurisprudence 11 (1996).

APA 7th ed.

Koniak, S. P. (1996). Law and ethics in world of rights and unsuitable wrongs. Canadian Journal of Law and Jurisprudence, 9(1), 11-32.

Chicago 17th ed.

Susan P. Koniak, "Law and Ethics in a World of Rights and Unsuitable Wrongs," Canadian Journal of Law and Jurisprudence 9, no. 1 (January 1996): 11-32

McGill Guide 9th ed.

Susan P. Koniak, "Law and Ethics in a World of Rights and Unsuitable Wrongs" (1996) 9:1 Can J L & Jurisprudence 11.

AGLC 4th ed.

Susan P. Koniak, 'Law and Ethics in a World of Rights and Unsuitable Wrongs' (1996) 9(1) Canadian Journal of Law and Jurisprudence 11

MLA 9th ed.

Koniak, Susan P. "Law and Ethics in a World of Rights and Unsuitable Wrongs." Canadian Journal of Law and Jurisprudence, vol. 9, no. 1, January 1996, pp. 11-32. HeinOnline.

OSCOLA 4th ed.

Susan P. Koniak, 'Law and Ethics in a World of Rights and Unsuitable Wrongs' (1996) 9 Can J L & Jurisprudence 11

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Law and Ethics in a World of Rights and Unsuitable Wrongs

Susan P. Koniak

I. Introduction

Law, ethics and morality. What distinguishes these concepts? What connects them? Those are my questions. My argument is this. There is a traditional understanding of the relationship between law and ethics, and that understanding is inadequate as description.¹ While passing as description, the traditional understanding of the relationship between law and ethics is instead normative. The normative message in the traditional understanding is worthy of examination and ripe for critique.² This Article offers an alternative method of understanding the relationship between law and ethics and a normative examination of the old and the new.

II. The Relationship between Law and Ethics as Traditionally Conceived and its Descriptive Failings

The traditional understanding of the relationship between law and ethics, at least professional ethics, can be simply stated. It is that ethics begins where law leaves off, that ethics is about obligations above and beyond the requirements of law.³ The traditional understanding teaches that professional ethics supplements law, supplying norms to govern conduct that the society at large lacks the necessary

This article along with the other work I have published during my career is inspired and informed by the work of two men, my teachers and my friends: Robert M. Cover and Geoffrey C. Hazard, Jr. I thank them for their wisdom, their love and the enrichment that their lives and their work have brought to my own. I also want to thank Mark Berube, Boston University Law School '97 for his research assistance.

1. This part of my argument draws heavily on ideas I developed in the following earlier work: Susan P. Koniak, "The Law Between the Bar and the State" (1992) 70 N. Car. L. Rev. 1389 and Susan P. Koniak, "Whose Law is it Anyway?" (1992) 9 Yale J. on Reg. 575.
2. This part of my argument expands on ideas I recently put forth. Susan P. Koniak, "Through the Looking Glass of Ethics and the Wrong with Rights We Find There" (1995) 9 Geo. J. Leg. Ethics (forthcoming issue).
3. This view pervades the literature on professional ethics. For examples from the literature on medical and accounting ethics see: Council on Ethical and Judicial Affairs, *American Medical Association: Current Opinions* (1986) 1.02 at 1-2; Special Committee on Biomedical Ethics, *Values in Conflict: Resolving Ethical Issues in Hospital Care* (Chicago: American Hospital Assoc., 1985) at 2-3; Marc D. Hiller, "Medical Ethics and Public Policy" in M.D. Hiller, ed., *Medical Ethics and The Law* (Cambridge, MA: Ballinger Publishing Co., 1981) at 3, 10, 12, 22; American Institute of Certified Public Accountants (AICPA), *Concepts of Professional Ethics* 3 (1985); Walter G. Kell et al., *Modern Auditing*, 4th ed., (New York: Wiley, 1989); Stephen E. Loeb, "Introduction" in S.E. Loeb, ed., *Ethics in the Accounting Profession* (Santa Barbara, CA: Wiley, 1978); Michael K. Schaub, "Restructuring the Code of Professional Ethics: A Review of the Anderson Committee Report and Its Implications" (1988) 2 Acct. Horizons 89.

expertise to regulate⁴ or for which the law's norms are too inexacting.⁵ Thus understood, professional ethics does not compete with law and cannot conflict with it. The two categories cover separate domains.

As description, the traditional understanding cannot withstand even cursory inspection. Much of the conduct that is the subject of ethical codes in law, medicine and business is conduct that is also regulated by law.⁶ Instead of separate domains, we find substantial and in some cases total or near-total overlap.⁷ The traditional

4. This understanding runs throughout the sociological literature on the professions. See for example, A.M. Carr-Saunders & P.A. Wilson, *The Professions* (London: Frank Cass, 1933) at 301-03; Talcott Parsons, "The Professions and Social Structure" in Talcott Parsons, *Essays in Sociological Theory* (Glencoe, IL: Free Press, 1958 (rev'd ed.)) at 33-37; Talcott Parsons, *The Social System* (Glencoe, IL: Free Press, 1951) at 463-64; Dietrich Rueschemeyer, *Lawyers and Their Society: A Comparative Study of the Legal Professions in Germany and the United States* (Cambridge: Harvard University Press, 1973) at 13-14; Dietrich Rueschemeyer, "Professional Autonomy and the Social Control of Expertise" in Robert Dingwald & Philip Lewis, eds, *The Sociology of The Professions: Lawyers, Doctors and Others* (London: Macmillan, 1983) at 38-41. In general, the sociological literature explains that society at large and consumers of professional services lack the expertise to control or monitor adequately the performance of professionals but have a strong interest in the existence of controls because the work entrusted to professionals involves core social values like justice and the health of society's members. Society and the professions thus strike a bargain: in exchange for high status, financial rewards, some form of monopoly and a significant degree of autonomy from state control, the professions regulate themselves, adopting norms, monitoring compliance with the norms and educating professionals to internalize the norms as a means of assuring that society and consumers will be protected from professional abuse. Economists offer a similar explanation of professional ethics. See, e.g., Kenneth J. Arrow, *The Limits of Organization* (New York: Norton, 1974) at 36-37.

5. See, e.g., Stephen Gillers, "What We Talked About When We Talked About Ethics: A Critical View of the Model Rules" (1985) 46 Ohio St. L. J. 243.

6. For example, in law the American Bar Association's *Model Rules of Professional Conduct* deals with such topics as the lawyer's obligation not to assist knowingly a client in criminal or fraudulent conduct: Model Rule 1.2(d). Of course, to assist knowingly another in such conduct subjects the assistor to civil and possibly criminal penalties. See, e.g., *United States v. Benjamin*, 328 F.2d 854 (2d Cir. 1964). Legal and medical codes of ethics deal with the confidentiality between professional and client/patient. See, e.g., *Model Rules of Professional Conduct* Rule 1.6 (1991) (articulating lawyer's duty of confidentiality); and Amer. Med. Ass'n. *Code of Medical Ethics and Annotated Current Opinions*, 505 (articulating physician's duty of confidentiality). These topics are also covered by law. See, e.g., *Upjohn v. United States*, 449 U.S. 383 (1981) (concerning the scope of a corporation's attorney-client privilege in federal courts); *People v. Decian*, 2 N.Y. 2d 133 (1956) (holding that the presence of third parties does not destroy the doctor-patient privilege when under all the circumstances the disclosures were intended to be confidential). As for business codes of conduct, they typically cover such topics as bribing government officials, foreign and domestic; stealing from the company; and manufacturing unsafe products. All of which are matters of law. For example, Dow Corning Corporation's ethics code prohibits employees from authorizing or giving "payments or gifts to government employees...to obtain or retain business," and from engaging in "any practice which might give the appearance of being illegal or unethical." *Dow Corning Corporation Revised Code of Business Conduct* (1983), reprinted in "Dow Corning Corporation: Business Conduct and Global Values", *Harvard Bus. School Materials* (A) 9-385-018 (1984).

While most of my discussion in the text is limited to professional ethics, I believe that the same arguments apply to ethics more broadly defined, although I do not have the space or the energy to make out that broader claim in depth here. Consider, for example, the claim I have just made about ethical prescriptions overlapping with legal prescriptions. Many of the matters covered by the Ten Commandments are also covered by secular law: the prohibition on killing and bearing false witness are prime examples.

7. In the United States, once the court in a jurisdiction adopts a code of ethics for lawyers that code is a form of law thus making the overlap complete and the traditional understanding more or less incoherent. Nonetheless, the traditional understanding survives, which suggests it is serving some function other than accurate description.

understanding simply does not match the facts. On the other hand, the traditional understanding has been used to critique the overlap I have just described. Some commentators point to the repetition of legal prescriptions in ethical codes as if they had uncovered folly, a horrible mistake that signals the debasement of high-born ethics to the status of lowly law.⁸ The traditional understanding is doing normative work.

The normative message embedded in the traditional understanding of the relationship between law and ethics begins to come into focus when one notices that for professionals, the salient point is not that ethics begins where law ends but that law ends (or should end in any reasonable world) where ethics begins. In other words, central to the ideology of all professions is the idea that the state should leave the profession substantial space to regulate itself—the idea that state law should leave off sooner rather than later.⁹ The rhetoric of the professions is filled with talk of the “right” of self-regulation and of the “encroachments” by state law into areas of professional control,¹⁰ revealing a struggle over normative space between professionals and the government—a struggle over whose norms should reign. The normative message in the struggle? The less law (or government control), the better. The first part of the normative message is thus revealed. We will see later how this piece of the puzzle fits into the larger picture, but we have other work to complete first.

While on close inspection the traditional understanding of the relationship between law and ethics reveals a competition over normative space embedded in the rhetoric on self-regulation, the main thrust of the story is that the competition between profession and state is well bounded, restrained. However much room the traditional understanding suggests *should* be provided for ethics as opposed to law, it insists that what *is* the case is that the primacy of ethics begins only when state law leaves off—that professional ethics does not challenge law but only supplements it. This account presumes that there is some discernible point accepted by the state and the professions alike on when state law *does* leave off. The account thus includes a naive positivism about the nature of law, a positivism that suggests

8. See, e.g., *supra* note 5, at 246–48 (“The more [the legal ethics code traces the commands of civil or criminal law]..., the less it can be considered a code of ethics. ... It is [the] extralegal realm that defines ethics.”); Joel Kurtzman, “Shifting the Focus at B-Schools” *N.Y. Times (Business)*, Dec. 31, 1989 at 3–4 (“‘It is an irony that it was the scandals on Wall Street that caused us to be so concerned about the teaching [of] ethics on campus. But the scandals had nothing to do with ethics. They were simply against the law and that’s different.’” (quoting Donald P. Jacobs, Dean of J.L. Kellogg Graduate School of Management at Northwestern University)).

9. See, e.g., Rueschemeyer, *Lawyers and Their Society*, *supra* note 4 at 13 (discussing how the idea that the state should leave the professions substantial room for self-regulation is central to the ideology of professions).

10. See, e.g., Robert D. Raven, “Disciplinary Enforcement: Time for Re-examination” *A.B.A. J.*, May 1989 at 8. Raven, a former president of the ABA, discussed the connection between state law and the profession’s own rules as follows:

Certainly establishing and enforcing codes of conduct are two of the most important responsibilities of self-regulation. In fact, dissatisfaction with lawyer discipline is often at the root of attempts by legislative and executive branches of state and federal government to gain regulatory authority over the profession.

The ABA has steadfastly opposed such attempts, believing that lawyers, like judges, must be protected from the political process.

that the meaning and reach of law is clear enough to serve as a line above which ethics can be built without disputes about where the boundary in fact lies. This positivist (and I believe unsustainable) understanding of law) is not peripheral to the traditional understanding of the relationship between law and ethics; it is central. Without a strong positivist assumption about the discernibility of law's meaning and reach, the idea that ethics supplements law but does not challenge it, collapses. It collapses because once one concedes that the borders of law are uncertain, the possibility that ethics might speak to matters of law and speak with a different voice becomes real.

A defender of the traditional understanding of the relationship between law and professional ethics might protest at this point that challenge is not inevitable once the positivist understanding of law is abandoned. All that is inevitable, a defender might argue, is that some area of uncertainty will exist about whether law or ethics governs some matters and that any uncertainty can be cured, once discovered, by judicial or legislative pronouncements that clarify whether the law speaks to the matter and what it says. Once that is done, any ethical precepts suggesting a contrary course of conduct are in effect voided without any disruption to the order of the system.

This response will not do. First, it does not abandon positivism; it asserts that uncertainty in law is temporary and can be fixed. It fails, in other words, to address why the clarification should end dispute on the precise meaning and reach of law any more than the first pronouncement did. Second, while acknowledging some room for doubt on the meaning of law, it assumes that there is agreement between the professions and the state on the authoritative position of law over ethics. It must do this because agreement on the authoritative position of law is central to the traditional understanding. It cannot be abandoned without abandoning the understanding of ethics as merely supplemental to law. But the claim that the professions and the state agree that law is authoritative as a guide to conduct when ethics and law speak to the same conduct with differing norms is not sustainable. There is, I maintain, no such agreement between the professions and the state on the authoritative position of state law. Instead, the state is somewhat unsure¹¹ and the professions are ready to be defiant. The neat picture of ethics sitting passively atop accepted law does not match the world around us.

Here I beg the indulgence of my Canadian audience for I must resort to examples from my own country, being unfamiliar with the terrain in yours. Before doing so, however, I want to assure my colleagues from the north that while I am not equipped to prove by reference to the facts that a struggle between the professions and the state over whose norms will reign goes on in Canada, I can and will later offer a theoretical explanation of the relationship between law and ethics that suggests that such a struggle is inevitable, at least in modern Western nation states. Before I get to theory, though, I want to give you a taste of the struggle as it is played out in the United States, in the hope that doing so will provide you with some concrete signs for uncovering the struggle as it proceeds in your own country.

11. For a discussion of how the state tends to back off from confrontations with the legal profession over the meaning of the law that governs lawyers, see Koniak, "The Law Between the Bar and the State", *supra* note 1 at 1461-78.

Let me begin with two dramatic examples of the conflict between the bar and the state in my country. Congress passed a tax provision in 1984 that requires people to report cash payments of \$10,000 or more received in their trade or business.¹² Persons receiving this money must fill in IRS Form 8300, reporting the payor's name, address, social security number, occupation, and the name of the person for whom the transaction was conducted, if that applies.¹³ Many lawyers submitted incomplete forms, claiming much of the information could not be provided because it was protected by the attorney-client privilege and that to provide the information would violate their ethical obligation to keep client confidences.¹⁴ The IRS contacted 956 of these noncomplying lawyers, demanding that the lawyers fill in the forms completely.¹⁵ Ninety percent of those lawyers refused to comply.¹⁶ The IRS selected 90 of the defiant lawyers who had reported unusually high cash payments and issued summonses to them to produce the omitted information on the payments.¹⁷ Lawyers refused to comply with the summonses. The government then filed a test case against several of these lawyers to force compliance. The court ordered the lawyers to comply, holding that the general rule that client identity and fee information are *not* privileged applies in this context.¹⁸

Many of the 90 lawyers who had received summonses continued to refuse to comply, as did 771 lawyers who had received IRS letters,¹⁹ and they were backed by the organized bar.²⁰ These lawyers and bar groups claimed that their ethical

12. *Tax Reform Act of 1984*, Pub. L. No. 98-369, 98 Stat. 685 (1984) (codified as amended at 26 U.S.C. § 60601 (1988)).

13. 26 U.S.C. s. 60501(a), (b) (1988).

14. Alexander Stille, "On Disclosure of Attorney Fees: A Strategic Retreat for the IRS" *National L.J.* May 14, 1990 at 3. See also, Chicago Bar Ass'n, Op. 86-2 (1988); Ethics Advisory Comm., Nat'l Ass'n of Crim. Def. Lawyers, Formal Op. 89-1 (1989); Fla. Bar, Staff Op. TEO 88-203 (1988); State Bar of Ga., Advisory Op. 41 (1984); State Bar of N.M., Op. 1989-2 (1989) (ethics opinions issued by bar associations stating or strongly suggesting that filling in form 8300 is unethical).

As to the claim that compliance would violate the attorney-client privilege. On its face a legal claim not an ethical claim, it was asserted despite the fact that courts have unanimously held, in other contexts, that client identity and fee information are not generally protected by the privilege. See, e.g., *United States v. Hodge and Zweig*, 548 F.2d 1347 (9th Cir. 1977); *United States v. Haddad*, 527 F.2d 537 (6th Cir. 1975); *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962). See generally, Edward W. Cleary et al., *McCormick on Evidence*, 3d ed., (St. Paul, MN: West Publishing, 1984) at 90 (explaining general rule that fees and identity are not privileged information). The courts uniformly describe as rare the circumstances under which client identity and fee information might be privileged information. See, e.g., *In re Grand Jury Subpoenas (Hirsch)*, 803 F.2d 493 (9th Cir. 1986).

15. Stille, *ibid.* at 3.

16. *Ibid.* (quoting an IRS spokesperson to the effect that only 95 of the lawyers responded to the letters by providing the required information).

17. *Ibid.*

18. *United States v. Fischetti*, No. M-18-304, slip op. at 51-52 (S.D.N.Y. Mar. 13, 1990).

19. Steve Albert, "Courting a Showdown: More Lawyers Defy IRS Demands for Client Data" *Legal Times*, Apr. 30, 1990 at 2.

20. The organized bar demonstrated its support in a number of ways. The Association of the Bar of the City of New York, the National Association of Criminal Defense Lawyers and the New York Council of Defense Lawyers filed amicus briefs on behalf of the lawyers in *Fischetti*. The American Bar Association communicated to the Justice Department that wholesale enforcement of the federal law would have a devastating effect on the attorney-client relationship. See Respondents' and Intervenor's Joint Memorandum of Law at 5, *Fischetti* (No. M-18-304) (letter dated Nov. 9, 1989, from the ABA's Grand Jury Committee to James Bruton, Deputy Assistant Attorney General, Tax Division). Other bar groups issued ethics opinions supporting the defiant lawyers. See, opinions cited *supra* note 14.

responsibilities precluded them from complying with the federal statute, the IRS regulations, the IRS interpretation manifest in its letters and summonses that lawyers must comply, the long line of court precedents holding that the privilege generally does not protect the kind of information sought by the government,²¹ and the district court decision requiring the lawyers before the court to produce the information. Despite all these indicia of where the legal line was, the lawyers and the organized bar continued to maintain both that the law expressed by these sources was not the law and that it could not be the law because the ethical obligations of lawyers suggested that any such law would be wrong.²² The appeals court upheld the lower court's ruling that the lawyers were required by the tax law to turn over the information.²³ And a leader of the bar's resistance suggested that lawyers should still refuse to turn over the information until personally ordered—one by one—by a court to do so.²⁴

The next story involves the government's power under law to subpoena lawyers to appear before grand juries. By 1985 a substantial body of court decisions had proclaimed that the government had the power under law to call lawyers before grand juries without first seeking court approval and that the information most often sought by the government from lawyers, the client's name and details on the fee paid, was not protected by the attorney-client privilege.²⁵ The organized bar nonetheless continued to take the position that the government was required to make some form of preliminary showing before a lawyer could be subpoenaed.²⁶ Having little

21. See, e.g., the cases cited *infra* note 25.

22. For example, the president of the Criminal Trial Lawyers Association of Northern California urged other lawyers to resist: "There are ethical responsibilities we have as lawyers that foreclose giving information which may put our clients in jeopardy.": William Carlsen, "U.S. Demands Data on Clients: Drug War Tactic Hits Lawyers" S.F. Chron., Jan. 15, 1990, at A1.

23. *United States v. Goldberger and Dubin, P.C.*, 935 F.2d 501 at 504 (2d Cir. 1991). "The [privilege] protects only those disclosures that are necessary to obtain informed legal advice and that would not be made without the privilege.": *ibid.*

24. Gerald B. Lefcourt, head of the National Association of Criminal Defense Lawyers' "8300 Task Force", said: "I would say many people subscribe to the notion that you don't violate a confidence until you are ordered to do so by a court". Fred Strasser, "Lawyers Must Name Names" Nat'l. L.J., June 24, 1991 at 18. It is clear from the context that he meant personally ordered.

One lawyer who continued to fight after the 1991 decision of the Second Circuit finally agreed in 1995 to abide by a district court ruling that personally ordered him to turn over information on 15 cash paying clients. David Lyons, "Court: Report Fees" Nat'l. L.J., June 5, 1995 at 4. The lawyer, Joel Hirschorn of Florida, had been fighting with the IRS for 10 years over his refusal to reveal client information, which he believed he was ethically bound to protect. He was supported in his struggle by the Florida Bar, which took the position that lawyers should be exempt from the tax laws that require the reporting of information on clients who pay cash.

25. See, e.g., *In re Grand Jury Subpoena Served upon Doe*, 781 F.2d 238 (2d Cir.) (en banc), cert. denied, 475 U.S. 1108 (1986); *In re Klein*, 776 F.2d 628 (7th Cir. 1985); *In re Grand Jury Proceeding (Schofield)*, 721 F.2d 1221 (9th Cir. 1983); *In re Grand Jury Proceeding (Freeman)*, 708 F.2d 1571 (11th Cir. 1983). The only United States court of appeals case to have taken the position that the government was required to make a preliminary showing of need before summoning a lawyer before a grand jury, *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005 (4th Cir.), had been vacated and withdrawn on other grounds, 697 F.2d 112 (1982).

26. For example, in *In re Grand Jury Subpoena Served upon Doe*, *ibid.* at 241, amicus briefs opposing the government's use of such subpoenas and arguing for special procedures to limit the practice were filed by the Association of the Bar of the City of New York, the New York County Lawyers' Association, the New York Criminal Bar Association, the National Association of Criminal Defense Lawyers and the New Jersey Association of Criminal Defense Lawyers.

success getting the courts to accept the bar's reading of the law on this matter, the bar switched tactics. It adopted an ethics rule mandating the special procedures.²⁷

The Form 8300 story and the grand jury story both belie the peaceful picture drawn by the traditional understanding of the relationship between law and ethics. These stories demonstrate that there is not agreement between the bar and the state on either the content or the authoritative nature of state law. They suggest a far more active struggle between the profession and the state over whose norms should reign.

Moreover, these stories, while particularly dramatic examples, represent a pervasive phenomenon. The Form 8300 controversy yielded a number of ethics opinions written by bar associations that actively and openly encouraged disobedience of state law in the name of complying with the ethics rules.²⁸ While such openly defiant opinions are relatively rare, it is quite common for ethics opinions to state that the ethics rules permit, but do not require, compliance with law.²⁹ These more commonplace opinions provide strong, if less dramatic, evidence that the profession presumes that the ethics rules have the power to trump norms embodied in state law. That much is implicit in the question, do the ethics rules permit compliance, and in the answer, the ethics rules do so permit. The bar's understanding that ethics rules have the power to limit or nullify state law is also evident in the adoption by the bar of ethics rules to counter court interpretations of law. The ethics rule on grand jury subpoenas that I have described is one example. Other examples include: ethics rules and opinions designed to prohibit the disclosure of client fraud to the

27. The ethics rule was first suggested by the Massachusetts bar. Mass. Sup. Jud. Ct. R. 3-08 (PF 15) (proposed by the Massachusetts bar in 1985 and adopted by the state court as an ethics rule effective in 1986). The federal court of appeals with jurisdiction in Massachusetts split four-four on whether such a rule could supplant federal court decisions on the matter, leaving in place a lower court decision upholding the ethics rule as valid: *United States v. Klubock*, 832 F.2d 664 (1st Cir. 1987) (en banc). In 1990, the American Bar Association adopted a similar rule to that adopted earlier in *Massachusetts' Model Rules of Professional Conduct* Rule 3.8(f) (1991).

28. Chicago Bar Ass'n, Op. 86-24 (1988) (lawyer would not be condemned for filing a completed IRS form; "however, the better course...is to file an IRS form that asserts the attorney-client privilege and gives notice...that information has been withheld"); State Bar of N.M. Advisory Opinions Comm., Advisory Op. 1989-2 (1989) (identifying a conflict between the ethics rules and federal law and stating that "the highest ideals of the profession" approve challenging the law in the name of the ethics rules); Ethics Advisory Comm., Nat'l Ass'n of Crim. Def. Lawyers, Formal Op. 89-1 (1989) (stating that lawyer who receives an IRS summons should not disclose client confidences unless a court orders disclosure); State Bar of Ga., Advisory Op. No. 41 (1984) (lawyer should pursue all reasonable avenues of appeal before complying with requests from state agency); State Bar of Wis., Formal Op. E-90-3 (1990) (lawyer should not make disclosure when faced with an IRS summons "unless and until a court, preferably an appellate court, considers the validity of the summons and any judicial enforcement orders in this area and that court's ruling requires such disclosure").

29. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1349 (1975) ("[W]e do not decide whether local criminal law makes it unlawful for S to fail to reveal the information ... If disclosure is required by such law, S may, but is not required under DR 4-101(C)(2), to make disclosure."); Chicago Bar Ass'n, Op. 86-4 (undated) (lawyer is permitted but not required to disclose to IRS its overpayment to client if he is under a legal obligation pursuant to statute or regulation to disclose such information); Association of the Bar of the City of New York, Op. 1990-2 (1990) (under the ethics rules a lawyer may, but is not required, to disclose information pursuant to the *Federal Rules of Civil Procedure*).

Securities and Exchange Commission or to purchasers of the fraudulent securities;³⁰ and similar efforts to prohibit lawyers from negotiating for attorneys' fees in class action cases at the same time that they are negotiating a settlement of the underlying action.³¹

In short, in the United States there is a longstanding, continuing and active struggle over whose norms reign, the bar's or the state's, which is simply not captured by the traditional understanding of the relationship between professional ethics and law. As a descriptive matter, the traditional understanding fails. Yet it persists. We will come back to the normative function that the traditional understanding serves, despite its descriptive failure. First, however, I want to suggest an alternative explanation, which I claim has more descriptive power. My alternative also contains a different normative message, which I will later contrast with the normative message implicit in the traditional understanding.

30. In February 1974 the ABA adopted an amendment to Model Code DR 7-102(B)(1) that all but eliminated the lawyer's duty to reveal a client's fraud in which the lawyer's services had been used: *Model Code of Professional Responsibility* DR 7-102(B)(1) (1974). It is generally known that this amendment was a response to several court decisions that had alarmed the securities bar, particularly *SEC v. Spectrum, Ltd.*, 489 F.2d 535 (2d Cir. 1973) (holding that a lawyer who negligently prepared an erroneous opinion used to sell securities could be enjoined from future violations of the securities laws), and to the position being advanced by the SEC on securities lawyers' obligations to the SEC and to stockholders, particularly as evidenced by its complaint in *SEC v. National Student Marketing Corp.*, 457 F. Supp. 682 (D.D.C. 1978) (No. 225-72), reprinted in [1971-72 Transfer Binder] *Fed. Sec. L. Rep.* (Chicago: CCH, 1972) P93, 360, at 91, 913 (D.D.C. Feb. 3, 1972) [hereinafter "*National Student Marketing Complaint*"]; see also Junius Hoffman, "On Learning of a Corporate Client's Crime or Fraud" (1978) 33 *Bus. Law* 1389 (explaining that the amendment was one of a series of attempts by bar groups to resolve the "conflict" raised between the state's position and the securities lawyers' ethical obligations).

The article by Junius Hoffman describes other efforts by the ABA and state bars in the 1970's to restrict the obligations of securities lawyers under the securities laws by passing ethics rules and issuing interpretations of ethics rules: Hoffman, *ibid.* at 1406-08. One example notable for its breadth is the Association of the Bar of the City of New York, "Report by Special Committee on Lawyers' Role in Securities Transactions" (1977) 32 *Bus. Law* 1879 [hereinafter "ABCNY Report on Securities Transactions"].

In the 1980s this struggle over the law governing securities lawyers was played out in the ABA's adoption of rules 1.13 and 1.6: *Model Rules of Professional Conduct*, Rules 1.13, 1.6 (1983). Rule 1.13, as adopted, eliminated the lawyer's discretion to disclose criminal or fraudulent corporate activity to stockholders, government agencies, or those defrauded by the corporation's activities—discretion that had been included in the draft presented to the House of Delegates. See Geoffrey C. Hazard, Jr. & Susan P. Koniak, *The Law and Ethics of Lawyering* (Westbury, NY: Foundation Press, 1990) at 759 (explaining the difference between the adopted rule and the draft, and juxtaposing the text of the adopted rule and the draft proposal); see also Stephen Gillers, "Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure" (1987) 1 *Geo. J. Legal Ethics* 289 at 291-94 (discussing the evolution of rule 1.13, focusing on three drafts between 1980 and 1982); Harvey L. Pitt, "The Georgetown Proposals" 36 *Bus. Law* 1831 at 1834-35 (explaining the connection between the ABA's work on rule 1.13 and the SEC's position). Rule 1.6 eliminated the lawyer's discretion to reveal client fraud—discretion that had been included in the Kutak draft. See Geoffrey C. Hazard, Jr., "Rectification of Client Fraud: Death and Revival of a Professional Norm" (1984) 33 *Emory L.J.* 271 at 296-98.

31. Robert Hewitt Pate, III, "Comment, *Evans v. Jeff D.* and the Proper Scope of State Ethics Decisions" (1987) 73 *Va. L. Rev.* 783 at 794-95 (discussing the conflict between ethics opinions on this subject and court decisions).

III. The Relationship between Law and Ethics Reconceived

Law, ethics and morality all divide conduct into that which is acceptable and that which is not: the lawful and the unlawful; the ethical and the unethical; the moral and the immoral. They each serve as a means of validating and voiding actions, affirming and condemning behavior. Moreover, as the three terms are commonly used, the conduct they purport to judge overlaps in large part. Many things are condemned as at once unlawful, unethical and immoral. To give one example, in the United States and I suspect elsewhere in the Western world, lying to get another's property is condemned by the law as unlawful fraud and by most people as unethical and immoral as well. It has thus been my contention that to insist that these systems are distinguishable based on the categories of conduct monitored by each fails as description. The way in which we use the terms, law, ethics and morality, suggests instead that the systems are more accurately distinguished by the source of the norms that constitute each system and by the primary method by which each system enforces its norms.³²

The source of the normative judgments embodied in law, as we commonly use that term, is the state, which in democracies is equated with the larger body politic. The source of the normative judgments embodied in ethics is some subset of the larger body politic, which in the case the professional ethics is equated with the professional group. The source of the normative judgments embodied in morality, as that term is commonly used, seems to be much more personal, one's conscience or family or the religious institutions to which one adheres or for some, either blessed or damned, the voice of God directly.

The systems differ also in the primary method used by each to enforce the obligations embodied within the system. Law, at least in modern Western nation states,³³ uses force as the primary method of demonstrating commitment to the norms embodied in the system. Behind the state's laws, its civil laws as well as its criminal laws, lies the state's power to coerce obedience through force.³⁴ In the West, governments spend precious little time encouraging obligation to law through education of the populace or by attempting to shame people into obedience. There are important reasons that these alternative methods of enforcing norms are largely eschewed by modern states, reasons we will return to soon, but for now it is sufficient to notice that force is the state's primary method of demonstrating that it means its laws to be obeyed.

Instead of relying on force, ethical systems can be conceived as relying primarily on education and the privilege of belonging as the means of demonstrating

32. For another recent attempt to distinguish law, morals and ethics along lines similar to those used in this Article, see Geoffrey C. Hazard, Jr., "Law, Morals and Ethics" (1995) 19 So. Ill. U.L.J. 447. I am indebted to Professor Hazard for many rich conversations on these matters conducted over the years of our friendship.

33. Apparently Japanese culture relies more on shame in the enforcement of state laws (or did in the recent past) than Western nations. See R.F. Benedict, *The Chrysanthemum and the Sword: Patterns of Justice in Japanese Culture* (Boston: Houghton Mifflin Co., 1946).

34. See Robert M. Cover, "Violence and the Word" (1986) 95 Yale L.J. 1601 (describing the central role that force plays in all law).

commitment to the system's stated norms. Through control over the educational systems that hold the keys to group membership and through the threat of exiling those members who fail to internalize group norms, the professions demonstrate commitment to their ethical norms. Moral systems, like ethical systems, rely on education, the internalization of norms and the privilege of group membership, whether the group is defined as a religion which can excommunicate or shun a member, or God who can abandon one for not heeding his word; or whether the "group" is reflected solely by one's conscience. Consider the commonly heard refrain: "I could not live with myself, if I did that." It is a way of expressing how conscience can ostracize.

Notice that this second measure (how a system demonstrates commitment) imperfectly distinguishes moral systems from ethical systems. This is not, I submit, a flaw in the analysis I am proposing, but rather a reflection of how imperfectly those concepts are distinguished in modern discourse: the terms are sometimes used interchangeably. It is, however, my sense that when most people bother to choose one term over another, they do so to suggest some difference in both the source of the obligation invoked and the method of enforcing that obligation, with morality having as the source of its norms a more intimate group and relying more on shame than ethics. Not living with oneself, not sleeping at night, not being accepted by God or being shunned by one's religious brethren are measures that seem inextricably bound up with shaming one into obedience in a way that ethical judgments do not.

Having provided a descriptively plausible account of the differences in the three normative systems, which does not depend on the kind of conduct monitored by each system, we can reconceive the question of overlap. Rather than a category mistake, we can ask whether there are some functions that are served by more than one system speaking to the same conduct. What functional purposes might the widespread repetition of legal injunctions in ethics codes serve?

The simplest of answers has in a sense already been provided by the account I have given. Above I asserted that law in the modern nation state is enforced by the state through force, not through education, and that the state took very little responsibility for ensuring that the population internalized or even understood what the state's norms were. If that is true, how do most people know enough about the norms to be able to obey them? Enter ethics and morality. Why might a state leave non-state groups such a large role in education about norms? Doesn't this present a danger that non-official groups will subvert the norms of the state, will subvert state law? The short answers to these questions are: the modern nation state has no choice, particularly if it is dedicated to freedom; and yes, this division of responsibility presents a threat to the state and its professed norms (freedom always does), but it also provides a check on oppression and a promise that the path to a more just society remains open and traveled. Now for the longer answers.

To better understand the functions served by overlapping normative systems, we need to start with an understanding of the necessary components of a normative system, any system of norms that serves to direct behavior.³⁵ Let's take law.

35. Robert M. Cover, "The Supreme Court, 1982 Term—Foreword: Nomos and Narrative" (1983)

Laypeople and even those trained in law often speak as if law could be equated with a set of rules. But rules alone are not enough to constitute law that people might obey. Rules demand explanation, narratives that connect the rules to possible states of affairs in the world. Stories, explanations of the rules as they apply to the world, give law the meaning that it needs, if it is to affect the material world by guiding behavior. Try speaking a legal rule, almost any rule. The next thing out of your mouth, if you are seeking to be understood, is "for example," That "for example" is a story explaining how the rule is designed to operate in the world. Stories, on the other hand, need their prescriptive point, their rule, if the story is to be understood: explanatory narrative demands its moral, if you will. Stories and rules are the inseparable twins that make communication of normative messages possible. They are inextricably linked, and both are necessary to any workable normative system, including law.

But law is more than rules and stories; literature, history and philosophy can all be envisioned as being made up of rules and stories with some normative point. While each of those disciplines are important to normative discourse, none is law. Something other than rules and stories is necessary to constitute law, something not present in literature, history and philosophy.

The third component is commitment, action intended to convey that the normative point of the rules and stories is one that people will be held to, is one that people are meant to live by. Literature, history and philosophy are lacking this component. Their normative points are not insistent. They do not demand realization in the concrete world. Law does. By the way, so do ethics and morality, when those terms are used in contrast to philosophy. Thus, all normative systems can be said to be comprised of three components: rules, stories and commitment. At this point, we can reformulate the earlier discussion on the differences among law, ethics and morality. They differ in the perceived source of their normative messages, their rules and stories. And they differ in the primary method each system uses to express commitment: law depends most heavily on force; ethics on education, membership and ostracism; morality on education and shame.³⁶

97 Harv. L. Rev. 4. This discussion on the components of normative systems is based on the jurisprudence articulated by Professor Cover in his much-cited, but too little used, Foreword. The Foreword is not user-friendly. Professor Cover invented a variety of terms to set out his ideas, like "jurispathic", and used sources unfamiliar to many legal scholars, such as the Talmud. Unfortunately, his inaccessible style has restricted the impact of his ideas. Through my continuing efforts to translate and apply his ideas to more familiar legal questions, I hope to extend that impact.

36. In his work, Professor Hazard describes law and ethics along lines parallel to those drawn here. We differ most in our description of morality. Professor Hazard describes moral notions as "single-person" events, which cannot be fully communicated to others: Hazard, *supra* note 32 at 452. He sees morality as occupying the opposite end of the normative spectrum from law "in terms of form, mutual intelligibility and as mechanisms of personal and social action" with ethics somewhere in between the two: Hazard, *supra* note 32 at 453. According to the description I offer in the text, morals need not be single-person events. More important, I see more similarities in the "form" between law, ethics and morals than Professor Hazard, who seems to see rules as more or less foreign to morals, as he defines that term. In contrast, my analysis emphasizes that rules are important and necessary components of all three systems. I do, however, agree that the normative message of morality is more commonly communicated with the emphasis on story and correspondingly with the connected precept (or precepts) taking on secondary status or remaining implicit and unspoken, while with law, rule generally comes first and story second.

Force is a powerful method of demonstrating commitment.³⁷ When force is used or threatened as a means of backing up norms, there can be no doubt that the norms are meant to be obeyed. The state has an important, if imperfect, monopoly on force, which thus gives it (and its normative system, law) a powerful advantage in the normative arena. Modern nation states also have developed elaborate structures for articulating and ordering the rules that constitute law.³⁸ They thus seem well positioned to maintain effective normative systems without the aid of smaller groups, but that appearance is misleading. While the state plays a commanding role with respect to two of the components necessary to maintain law, rules and commitment,³⁹ it does not play a primary role as to the stories that give law the meaning it needs to guide conduct.

The narratives that give meaning to the state's law, by explaining what the norms mean for action to be taken in the material world, are uncontrolled by free states and all but uncontrollable by any state. "All Americans share a national text in the first or thirteenth or fourteenth amendments, but we do not share an authoritative narrative regarding its significance."⁴⁰ In every society that respects freedom of thought and speech, the same is true, not just for the laws that make up that nation's constitution, but for all its laws. The courts or legislature or executive of such a state may explain through narrative what a rule of state law means, what it is designed to do, what conduct it hopes to allow and to prohibit, but all are free to tell a different story, to see the meaning of law in a narrative not blessed by the state. For example, when the state passes an environmental law, environmental groups may share with one another one understanding of what that law means, cor-

Moreover, I do not think that the different ordering of chicken and egg by the two systems is fortuitous. Instead, I think the primacy of one component over another is a necessary result of the different ways in which the two systems demonstrate commitment to their norms. See discussion, *infra* text following note 60, on the importance of pedagogy for ethics and morality and the problems that "talk" (stories) generates for these systems. As to the primacy of rules for law, the fact that force is the primary method of demonstrating commitment in law explains the primacy of rules, at least in democracies. Rules convey an objectivity that helps assure the populace that the state is using the monopoly on force that it is granted by the people, not arbitrarily, but in accordance with identifiable principles.

37. As Professor Cover explained: "The state becomes central in the process [of law] not because it is well suited to jurisgenesis [the creation of legal meaning] nor because the cultural processes of giving meaning to normative activity cease in the presence of the state. The state becomes central only because...an act of commitment is a central aspect of legal meaning. And violence [as to which the state has an imperfect but important monopoly] is one extremely powerful measure and test of commitment.": Cover, *supra* note 35 at 11 n.30.
38. The state maintains a hierarchy that dictates where the authority to articulate the rules that make up state law lies and that controls which precepts trump which, when there is a perceived conflict between state rules. Cover, *supra* note 35 at 16-17. This hierarchy "conforms all precept articulation and enforcement to a pattern of nested consistency.": *ibid.*
39. It is my position that, while the state plays a commanding role as to rules and stories, it does not claim an exclusive role over either of these components of law. I discuss the role private groups and their ethics play in supplying norms to be incorporated in state law, *infra*. As to commitment, in the United States standard state doctrine provides that one may challenge a law by disobeying it. That demonstrates that the state does not claim an exclusive right to demonstrate commitment to norms, but instead allows private groups and individuals to demonstrate commitment to norms through action, even when those norms are contrary to accepted state doctrine on the requirements of law. For a discussion of this point, see Koniak, "Whose Law is it Anyway?", *supra* note 1 at 590.
40. *Ibid.* at 17.

porate groups may have another and the executive branch of the government, a third. The government may use its institutions to back its understanding with force, but the government is prohibited from attempting to force belief in the story it tells. The standard state story on the First Amendment to the United States Constitution makes this point: we are free to doubt, disbelieve or disparage the stories the state provides to explain its rules or to justify its use of force, including this story.⁴¹ Indeed, even if a state tried to insist that all its people accept the stories that it tells, it is doubtful how successful it would be in bringing about that result.⁴² How would a state eliminate unwanted interpretations of what it says or what it does? This is the problem facing all totalitarian societies.⁴³

In free societies, the state depends heavily on private groups to maintain and transmit some semblance of shared meaning of what the norms of the society are.⁴⁴ Put simply, people are expected to learn right from wrong largely from non-state sources: from family, church, community, fellow professionals. The tradition of an independent bar, which has long been quite strong in the common law countries, also reflects how the state depends on non-state institutions to transmit normative meaning about the state's law to ordinary citizens, meaning that is intended to guide

41. See, e.g., *Texas v. Johnson*, 491 U.S. 397 at 413-417 (1989). In that case, the Supreme Court stated:

[T]he state's claim is that it has an interest in preserving the flag as a symbol of nationhood and national unity, a symbol with a determinate range of meanings...

...According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the message conveyed thereby is a harmful one and therefore may be prohibited. If there is a bedrock principle underlying the First Amendment, it is that Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable...

...[N]othing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it...Texas' focus on the precise nature of Johnson's expression, moreover, misses the point of our prior decisions: their enduring lesson, that the Government may not prohibit expression simply because it disagrees with its message...[If we were to accept Texas' argument, we] would be permitting a State to prescribe what shall be orthodox"...

...We never before have held that the Government may ensure that a symbol [or anything else] be used to express only one view of that symbol or its referents...

...To conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernable or defensible boundaries.

42. See George Orwell, *Nineteen Eighty-Four* (New York: Harcourt, Brace & World, 1949) (portraying how difficult it would be for even the most oppressive of societies to control the beliefs of its members).

43. Torture is one potent method of destroying meaning. Cover, *supra* note 34 at 1602 (discussing Elaine Scarry, *The Body in Pain* (New York: Oxford University Press, 1985)). The connection between torture and meaning explains why torture is a familiar feature of totalitarian societies. Of course, even torture or the likelihood of torture is no guarantee that the state can destroy non-conforming meanings. There is always the possibility of martyrdom. "[The] triumph of the[ir] normative universe, [their meaning]...over the material world of death and pain": Cover, *supra* note 34 at 1604-05.

44. Secular states do some of this work through the public school systems they maintain, which goes far toward explaining why debates about the curriculum in public schools are often so contentious. Which normative stories the state should be telling is a question ripe for dispute in any free society. The tradition in the United States of vesting curricular control in local government authorities, small units of government closely aligned with the citizenry, is a rejection of centralized government selling one story in a pluralist society committed to freedom.

conduct. But the meaning of norms cannot be transmitted through a story without new meaning being created in the process. To explain a rule in a particular context is to create new meaning for the norm at issue. Because this process is entrusted to private groups and institutions, the meaning of law is radically uncontrolled in free societies. Meaning grows in the telling and as it multiplies, divergence appears. Competing interpretations are born and coexist.

Some disputes that arise over which interpretation should guide action in a particular situation are resolved by compromise; others are brought to court. When faced with competing narratives about what law means, a court chooses to back one with the state's force and not another, or it creates a third and backs that one. Once force is put behind a certain interpretation, the dissenter risks destruction, if he refuses to conform his conduct to the order of the state. But he need not accept that what the state has said is right. He can conform as a concession to the state's *force* without conceding that the state's *interpretation* is worthy of guiding future conduct. That move is exactly the move advocated by the bar leader quoted above on the Form 8300 dispute.⁴⁵ His position is: each lawyer ordered by a court may disclose the information; all others lawyers should continue to reject the interpretation backed by the courts, should keep the information confidential, until personally threatened with force, i.e., until under individual court order. This move is an attempt to separate the state's force from the meaning of law that the state is attempting to vindicate through its force.⁴⁶ People make such moves in the name of their ethic or their morals.⁴⁷ They make such moves to challenge what the state tries to sell as right.

If private groups play an essential role in maintaining the state's law by trans-

45. See *supra* note 24 and accompanying text.

46. Abraham Lincoln made a similar move when confronted with the Dred Scott decision. See *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857). Lincoln said: "I do not resist [*Dred Scott*]. If I wanted to take Dred Scott from his master, I would be interfering with property.... But I am doing no such thing as that, but all that I am doing is refusing to obey it as a political rule. If I were in Congress, and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of that Dred Scott decision, I would vote that it should." Cover, *supra* note 35 at 54 n.146 (quoting speech by Abraham Lincoln in Chicago, Illinois (July 10, 1858), reprinted in Roy P. Basler & Christian O. Basler, eds, *Abraham Lincoln, The Collected Works of Abraham Lincoln* (New Brunswick, NJ: Rutgers University Press, 1953) at 484-95. Professor Cover explained that what Lincoln was saying is that "[o]ur future actions are to be governed by our own understanding, not the Court's." *ibid.*

47. In the United States the bar makes ample use of this move. Consider the ABA's statement on a lawyer's obligations when faced with a court order to disclose what the bar considers to be confidential information:

If the motion to quash is denied, the lawyer must either testify or run the risk of being held in contempt.... The lawyer has an ethical duty to preserve client confidences and to test any interference with that duty in court. If a contempt citation is upheld on appeal, however, the lawyer has little choice but to testify or go to jail. Both the Model Rules and the Model Code recognize that a lawyer's ethical duty to preserve client confidences gives way to final court orders.

Disclosure: Lawyers Subpoenas, Laws. Man. on Prof. Conduct (ABA/BNA) No. 55, at 1301-07 (Oct. 25, 1989). The position here is that the bar's interpretation of law (its ethic) "gives way" not to lower court orders but only to appellate orders. Moreover, the group's ethic "gives way" to appellate orders because at that point the imposition of force becomes extremely likely: "the lawyer may have little choice but to testify or go to jail." The implication is that the concession is to the state's force, not to the rightness of its interpretation and not even to its right to authoritatively interpret what the law means.

mitting and creating normative meaning for the state's rules, it should be apparent why it is useful for ethics rules to repeat the injunctions found in state law. By claiming the norms as central to their own law, their ethic, private groups claim for themselves an important role as interpreter of these norms, at least for their members. At the same time, by repeating state norms the groups signal to the state that they share an allegiance to the state's precepts. A group thereby signals that it is worthy of the state's trust because it is committed to the same norms. Finally, an ethical code that repeats state injunctions gives the group an advantage in gaining support from other groups for the understanding of the law it seeks to vindicate in opposition to an understanding put forth by state institutions. A claim that one is acting in accordance with the "real" meaning of a state precept is a much more powerful claim in a democracy than that one is acting in the name of a precept that is not recognized as the official precept of the whole people.

Those who mock ethics codes that repeat state precepts on the ground that such codes add little to the normative discussion of how people should behave miss the central point that to share precepts is not to share a normative understanding. They also miss the advantages to groups of sharing precepts with the state. In the United States, the bar and the state generally agree on all the relevant precepts that are to govern the conduct of lawyers.⁴⁸ But they do not share an understanding of what those precepts mean. The bar interprets the precepts differently from the state, as the disputes over Form 8300 and the grand jury subpoenas shows. The bar orders the precepts differently from the state, making clear in its ethics opinions (its official narratives on what the precepts mean) that confidentiality is the central norm and trumps all other precepts, like the duty to obey the law (including the tax law and a summons before a grand jury) when those laws come in conflict with the confidentiality norm.⁴⁹

48. For the most part, the bar and the state agree that precepts contained in the Constitution of the United States; the ethics rules as embodied in various codes promulgated by the bar; the common law of lawyering, particularly the attorney-client privilege; and precepts embodied in "other law," including the law of torts, criminal law, securities law and the law of procedure, constitute the body of precepts making up the law governing lawyers. I say "for the most part" for two reasons. First, the state treats ethics rules as "law" only to the extent that they are (and in the form in which they are) adopted by the state. On the other hand the bar may treat as law ethics rules adopted by the ABA or a state bar organization but not adopted by the state. For example, one study showed that many lawyers accepted as law an ABA rule that severely limited the lawyer's ability to disclose client fraud that had been rejected by most state courts. Steven D. Pepe, *Standards of Legal Negotiations: Interim Report for ABA Commission on Evaluation of Professional Standards and ABA House of Delegates* (1983) at 251-255, accepted in Geoffrey C. Hazard, Jr. & Deborah L. Rhode, *The Legal Profession: Responsibility and Regulation*, 1st ed., (Westbury, NY: Foundation Press, 1985) at 206-08. Second, the extent to which the bar accepts that precepts of "other law" govern the conduct of lawyers is not clear. Sometimes lawyers and bar groups speak as if lawyers enjoy some form of immunity from the precepts of other law. See, e.g., Brief for the Massachusetts Assoc. of Criminal Defense Lawyers and the National Network for the Right to Counsel as Amici Curiae Supporting Appellant at 3; *Cintolo* (No. 85-1615) (arguing unsuccessfully that the court should overturn a lawyer's conviction for obstructing justice because, unlike other people, lawyers should not be liable for obstructing justice when the means used to do so are not in themselves unlawful). See *United States v. Cintolo*, 818 F.2d 980 (1st Cir.), cert. denied, 484 U.S. 913 (1987) (rejecting the argument of amici and holding that lawyers are subject to the criminal laws in the same manner as other people).

49. See Koniak, "The Law Between the Bar and the State", *supra* note 1 at 1431-47 (demonstrating how the bar's ethics opinions elevate the norm of confidentiality above other norms and interpret it as capable of trumping other norms).

The state, on the other hand, generally holds that the duty of confidentiality may be trumped by tax law and the like,⁵⁰ although the attorney-client privilege may not. But the courts interpret the privilege quite narrowly, while the bar interprets the privilege much more broadly.⁵¹ The bar's ethic does not repeat the state's understanding of its law, although the ethics codes repeat state precepts. The same is true of other professions, which borrow state precepts to help constitute the ethic they teach their members to live by. For example, journalists claim the First Amendment to the U.S. Constitution as a part of their ethic, but they interpret it differently from the courts.⁵² Journalists find within that Amendment a right to refuse to testify that the courts have rejected, but journalists adhere to their reading as a guide to action and risk the state's use of force against them in the name of their ethic.⁵³

While the picture I have drawn thus far explains the repetition of legal injunctions in ethical codes and posits an important function for ethics and morality in maintaining and shaping legal meaning, it nonetheless understates how dependent state law is on the ethics and morals of smaller groups. Normative systems maintained by smaller groups not only contribute meaning through law by creating and transmitting narratives to explain state precepts, they contribute precepts too. First, this must be so in that new precepts fall out of the stories that are created to explain other precepts. But I mean something much stronger here. Our common law heritage demonstrates the important role that private groups have historically played as a source of rules incorporated into state law.⁵⁴ Moreover, in the United States private groups remain an important source of the rules that the state acknowledges as official law, notwithstanding the United States Constitution's grant of rulemaking

50. *Ibid.* at 1447 (explaining how courts reject the bar's broad view of the confidentiality norm).

51. See *supra* note 25 and accompanying text.

52. See *Branzburg v. Hayes*, 408 U.S. 665 (1972) (describing the reporter's argument, which was rejected by the Court, that the First Amendment protects journalists from having to reveal their sources to a grand jury).

53. See, e.g., Brief for Amici Curiae Advance Publications Inc. et al. at 11, *Cohn v. Cowles Media Co.*, 111 S. Ct. 2513 (1991) (No. 90-634) (arguing that the First Amendment prevents a source from suing a reporter for breaking a promise to keep the source confidential, an argument rejected by the Court, *Cohn*, 111 S. Ct. at 2516); Brief for Amicus Curiae Association of American Publishers, Inc. at 7; *Simon & Schuster Inc. v. Members of the N.Y. State Crime Victims Bd.*, 112 S. Ct. 501 (1991) (No. 90-1059) (arguing that the First Amendment protects the press and authors from laws prohibiting publishers from paying—for writing the stories of their crimes—those who have been convicted, accused, or who admit having committed crimes); "Facts on File" (1976) *World News Dig.* 748 A3 (describing Daniel Schorr's nine refusals to answer questions about his sources posed by a House Ethics Panel and quoting Schorr's explanation that his silence was based on "professional conscience as well as [the First Amendment, freedom of the press] constitutional right" (brackets in original)).

54. "In the 16th and 17th centuries the common-law courts adopted wholesale the customs and usages of merchants, at first only in any matters between merchants and later in any mercantile transaction." Louis L. Jaffe, "Law Making by Private Groups" (1937) 51 *Harv. L. Rev.* 201 at 213. Professor Jaffe's article remains an excellent discussion of the role of private groups in making state law. Inspired by attacks on New Deal legislation that explicitly and overtly involved private groups in the formulation of rules (and sometimes in the enforcement of those rules), the Article is still one of the most powerful refutations of the idea that lawmaking should be thought of as the exclusive province of the state or the majority. For more recent discussions of this subject, see David M. Lawrence, "Private Exercise of Governmental Power" (1986) 61 *Ind. L.J.* 647; and George W. Liebmann, "Delegation to Private Parties in American Constitutional Law" (1975) 50 *Ind. L.J.* 650.

responsibility to the federal legislature, the modern ascendancy of legislation over common law, and the rise of the administrative state.

Consider just a few examples. The stock and commodities exchanges have always been and remain today a primary source of the rules accepted by the United States government on the trading of securities and commodities.⁵⁵ Rules developed by miners were given the force of law by federal statute in 1866 and remain the primary source of law under current federal law.⁵⁶ The Uniform Commercial Code, some form of which governs most commercial contracts in the United States, is heavily dependent on industry standards as a source of the governing law.⁵⁷ State courts generally accept rules generated by professional groups as providing the standard of care owed to others under state law.⁵⁸ And the Supreme Court of the United States accepts the legal profession's rules as providing the general standard on the quality of representation demanded by the Sixth Amendment to the Constitution.⁵⁹ Thus, the state borrows many, if not all,⁶⁰ of its rules from private groups, reserving to itself only the final say on whether a particular rule will be recognized as state law. Thus, the accusation that professional groups merely piggyback on state norms may have the process backwards.

Ethical systems could not serve the function of providing meaning for state norms or providing new precepts for the state to adopt, if they were not complete normative systems in their own right. The state uses force to demarcate the bound-

55. See L. Loss, *Securities Regulation*, 2nd ed. (Boston: Little, Brown, 1961) at 1175-76 (describing Congress' reliance on the exchanges as the formulators of rules governing the industry); Lawrence, *ibid.* at 653 (describing the important rulemaking authority of the exchanges); Marianne K. Smythe, "Government Supervised Self-Regulation in the Securities Industry and the Antitrust Laws: Suggestions for an Accommodation" (1984) 62 N.C.L. Rev. 475 at 475-78 and 485-86.

56. See *Jennison v. Kirk*, 98 U.S. at 453 (1878) (explaining that the rules incorporated in the federal mining legislation, Act of July 26, 1866, ch. 262, § 1, 2, 4, 9, 14 Stat. 251, 251-53, were developed by the miners themselves). See also 30 U.S.C. § 28 (1982).

57. For example, implied warranties of merchantability are based on generally accepted industry standards. U.C.C. § 2-314. See also *Restatement of the Law of Contracts* (St. Paul, MN.: American Law Inst., 1981) § 222(3) ("Unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement."). While we are on the subject of contract law, it should be obvious that all contract law is based on the assumption that the state will give effect to the rules developed by private parties.

58. See, e.g., *Stepakoff v. Kantar*, 393 Mass. 836 (1985) (holding that a psychiatrist is held to the standard of others in the profession); *Toth v. Community Hospital at Glen Cove*, 22 N.Y. 2d 255 (1968) ("The law generally permits the medical profession to establish its own standard of care."). See generally W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, 5th ed. (St. Paul, MN: West Publishing Co., 1984) § 32 at 189 (discussing how courts generally accept as the standard of care in tort cases the standard as defined by the profession itself).

59. *Strickland v. Washington*, 466 U.S. 668 (1984) ("The proper measure of attorney performance [under the Sixth Amendment] remains simply reasonableness under prevailing professional norms"). For a discussion of the deference, *Strickland* gives the bar to determine what the Sixth Amendment requires, see Koniak, "The Law Between the Bar and the State", *supra* note 1 at 1454.

60. The claim could be made that all state rules are based on rules formulated by private, non-majoritarian, sources. See, e.g., K.T. Kofmehl, *Professional Staffs of Congress* (West Lafayette [s.n.], 1977) at 117-18 (describing how Congressional staff members charged with drafting legislation rely on suggestions of affected interest groups); and H. Walker, *The Legislative Process* (NY: Ronald Press, 1948) at 113 (discussing the role of interest groups in the drafting of legislation).

aries of its normative system. Private groups use belonging, by which I mean both a sense of shared purpose and the threat of ostracization. A normative system, like law, that depends primarily on force to express commitment need not be *understood* to work; people need not know why *x* is required, just that it is. On the other hand, normative systems that rely primarily on belonging must be understood to be lived. To be a member of the group is to know its law and to accept it by living that law. Acting in accordance with an ethic is a method of affirming that one is a lawyer, a doctor, a minister, a Boy Scout. While the state need not and does not concentrate on teaching its normative message, private groups must and do. The primary mode of transmitting ethics (and morality) is pedagogic, and this generates much talk.

Talk, however, presents a problem for every ethic. Talk cannot help but generate new meaning. The meaning of the ethic begins to break up, diverge among factions, and so the inherent weakness of all ethical systems is revealed. Ethical systems are always at risk of falling into incoherence through the creation of too much meaning. They are at risk of losing coherence through the proliferation of competing narratives. Largely deprived of the use of force to delineate the boundaries of the normative world, private groups lack an effective means of killing off widely divergent understandings of what is expected. To recapture some semblance of shared meaning, a form of force is necessary, such as shunning or excommunication, or the group may depend in part on state force in its effort to retain some coherence. Many professions borrow state force for this purpose. For example, most states refuse to allow people to claim membership in the legal or medical professions without first having undergone education by the group in institutions maintained and run by the group. This is a borrowing of state force that helps the group maintain ethical coherence, as is the state requirement that certain professionals pass tests written and graded by the group before the professional may practice, and the threat that the professional may be divested of his license by the state. This last use of state force is as a practical matter heavily dependent on the acquiescence of the group. When the state seeks to remove a professional who is supported in his conduct by the group, in effect the state is trying to redefine the group's ethos. The group can be expected to resist, and sometimes it wins, i.e., gets the state to back off.

While the weakness of ethical systems is that they risk falling into incoherence from too much talk and too little force, the weakness of law is that it has no adequate way of conveying an explanation of why a certain rule demands the imposition of force and no way of making people believe any explanation that is conveyed. Thus the state's use of force is always at risk of seeming arbitrary and oppressive. That is why the state depends on private institutions, the bar, the press, the church, community groups, to provide meaning for state law. The state borrows the strength of ethical systems (their ability to convey shared meaning) just as communities that seek to maintain an ethic often borrow the strength of the state (its near monopoly on force).

No normative system, be it state law or ethics, can be sustained for long by using only one method of commitment. The state's law needs education to be understood, although it primarily depends on force. Ethical systems resort to some form of force,

be it shunning or controlling membership in the group through the use of state sanctions, although they primarily rely on education and the internalization of norms. But each system has its primary mode of demonstrating commitment; recognizing these distinctions provides a coherent method of distinguishing law from ethics.

To summarize, I do not see ethics sitting atop of law, providing norms additional to those provided by the state. Instead, I see ethics and morality as two methods of supplying meaning to the norms of the state, of teaching the citizenry right from wrong, and of challenging the official version of what is right—the version the state is willing to back with force. My explanation makes sense of the repetition of legal injunctions found in ethics codes and makes sense of the reality that ethics is used as a challenge to law. I thus make the claim that my explanation is descriptively superior to the traditional understanding outlined above.

But my story has a normative dimension as well as a descriptive one, as does the traditional understanding. We now turn to those points.

IV. The Opposite of Right is...

The traditional understanding of the relationship between law and ethics is grounded in a theory of the state and its law that glorifies rights. Its plea for less law and more room to exercise the right of self-regulation appeals to our most basic myth—the myth of social contract, which underlies the Western understanding of the state and its laws and which places rights at the center of our legal universe. The starting point of this myth is the individual, and he comes complete with rights. To obtain security from the hostile others who surround him, he trades in some of his rights, and a state is formed to protect him.

Rights are the basic good in this tale, traded only in their own name. In a perfect world, all rights could be retained, or so the story implies, but the world not being perfect, some rights must be sacrificed, however reluctantly, to ensure that other rights are protected. This myth explains how rights both justify the state and provide an implicit check on state power. It places rights at the center of our social and legal order. It teaches us that vindicating rights is presumptively right and that interfering with them is presumptively wrong. We all understand this much about our normative world without any reflection. Consider that every demand for justice is phrased in terms of rights: the right to choose or to an education; gay rights, women's rights, and the rights of the disabled. These are our rallying cries.

Social contract myth and the glorification of rights that flows out of it have their strengths. Considering that the modern nation state has a near-total monopoly on force, which it uses to back up its laws, there is much to be valued in an ideology that checks government power and that glorifies laws that vindicate rights over laws that impose obligations. The ideology performs as well as any ideology can to prevent oppression and tyranny. But the ideology has its weakness too, and that weakness is particularly destructive to the maintenance of vigorously ethical and moral law.

As I have argued, ethical and moral systems depend on belonging. They locate

and define the individual, not by his rights, but by his fulfillment of his obligations, by his living out of the community's law. It posits an individual surrounded by teachers who give him a sense of identity by transmitting the community's law and brothers who help him understand what is required of him and correct him when he has walked astray. In other words, to maintain an ethic requires a fundamentally different myth than social contract. It requires a myth that places the community and its laws before the individual and posits bonded relationships among individuals, not the relationship of strangers. Some such myth underlies all religious communities and must similarly underlie all communities that seek to maintain norms, law, primarily through education and belonging rather than force.

A prime example of such a myth is found in the biblical story of Sinai, a story in which we do not choose, but are chosen. A group is created, not by the will of individuals, but by the imposition of obligations by God. Those obligations ennoble the group; they are its blessings. Finding ways to live those obligations gives the group and its members purpose and dignity. The group's law, its ethic, is celebrated, not seen as a necessary evil. This myth portrays obligations as the central category, not rights. The person with the most obligations is the most privileged under Jewish Law, as under rights theory is the person with the most rights. "Indeed, [in Jewish law] to be one who acts out of obligation is the closest thing there is to a Jewish definition of completion as a person within the community. A child does not become emancipated or 'free' when he or she reaches maturity. ... No, the child becomes bar or bat mitzvah, literally one who is of the obligations."⁶¹

The understanding of professional ethics that I provided is grounded in similar ideas. A lawyer or doctor is one privileged to have certain obligations. Those obligations define the lawyer or the doctor. They dignify and ennoble him and his group. They are his blessing. They make him and his group chosen. They are to be cherished, not avoided. They are to be embraced.

But social contract theory, positing as it does an individual surrounded by hostile others, who owes nothing to those others and who seeks first and foremost to protect his rights, is fundamentally antagonistic to the idea of insistent obligation. It certainly implies that the state should impose as few obligations as possible, but more generally in cherishing rights as it does, the story implies that obligations imposed by anyone by any method are presumptively wrong. With its implicit yearning for the return of all rights and its starting point of the individual unencumbered by responsibilities to others, it sets rights up in opposition to obligations. It teaches that rights are right, and obligations are wrong.

The jurisprudence implicit in our central story is one that renders imposed obligation a problem, irrespective of the source of that obligation. Voluntary obligation takes its place. In other words, from the perspective of rights jurisprudence, we have the right to be ethical or not, moral or not. The problem is that from the per-

61. Robert M. Cover, "Obligation: A Jewish Jurisprudence of the Social Order" (1987) 5 J. Law & Relig. 65. In this article, the reader will find a full discussion of the contrast between social contract ideology and the Sinai myth. See also Koniak, *supra* note 2 (examining how certain doctrines on the responsibilities of lawyers take as their starting point rights theory and thus produce anti-obligation law).

spective of ethics, this view is nonsensical. Ethics is either insistent in its demand for realization or it risks becoming literature or philosophical musings, something less than a normative system, something less than a group's law.

By grounding itself in our central myth with its aversion to obligation and law, the traditional understanding stakes out a position that makes ethics and morality shadows of themselves. It transforms them into matters of individual choice or taste and thus diminishes their ability to produce action in their names. It weakens ethics and morality and thus paradoxically ends up strengthening the state. To understand the relationship between law and ethics from a perspective fundamentally hostile to ethics, from a theory centered on rights, diminishes the ethical project. Once the traditional understanding has had its say about less government regulation, what inspiration does it provide for the maintenance of a strong group ethic? The answer is none. The only justification for ethics provided by the traditional understanding is as a means of warding off law. This is not enough.

The perceived close association between ethics, morality and religion is no mere historical accident. They all are grounded in some myth, however unrealized, that comes closer to Sinai than social contract—a myth that places obligations center stage, imagining them as goods not burdens.⁶² That myth sees ennobling obligation as law, which is to say that it envisions norms maintained primarily through belonging and education as binding in some strong sense, binding as Westerners see law as binding. That is why religious law claims the word law for its own: to proclaim, as only the word “law” can, the deepest of commitments to the norms expressed. I similarly dignify the ethics of groups with the word law. My many references to the state's law were intended to imply that other law was possible too, that ethics were not secondary to state law but necessary and equal to it. All this is normative. It celebrates civil disobedience and the struggle to build a more just world. It refuses to revile law or deny obligations and seeks instead to encourage us to accept both. It is an alternative vision, one that proceeds from ethics to state law rather than the reverse.

V. Conclusion

Ethics is the place where rights jurisprudence should end. The idea of an ethic is that obligation can be ennobling. The traditional account of the relationship between law and ethics weakens that bond by envisioning ethics as a matter of right. Social contract theory, which so ably protects freedom, at the same time undermines the survival of vigorous ethics. Social contract theory and the rights jurisprudence that flows out of it, while glorifying state laws that preserve rights, also makes tenuous our commitment to state laws that impose obligations towards our fellows on us. It undermines our tax laws, our environmental laws, our welfare laws and

62. It should be apparent to most readers that other religions have similar understandings of the obligations given to members. The privilege/obligation of taking communion for a Catholic or journeying to Mecca for a Muslim, are examples. Moreover, it is no accident that religious communities have this understanding of obligation, given that their law is maintained primarily through a sense of belonging, education, the internalization of norms.

makes each of those laws particularly vulnerable to attack. Social contract myth teaches us that those “burden laws” are presumptively wrong. In so teaching, it risks creating the world of hostile others that it takes as its starting point. That is reason enough to retrieve our Sinai-like myths and to start our conversations about ethics and its relationship to law without social contract myth as our baseline.

Ethics, morality and religious law, with their implicit celebration of obligation, serve as powerful challenges to state law and powerful counterpoints to the social contract myth that lies at the base of Western jurisprudence. Perhaps if we understood that we not only choose but are chosen—that we are blessed not only in our rights but in our obligations—the world would be a more just place. Ethics gives us that different vision. It does not sit passively atop state law; it competes. Let’s celebrate the competition.