Law and Conformity, Ethics and Conflict: The Trouble with Law-Based Conceptions of Ethics

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Ethics comprise the systems by which humans make moral decisions. The ethical basis of a particular decision may be a perceived universal truth, a socially constructed system of values and priorities, a theoretically objective analysis of good and bad effects, religious imperatives, inner promptings that compel a highly personalized set of beliefs, or a combination of many such factors. Generally, the ethical basis of a decision can be defined externally, as a code of ethics which divides behaviors into categories of acceptable and unacceptable, or it can be defined individually and personally, perhaps influenced by, but not limited to, the intentional and explicit reference to outside signals.

Businesses and professions commonly apply ethical codes in particular, and external, legalistic sources of guidance in general, as they attempt to encourage good behavior and improve the moral climate within their organizations, fields, industries, and professions. Lawyers have their code of

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1. The behavioral school of decision theory has begun to recognize the variety of ways in which decisions are made. Whereas economic models have traditionally assumed that the behavior of humans is both intentionally and manifestly rational, critics like Herbert Simon have observed disparity of rationality even among intendedly rational decision makers. Simon observes that rationality is bounded by practical and cognitive limitations, so that the intent to make optimal decisions is limited by the tendency to satisfice, or choose the first acceptable alternative found. Herbert A. Simon, Administrative Behavior 79-109 (3d ed. 1976).

2. The bifurcation of externally and internally based ethical models is a necessary simplification into ideal types, and is not intended to reflect the hybrid nature of virtually all decisions. In other words, even the most calculatedly internal ethical decision mechanism must be affected by external cues and values in a social world. The models examined in this Article are therefore broadly classified as external versus internal to reflect an idealized emphasis or approach rather than actualization. The distinction remains extremely important, as idealized models affect the nature of the decisions one makes. Much of this Article focuses on identifying differences in the quality of ethical decision making under intendedly external and intendedly internal approaches.

professional ethics, and law students are required to prove their familiarity with this code both in their studies and in their bar examination performance. Similar professional codes exist in medicine and accounting. Likewise, many corporations have adopted codes of ethics as they attempt to eradicate unethical behavior directly, and to encourage the moral development of community members indirectly.

While this Article does not specifically critique codes of ethics, such codes do serve as the most salient example of the confusion and misapprehension inherent in the nature of legal instruments as congealed ethical theory. Codes of ethics provide a sadly diluted notion of what ethics entails, how ethical decisions are made, and the nature and degree of individual responsibility involved in the process of examining one's choices. Part I briefly addresses the case of the code of ethics to illustrate this basic point. Part II examines six dualities of ethical theory, suggesting that there is a legalistic choice and a non-legalistic choice in each set, and arguing that only the latter falls properly within the realm of ethics. Part III provides a theoretical framework that ties the six broad dualities into one even larger model, suggesting that the dualities can each be classified as a choice between conformity theory and conflict theory, with consensus theory falling some-

4. See, e.g., Texas Disciplinary Rules of Professional Conduct (1992). The rules cover difficult areas of ethical decision making in the law, such as conflict of interest (Rules 1.06-1.09), the treatment of confidential information and the scope of the lawyer-client privilege (Rule 1.05), advising clients as to economic matters regarding domestic relations law (Rule 1.04 cmt. 9), lawyer advertising (Rule 7.01), and even law firm letterheads (Rule 7.04). To the extent that the rules encompass values held across the profession, they are valid rules of conduct but must be recognized to fall short of the realm of ethics. The labelling of disciplinary rules as professional rather than ethical (beginning in 1969), and the trend among law schools to name courses "Professional Responsibility" rather than "Professional Ethics," reflect an improvement among lawyers in distinguishing between mandatory codes of behavior and the sphere of ethics.

5. E.g., Council on Ethical and Judicial Affairs of the American Medical Association, Current Opinions ix, 42-49 (1986) (an adjunct to the revised Principles of Medical Ethics adopted at the Annual Convention of the American Medical Association in 1980) (Stating at vi: "[I]n all instances, it is the conglomerate intent and influence of the Principles of Medical Ethics which shall measure ethical behavior for the physician.").

6. E.g., American Institute of Certified Public Accountants, Code of Professional Conduct (1988); see also Steven M. Mintz, Cases in Accounting Ethics and Professionalism 1, 5 (2d ed. 1992). Mintz observes, "[t]he code of ethics that exists today is a codification of standards, rulings, and interpretations of rules of conduct published by the Institute over many years." Id. at 1. He describes the Code as consisting of principles and rules, noting that "[t]he principles are goal-oriented and provide the framework for the profession's technical standards and ethics rules. The principles prescribe ethical responsibilities members should strive to achieve . . . ." Id. at 5.


8. For example, Alasdair MacIntyre states, "a virtue is now generally understood as a disposition or sentiment which will produce in us obedience to certain rules . . . ." Alasdair MacIntyre, After Virtue 244 (2d ed. 1984). The commingling and confusion of virtues and rules is the source of law-based ethical positions which I contend are untenable.
where between. These labels are defined in detail, culminating in the proposition that only the conflict theories give meaning to the concept of ethics.

I. THERE ARE NO CODES OF ETHICS

The standards and rules established by businesses and professions are often labelled "codes of ethics" or "canons of professional responsibility." Codes and canons can potentially serve a valuable function, providing participants and members notice of the boundaries of acceptable behavior, either within an organization or across organizations within a field. Particularized codes also institutionalize the expectations of the organizations that adopt them, establishing efficient, consistent means of control. Rather than apply idiosyncratic sanctions to individual instances of misbehavior, systems of authority can employ codes to establish wide-sweeping control that is largely self-administered by individuals, the majority of whom are sufficiently socialized to abide by rules as long as they are clearly stated in advance. So-called codes of ethics thereby create efficiencies in the enforcement of behavioral expectations through the effective process of socialization.

However, one pays a price for what one labels codes of ethics or canons of professional responsibility. Individual acts of conformity to rules and regulations which result from effective socialization represent an agreement between institution and conformer that the latter will suspend individual judgment and replace its exercise with the application of the rules contained in the code or canon. Whether one makes a good bargain in forfeiting this judgment to gain increments of social efficiency and control is usually a


10. Consistency is a virtue under the classical understanding of the law, in that clear notice of the rules is given such that the administration of sanctions is fair and expected. The foundations of due process are more appositely applied to law than to ethics, however, as consistent and efficient expectations are only relevant to situations of enforcement. Whereas it is important to give persons fair warning of minimal compliance standards under law, it is not analogously important to provide notice of consistent standards of ethical behavior. When an organization or profession seeks consistency of behavior in response to disputable ethical questions, the imposition of expectations of uniformity is likely intended to benefit the entity, rather than protect the individual.

11. Bureaucratic theory thus distinguishes among kinds of control. Simple control is individual and idiosyncratic, applied case-by-case to reward or punish individuals, thereby theoretically enhancing organizational effectiveness. Bureaucratic control consists of the rules, regulations, and standards of an organization, and is effective because socialization processes encourage conformity to such rules, regulations, and standards. For a detailed discussion of these concepts, see CHARLES PERROW, COMPLEX ORGANIZATIONS: A CRITICAL ESSAY 149-53 (3d ed. 1986).
question of degree. At the extremes, where all reasonable persons would agree that Behavior A is wrong, little meaningful autonomy is sacrificed for a comforting zone of security. Where there is widespread social consensus regarding a particular ethical question, it is appropriate and fitting that the disposition of the issue occur via incorporation into binding law. One should recognize that these relatively easy ethical questions are neither the hard questions, nor the important ones, and in this sense they are questions of law rather than compelling questions of ethics. At the margins, where exercise of independent judgment would render divergent opinions, the personal cost of coercion through the application of codes may be extremely high.

With its benefits and disadvantages duly noted, the crucial point is that both the phrases “code of ethics” and “canon of professional responsibility” are disingenuous in their inaccurate connotation of individual choice. A code is a law, and our codes of ethics establish particularized rules, regulations, and standards that are legalistic in the rigidity of their application. True ethics encompasses the recognition of an actual problem with at least one social value component. It is a problem precisely because there is an individual choice to be made among two or more options. Whereas our legal reasoning is evoked to decide whether to abide by clear-cut rules and regulations, our ethical reasoning is triggered only by questions that lack an unambiguous response. So defined, the realms of law and ethics are quite insular: the law can and should cover nonethical policy questions and questions of value for which there is widespread social consensus.

12. For example, there is widespread concurrence among reasonable persons that theft, murder, and rape are ethically insupportable. This social agreement transcends virtually all systemic religious and ethical boundaries. Therefore, the establishment of binding laws causes little or no usurpation of individual freedom and responsibility in the exercise of personal ethical judgment.

13. I borrow the concept of “hard cases” from Ronald Dworkin, who supports a relatively broad use of interpretive discretion in their resolution. See RONALD DWORFIN, TAKING RIGHTS SERIOUSLY 81-130 (1977).

14. Compelling questions of ethics are those that cannot be resolved by reference to virtually universally held values and beliefs. The more controversial an ethical question, the more difficult its resolution and the greater the danger created by authoritative imposition of a definitive mode of resolution. My objection in this Article to the legalistic conception of ethics is aimed at the compelling questions for which there is no unambiguous response.

15. For a discussion of the ineffectiveness of professional codes of ethics, see Roger Hauptman and Fred Hill, Deride, Abide or Dissent: On the Ethics of Professional Conduct, 10 J. Bus. Ethics 37 (1991) (“[T]here is strong evidence that the ethical ethos that has given American society its direction has been damaged; further, it has been the professed professionals who have been the major contributors to the ethical decline.”).

16. I do not suggest here that questions of value and questions of law are discrete or without overlap. Clearly society needs laws against murder, and clearly the act of murdering is a violation of the law as a manifestation of values rather than as a manifestation of public policy. This discussion brings us to the question of which value-driven issues are appropriately canonized into law. The answer I posit is that only those questions of values for which there
Questions of value not characterized by such consensus are the true ethical questions. In deference to autonomy and responsibility, these decisions are best focused through decentralization—removing them from the realm of law, and placing them, in recognition of their ethical importance, squarely on the shoulders of individuals.  

Confronted with a code, the individual has only one ethical choice: to abide or not to abide. If an individual decides that civil disobedience to laws and codes is permitted within his or her normative system, the code becomes meaningless from an ethical standpoint because its effect is coercive in nature and the individual has declined to be ruled by coercion. Similarly, if the individual makes the overarching ethical decision to abide by all laws and codes established by the groups in which he or she participates, the ethical dimension of the code is lost as the individual simply follows the rules that have been predetermined and that are externally applied without individual cognitive recourse or evaluation. Canons of professional responsibility face the same double bind: as canons they are compulsory, yet the use of the phrase "responsibility" rather than "accountability" suggests, inaccurately, that the canon is ethical rather than legal in nature.

is widespread, nearly universal social consensus should become law. Within this framework, murder should be unlawful because humans near and far, at least within our society, believe it is wrong and should be outlawed. Abortion should not be unlawful because no such consensus exists. Without widespread consensus, the degree of coercion regarding ethical issues will be high. The less the consensus, that is, the closer a binary issue comes to a 50-50 split, the greater the coercion and the less comfortable society is with the paternalistic, ostensibly "correct" solution contained within the coercion. When uncontroversial ethical questions are encoded within the law, few grounds for objection will arise and few persons will feel cheated of their ethical autonomy. Only when controversial ethical questions are canonized is there an estimable loss of freedom in this loftiest arena of ethical decision making. The canonization of uncontroversial ethical questions should be accurately labelled as law, so as to avoid the suggestion that the ethical questions have been addressed beforehand and need no longer be considered. The canonization of controversial ethical questions is a usurpation of individual autonomy, and therefore insupportable. Since the former type of canon encompasses the easy questions, and the latter cannot be justified, there is no such thing as a code of ethics.

17. Central to this reasoning is the acceptance of a libertarian axiom—that important decisions on which reasonable persons may differ should vest in the individual, and that divestment of a compulsory system of controversial values enhances the humanity and dignity of ethical decision making. For a discussion of the virtues of libertarian non-coerciveness, see generally ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974).

18. For the classic statement on this topic, see HENRY D. THOREAU, Civil Disobedience, in WALDEN AND CIVIL DISOBEDIENCE 383 (Penguin Books 1983) (1849). For a more current ethical analysis of civil disobedience, see EDWARD H. MADDEN, CIVIL DISOBEDIENCE AND MORAL LAW IN NINETEENTH-CENTURY AMERICAN PHILOSOPHY (1968). The question of civil disobedience is certainly an ethical one, and, as any classroom discussion on the topic will verify, a controversial one. It is, however, a topic outside rather than within the question of codes. The ethical decision is made before an individual enters the realm of the code. Therefore, it confers no ethical dimension upon the code itself.

19. The distinction between the concepts of accountability and responsibility is an important one. Accountability connotes the administration of sanctions in the event of failure to meet an established set of standards. Responsibility implies the personal assessment of obligations and the individual policing of one's effectiveness in meeting those obligations.
The distinction is more than a semantic one for several reasons. Most basically, a code of ethics will tend to undermine ethical evaluation. Mislabelling law as ethics suggests external preemption, or at least selection and allocation, of the important ethical issues. This phenomenon facilitates an individual's conclusion that abidance by the rules will foreclose the possibility of ethical issues arising. A prefabricated, externally imposed code of ethics, taken literally to be what it pretends to be, suggests that the ethical issues have been addressed by the experts. The person who accepts the code at face value replaces the honest and difficult confrontation of ethical questions with a mindless conformity to the rules. The code ironically reduces or eliminates the perception that ethical questions remain to be solved, undermining the human potential to address specific moral problems and to develop a general normative framework.  

A code of ethics that is merely an inventory of rules for which there is widespread, nearly uniform consensus is self-defeating. If such compulsory canons were candidly called laws, the field of ethics would be clearly distinguished as manifestly the domain of the individual. A code of ethics that is anything more than a list of basic rules that are widely supported among its constituency is in itself immoral in its attempt to coerce conformity in areas in which reasonable minds can and do differ. Externally imposed value judgments in areas of highly charged controversy are at best paternalistic in their insistence that intelligent adults adopt the parental party line among several reasonable alternatives. At worst, they are dehumanizing and degrading. Ethical codes that address hard cases supplant good faith ethical appraisals with prefabricated ones. The mandatory substitution of corporate for individual assessment among difficult ethical choices is a personal assault at the most fundamental human level—the freedom and ability to make evaluations. As codes of ethics that address real ethical issues eliminate private evaluation of the most fundamentally important questions, they debase and demean their constituencies.

These generic observations are essential to all that follows. Legalistic manifestations of ethics are contained in many highly developed intellectual models. Analysis based on natural law, objectivity, deism, collectivism, and positivism share one fundamental flaw: they embrace a legalistic conception of ethics. Their conceptual opposites—relativism, subjectivity, existentialism, individualism, and realism—are superior in their rejection of legalistic models of ethics.

20. For a more detailed discussion of the flaws of compulsory ethics, see Bruce Jennings, *The Regulation of Virtue: Cross-Currents in Professional Ethics*, 10 J. Bus. Ethics 561, 567 (1991). Jennings discusses the need to infuse "conversation" into the development of professional ethics. He refers to the codification of professional responsibility as the "judicial model" and suggests replacing that model with "civil discourse" in the form of broader and more widespread dialogue among professionals and other citizens.

21. The reader may observe here that I am recommending a libertarian model that
II. THE GROUNDS ON WHICH THIS WAR IS WAGED

Normative questions of ethics have been the subject of analysis spanning many disciplines. Political theory, philosophy, theology, economics, law, and literature are only the most obvious ones. In the sub-parts that follow, six sets of paradigmatic rivals are examined. They come from all the disciplines forementioned, and some are interdisciplinary. In each case, there is an externally oriented, legalistic choice, and an internally oriented, individualistic choice. Regardless of the merits of the externally oriented options, law-based approaches should be recognized as codes of law rather than ethics. Only the internally oriented models are conducive to ethical choice.

A. Natural Law Versus Relativism

Natural law theory rests on the proposition that Choice A is inherently better than Choice B, under all circumstances and for all persons and cultures. The translation of natural law into a system of ethics requires an acknowledgement that human beings can know that Choice A is superior.
to Choice B. The ostensibly universal character of superior choices under natural law provides the justification for those contending to understand its valuation priorities to try to impose those priorities universally. Ethical systems based on natural law tend in this way to become coercive, and the belief that morality is absolute renders a legalistic form of ethical reasoning.

David Hume, while recognizing the relativity of values, ultimately insists that unambiguously correct standards can be articulated, resulting in an incontestable natural quality ordering of choices. Hume suggests that there exists a “natural standard” by which both aesthetic and moral superiority and inferiority of value can be objectively derived. Under the natural standard, rules exist which can reconcile divergent sentiments, elevating the natural over the merely personally or culturally preferred.

Likewise, Kant’s notion of the categorical imperative connotes a universality of moral mandate that transcends ephemeral differences in culture.

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25. See id. at 5. “The state of nature has a law of nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind, who will but consult it,” id., which suggests that human reason is capable of discerning natural laws of right and wrong.

26. In their efforts to understand and apply universal truths and ethical norms, natural law theorists often find themselves in conflict with those espousing multicultural tolerance of divergent values. Natural law, a product of the Enlightenment in Europe, is an essentially Western phenomenon which critics of multiculturalism contend is central to a superior, classically liberal normative system. For a detailed discussion of the limitations of multicultural value perspectives, see Arthur M. Schlesinger, The Disuniting of America (W.W. Norton & Co., 1992) (1991).

27. This is the reason that politically nonconservative citizens and members of U.S. Senate committees might worry about the natural law stances of Supreme Court nominees. The fear is that the nominee will: (a) believe that universal truths exist, (b) believe that he or she knows the nature of those universal truths, and (c) impose those universal truths upon his or her constitutional interpretation. In this manner, right-to-life proponents believe that they understand the natural edicts of a supreme being, and that it is appropriate to insist that all abide by such universal law.

28. See David Hume, Of The Standard of Taste, in Four Dissertations (1757), reprinted in Of The Standard of Taste and Other Essays 3, 3 (John W. Lenz ed., 1965). Hume states that:

[t]he great variety of Taste, as well as of opinion, which prevails in the world, is too obvious not to have fallen under every one's observation. . . . We are apt to call barbarous whatever departs widely from our taste and apprehension; but soon find the epithet of reproach retorted upon us. And the highest arrogance and self-conceit is at last startled, on observing an equal assurance on all sides, and scruples, amidst such a contest of sentiment, to pronounce positively in its own favor.

Id. (emphasis in original).

29. See id. at 7. Despite his initial insistence that values are variable, Hume ultimately contends that inferior pronouncements of value are “absurd and ridiculous.”

30. Id.

31. See generally Immanuel Kant, Grounding for the Metaphysics of Morals, in Ethical Philosophy (James W. Ellington trans., Hackett Publishing Co. 1983) (1785). The categorical imperative is Kant's source of moral principles. A moral principle should obtain under the categorical imperative if and only if it should be applied to all persons under all circumstances. Id. at 29-30.
Kant contends that "[c]ognitions and judgments must . . . admit of universal communicability; for otherwise . . . they would be collectively a mere subjective play of the representative powers."\textsuperscript{32} Grounded in the deontological concept of ethics by virtue of duty, the categorical imperative is compatible with natural law theory. Likewise implicit in the social functioning of the categorical imperative is an underlying belief that it is possible to achieve popular consensus regarding universal truths, transforming a theoretical ideal into a viable moral system.\textsuperscript{33}

Moral relativism is a denial of normative natural laws, and consists of the idea that ethics are a function of the cultural contexts within which they operate.\textsuperscript{34} Relativism is built on anthropological axioms, including the belief that (a) application of foreign norms to the relevant culture comprises ethnocentric behavior, which can only result in misunderstanding the culture, and the arbitrary imposition of paternalistic or imperialistic rules;\textsuperscript{35} and (b) very little behavior has been observed to be universal across all cultures studied, supporting the notion that what appears within the purview of one culture to be aberrant of nature is in reality only an unfamiliar, therefore disconcerting, alternative of equal plausibility and value.\textsuperscript{36} From a relativist standpoint, law must be separated from ethics because law embodies enforcement (which may or may not be driven by someone's moral determination, but very rarely self-determination), while ethics is a function of

\textsuperscript{32} IMMANUEL KANT, CRITIQUE OF JUDGMENT, § 21 (J. H. Bernard trans., Hafner Publishing Co. 1951) (1790).

\textsuperscript{33} A process for deriving ethics from a collection of values recommended for universal application is most likely to function when its fundamental assumption—universality—is achieved. While Kantian ethics technically require universality only as an assumption applied as a benchmark for establishing a set of categorical imperatives, natural law theory easily extends the assumption from formulation to implementation, thereby creating a coercive setting.

\textsuperscript{34} See TOM L. BEAUCHAMP & NORMAN E. BOWIE, ETHICAL THEORY AND BUSINESS 11 (3d ed. 1988). The authors note that supporters of relativist viewpoints observe that:

- moral rightness and wrongness vary from place to place and that there are no absolute or universal moral standards that have applied to all persons at all times. [Since] the concept of rightness depends on individual or cultural beliefs . . . rightness and wrongness are therefore meaningless notions if isolated from the specific contexts in which they have arisen.

\textit{Id.}

\textsuperscript{35} For a discussion of cultural relativity from social and anthropological disciplines, see ERNEST BECKER, THE BIRTH AND DEATH OF MEANING 112-54 (2d ed. 1971). Becker notes that:

Two centuries of modern anthropological work have accumulated a careful and detailed record of [the] natural genius of man: anthropologists found that there were any number of different patterns in which individuals could act, and in each pattern they possessed a sense of primary value in a world of meaning.

\textit{Id.} at 112. Anthropological study suggests that both value and meaning are culturally contingent, rather than absolute.

\textsuperscript{36} \textit{Id.} at 130. (observing that "for almost every timeless truth that one thought dear to the human heart, the anthropologist [can] name a tribe or a people who did not hold that truth dear—who may even have scorned it").
individual choices made within an inevitable and unavoidable social and cultural context.\textsuperscript{37}

The inability of natural law theories to convince us either that there is one truth or that we can know that truth is, respectively, its ontological\textsuperscript{38} and its epistemological\textsuperscript{39} failure. In this vein, Richard DeGeorge suggests that moral issues concerning whether to apply American laws in transnational settings are “false dilemmas” in that they confuse regulatory edict and morality.\textsuperscript{40} Regulations\textsuperscript{41} can be created for policy reasons or for moral reasons, the former being by definition value-neutral and the latter reflecting, in a democracy, only the values of the enacting or promulgating majority. In either case, regulatory edict remains edict, reflecting only coincidentally, and only sometimes, the morally developed position of any individual operating under its jurisdiction or sphere of influence.\textsuperscript{42}

B. Classical Versus Neoclassical Approaches

The discussion of normative systems as classical or neoclassical has developed in the area of contract law, and as such is more directly a product of jurisprudence than of ethics.\textsuperscript{43} Yet the distinction is relevant to the discussion of legalistic models of ethics because the contract law from which it arises forms a middle ground between the coercive nature of law and the conditions of conflict in which real ethical decisions are made. Contracts

\textsuperscript{37} William M. Evan makes this distinction nicely, stating, “[f]rom a sociological rather than a jurisprudential point of view, law is a body of norms with institutionalized methods of enforcement and justice is a set of cultural values justifying them.” William M. Evan, Value Conflicts in the Law of Evidence, 4 AM. BEHAV. SCI. 23, 24 (1960). The relativist might finish the comparison by observing that ethics is the set of individual choices made within the context of laws and cultural values.

\textsuperscript{38} Ontology concerns the state of being. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1576 (1986).

\textsuperscript{39} Epistemology concerns the act of knowing. Id. at 764.

\textsuperscript{40} Richard DeGeorge, Ethical Dilemmas for Multinational Enterprise: A Philosophical Overview, in W. Hoffman ET AL., ETHICS AND THE MULTINATIONAL ENTERPRISE (1986).

\textsuperscript{41} I use the term “regulation” synonymously with the word “law,” for they share the characteristic of imposition by force which is relevant to this discussion.

\textsuperscript{42} One might be tempted to argue that, in a democracy, regulations based on moral stances are constructively the ethical positions of the citizens who elected the enacting legislators. The fallacy of such a response rests upon the confusion between participation in a democratic system, which invariably includes the concession of some individual beliefs and values under a pragmatic social contract, and ethics, which concerns the application of values under whatever conditions of free choice remain outside the scope of the social contract. The mere fact of participation in a social contract cannot, therefore, be construed as the equivalent of ethical approval of all compromises developed under that contract. The poignancy of the social contract rests, after all, in the act of forfeiting a degree of individual freedom for an increment of social order. Ethics is the province of freedom, while law is the dominion of order.

\textsuperscript{43} For a discussion of the characteristics of classical and neoclassical approaches, see Ian R. Macneill, Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law, 72 NW. U. L. REV. 854 (1978).
between individuals can be viewed as the creation of concessions that alter existing rights patterns within and under the law. Contracts may be firmly bounded by unalterable law, or may allow the creation of idiosyncratic exceptions to lawfully created rebuttable rights and duties, which act effectively to create a default set of rules in the event that the parties fail to create their own. Because contract law creates the ability to mold interpersonal relations and to create or destroy obligations otherwise enforced by edict of law, it is a legal mechanism that is by its nature a hybrid or cognate of ethics as well. This special character of contract law can be traced on a continuum of ethical conception from pure coercion (law without the contractual option) to pure freedom (ethics without the exercise of contract, the pure resolution of conflicting postulates). Between the two would be all the varieties of contract, with their inherent basis in mutual concession, allowing resolution of ethical conflict within the coercive limits of the law.

While the coercive nature of law and the conflict-based essence of ethics are discussed in detail in Part IV, it is important to observe for our purposes

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44. I refer to contracts between individuals here, as opposed to the social contract, which in this context is more closely aligned with the law, as a crucial source of legitimizing coercion. The distinction between micro-level contracts, such as those occurring between two parties, and overarching social contracts is important. Micro-level contracts involve the exercise of choice on a case-by-case basis in the relinquishment of existing rights in exchange for new rights. As such, micro-level contracting is an essentially voluntary, noncoercive phenomenon, despite its effect of future restriction in accordance with the agreement. In contrast, the social contract binds all individuals who participate within the relevant society. Participation is only voluntary beyond a certain minimum point, since humans are forced by nature and by proximity into social interaction. To the degree that one is swept into society by unrelenting forces, the norms established under the social contract can be coercive. Although it has been suggested that social contracts are a significant source of ethical norms, the ethical component becomes less robust as the norms derived from the social contract become more coercive. For a discussion of social contract as a source of ethical norms, see Thomas W. Dunfee, Business Ethics and Extant Social Contracts, 1 Bus. ETmcs Q. 23 (1991).

45. The laws which consider certain forms of contract to be against public policy fall within this category. Contracts in restraint of competition, for example, are unenforceable, regardless of the voluntary agreement of the parties. See, e.g., Slisz v. Munzenreider Corp., 411 N.E.2d 700, 704-09 (Ind. App. 1980).

46. Contracts in this category create a new elective order which differs from the norm, and applies particularly to the parties. The Uniform Partnership Act, which allows contractual provisions within a partnership agreement but provides legal substance to relationships of partners in absence of an agreement, is an example of this type of contracting realm. See, e.g., UNn'. PARTNERsHiP ACT (U.P.A.), § 8(2) (1914) ("Unless the contrary intention appears, property acquired with partnership funds is partnership property."). The law establishes a presumptive assessment of rights under a particular condition, which may be altered by the consensual intent of both parties.

47. But see EMILE DURKHEIM, ON MORALITY AND SOCIETY: SELECTED WRITINGS 88 (Robert N. Bellah ed., 1973). Durkheim observes that the social contract is of limited value in establishing a truly consensual and therefore noncoercive form of ethics. This is so, he contends, because individuals who are born into a society already bound by a social contract have limited choice in the formation of that contract. It is, as such, a contract of adhesion, and therefore largely involuntary.
here what I mean by these phrases. Law is viewed as essentially coercive to reflect its omnipotence within its jurisdiction apart from individual assessment, judgment, or development of alternative options. The law in its purest form is applied uniformly and consistently, avoiding arbitrary or capricious differentiation of application. Ethical decisions in their pristine essence are purely voluntary and occur in the absence of coercive force, yet in the presence of normative argument and discourse. As a product of forensic interaction of conflicting viewpoints, the determination of ethical questions is an individual process of conflict resolution within a free society and marketplace of ideas. Contractual consideration is a form of concession or compromise which, under conditions that suggest value conflict, create a middle ground—still subject to the fiat of law, but with alterations and adjustments that represent the bargaining process, the purchase and sale of conflicting values and goals.

Within this context, classical contract embodies the most legalistic form of agreement, while neoclassical contract favors the less legalistic, more flexible form. While classically configured contract is a defensibly appropriate mode of law, it is too coercive to operate effectively as a mode of ethics.

Classical approaches to contract law promote predictability and stability. The philosophy behind classically fixed legal doctrine favors consistency of application, regardless of the status or identity of the parties bound, to yield fairness across cases and the security rendered by clear notice of unambiguous rules. Classical application of the law can act as a tempering influence upon its coercive nature, rendering compulsion less harsh through either interpretive consistency or the very removal of interpretive possibilities.

Gerald Wetlaufer describes classical reasoning as the denial of legal discourse. He observes in classical, legalistic reasoning the application of


49. This is not to suggest that classical contract is always the optimum mode of law. For a discussion of some of the considerations that must be weighed in this regard, see Steven R. Salbu, Joint Venture Contracts as Strategic Tools, 25 Ind. L. Rev. 397 (1991).

50. Macneil discusses these characteristics in terms of “discreteness” and “presentation.” Discreteness refers to the separate treatment of isolated transactions or contracting incidents. Presentation allows agreements for the future to fix at the time of contracting all rights, duties, and remedies in the event of a breach. See Macneil, supra note 43, at 862.

51. In its purest form, classical contract supplants any necessity for legal interpretation. The clear, unambiguous, and uncontested iteration of law under the purest classical model leaves no room or need for explication or development over time. While this situation does not exist in reality, it represents the classical ideal.

binary judgment as well as the closure of controversy.53 The law renders a series of decisions favoring one party or the other, determining, positively or negatively, whether elements of a cause of action exist, whether defenses exist, whether the granting of motions is justified, and ultimately, who wins and who loses. The invariable binary closure of controversy applies the legally created truth—the appropriate answer to a question as it has developed under common or legislated law. Catherine Belsey likewise compares classical versus interrogative conceptions of text, observing that the former leads to closure upon a truth whereas the latter denies the existence of a "single privileged discourse which contains and places all the others."54

Neoclassical approaches encompass the erosion of a stable, rule-based approach to the law.55 Neoclassicism is fluid rather than rigid, adjusting to changing assumptions and norms.56 It is less legalistic in its relinquishment of the binary closure of controversy, and thereby more responsive to the nature of bona fide moral, intellectual, and behavioral activity. Whereas codified, institutionalized ethical systems mark the end of discourse, neoclassical flexibility permits the exercise of choice within the context of meaningful discussion.57

The flexibility of neoclassicism is a function of the demystification of contract. Whereas the classical idea of concurrence views the contract as an idiosyncratic extension of legal rights, responsibilities, and obligations peculiar to the parties in privity, neoclassical reasoning views contract as a flexible commitment between two parties that can fall short of coercion. More organic, natural neoclassical concepts include contingent rights and duties, agreements to agree, and obligations the nature of which fluctuates in accordance with changes in circumstances and contracting assumptions. In this manner, neoclassicism replaces the classical notion of absolute commitment of obligations with the sense that the nature of obligations should be relative to external forces and conditions. The relativity of neoclassical contract is a compromise between coercion and conflict which favors the latter just as classical contract favored the former. From most to least coercive, the table below represents conceptions of contract:

<table>
<thead>
<tr>
<th>Law-Based Decision</th>
<th>Classical Contract</th>
<th>Neoclassical Contract</th>
<th>Conflict-Based Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Most Coercive</td>
<td>Least Coercive</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Contract occupies the moderate position between absolute compulsion

53. Id. at 1552.
54. CATHERINE BELSEY, CRITICAL PRACTICE 68, 92 (1980).
55. For a discussion of the nature of neoclassical formulations, see Macneil, supra note 43, at 865-86.
56. Id.
57. By "meaningful discussion," I refer to discourse that identifies ethical options and permits one to choose any of the options under consideration.
under the law and absolute freedom to resolve live conflicts within a dynamic discourse. Norms of ethics as a function of contract can be more or less classical or neoclassical, depending on the degree to which concession of rights is held to eclipse individually maintained freedoms. The classical nexus between contract and ethics suggests that norms arise from agreement. Therefore, ethical behavior comprises the formulaic application of these norms. While this is a viable contractual notion of ethics, it is ultimately sterile because it inhibits discourse beyond the establishment of the contractually created norms. The neoclassical formulation of contractual ethics suggests that norms must sometimes be established, even to the extent of creating coercive rules, but that these norms constitute laws by definition of coercion. The goal of ethical discourse should be the avoidance of classically confining contractual obligations, which by their very legalistic nature foreclose the realm of individual, value-driven decision making. From this standpoint, neoclassical contract formulations of ethics are self-immolating, establishing gaps for individual assessment within necessary legal boundaries. Neoclassical contract attempts to bind less completely, and in the breach leaves room for discussion, rumination, and deliberation. Opportunities for individual assessment permit the divergence of ethics from the realm of enforced law to the loftier climate of the exercise of free will.

C. Deism Versus Existentialism

Deistic and existentialist models of ethics acknowledge the legitimacy of fundamentally different sources of values. For the purposes of this Article, I define deistic philosophies to include a wide array of belief systems founded in some form of theology, including the existence of a divine or superior being as the legitimate source of ethical rules and norms. I define an existentialist philosophy as one which places responsibility upon the self rather than another entity as the ultimate source of values.

58. What I am labelling neoclassical contractual ethics recognizes the occasional need for coerciveness of law, but favors the limitation of codification to instances of widespread, virtually universal assent regarding the appropriate resolution of an ethical question.

59. To the extent that neoclassical consensus is self-immolating, it becomes relational in character. A relational agreement is open to total alteration or revision in the event that underlying assumptions and circumstances render change the best mechanism for optimizing the substantive quality of the contract. For a discussion of the manner in which relational conceptions of contract surpass neoclassicism in receptiveness to modification, see Robert E. Scott, Conflict and Cooperation in Long-Term Contracts, 75 Cal. L. Rev. 2005, 2030 (1987).

60. Deist religions encompass "a God who rule[s] through law, ... seen as the inexorable and uniform law of nature," Henry F. May, The Enlightenment in America 122 (1976). Deist and natural law theories, discussed infra Part III, are compatible.

61. Under this definition, I limit my analysis to atheistic or nontheistic philosophies. Atheistic philosophies deny the existence of a higher being; nontheistic philosophies view the existence of a higher being as irrelevant to the resolution of ethical problems and the development of ethical systems. In contrast with deistic approaches, it is unimportant to distinguish whether an existentialist philosophy denies the existence of a god or merely discounts its significance in the realm of ethics.
Religious formulations of ethics often include codes or laws, and under the preceding definition I focus my analysis by labelling as deistic only those systems which attempt to codify morality. Theological canonization of morality characterizes many religious systems, Judeo-Christian law being the most prevalent in and easily accessible to Western cultures. Beyond the bounds of identifiable Biblical laws, parables and object lessons provide textual fodder for the development of ethical reasoning. Reader reaction to sacred passages can and does run the gamut from identification of universal laws to the recognition of a personally serving and personally biased interpretation of laws and parables.

Deistic social systems that are rigid in their insistence on compliance with centrally developed interpretations tend to be legalistic, mandating the reading of actual theological rules literally and converting parables into other rules. This inflexible form of deistic ethics is also a degraded form because the centralized source of interpretive authority seeks to and does apply coercive measures to supplant the exercise of individual evaluative capacity with prefabricated, nonnegotiable doctrine. Deistic models that permit or encourage individual interpretation of text are far less coercive than their fundamentalist cognates, and as the degree of receptivity to interpretation increases, the degree of coerciveness regarding both canons and parables is diminished. The least coercive interpretive stance is that which views the relevant religious book as text rather than as moral commandment. While the context of the text in such instances is undoubtedly religious, the application is essentially existentialist because the reader is charged with complete custody of the processes of evaluation and moral judgment.

In this sense, existentialist perspectives do not necessarily discredit external sources of normative reasoning; rather, they limit the sources to the role of persuasion rather than force. The outcome of free persuasion in an open marketplace of ideas, coupled with free choice in the adoption of behaviors, comprise a dialectic necessary if what we term ethical activity is to be

62. Approaches that are theologically grounded but entirely devoid of moral codification are rare, but to the extent that they might exist, they are a form of existentialism under my definition. Since the deity under such systems provides no ethical code, the deity is discounted from the ethical process, and we must conclude that it serves extra-ethical functions apart from the canonization of morality.

63. E.g., Exodus 20:1-17 (God delivers the Ten Commandments to Moses); Deuteronomy 12:1-26:19 (the exposition of the law).

64. The phrases "personally serving" and "personally biased" here are not meant to be especially derogatory. Rather, they refer to a belief that textuality is contingent and an understanding that even good faith efforts to derive ethical values from texts is susceptible to the interactive process by which reading invariably incorporates subjective interpretation.

65. For example, fundamentalist Christians may condemn homosexual behavior as objectively immoral and cite parables or stories rather than commandments in defense of universal, legalistic enforcement of their moral beliefs.
imbued with a valuative aspect. Along these lines of reasoning, Hazel Barnes observes that ethics has little to do with "conformity with God's judgment or the opinions of other men." Rather, "[t]he choice to be ethical as such involves the bare idea of the inner demand for justification as a self-imposed necessary relation between actions and judgments by and within the same individual." Thus, models which demand compliance with an exoteric set of standards cannot be construed as ethical models because they lack the fundamental ethical components of personal judgment and assessment.

More explicitly, the divestment of individual responsibility for any decisions taken is viewed by pure forms of existentialism as evincing bad faith, and therefore as fundamentally at odds with the conception of the ethical. Authenticity is achieved through the acceptance of ultimate responsibility for the creation of meaning in all aspects of life, but perhaps none more crucial than the area of moral meaning. It is in this sense that Albert Camus ties moral philosophy inextricably with what he calls "metaphysical rebellion," conveying a sense that thoughtless conformity to sources of ethical domination is in reality an abdication of the good faith search for a morality. In the breach of good faith morality we are left with bare compliance with law. The restoration of good faith, consisting of the creation of fundamental individual evaluative responsibility, is the only existentially authentic version of an ethics.

D. Behavioral versus Fulfillment Models of Psychology

Behavioral psychology abounds in the language of legalistic ethics. The phrase "learning theory," with which behavioral theory is essentially synonymous, emphasizes that appropriate behavior is best determined by the
application of correct responses to various situations, responses that are taught by a relevant external authority. Proponents speak of the learning process in terms of intervention, suggesting the application of an extrinsically derived treatment, and of a concomitant performance and response, implying that the intervention or treatment is evaluated based on conformity to the predetermined goals of the outside source of authority.

Under the behavioral paradigm, learning occurs through the creation of a stimulus-response bond which is strengthened by reinforcement. Reinforcement using rewards valued by the individual increases the likelihood that the rewarded operant behavior will be repeated in the future. The source of authority who has control over the dispensation of rewards is able to use them as an instrumentality for the engineering of behavior. If the ends sought are labelled "socially acceptable or desirable behaviors," then the behavior modification program that increases the behaviors is elevated to the status of an effective ethical system.

An ethical system derived from behavioralism cannot avoid being legalistic because the external administration of rewards must come from a source of authority. The social engineer does not provide a code of laws accompanied by legally administered sanctions. Rather, he establishes a code of desired behaviors to be enforced by technically nonlegal but nonetheless legalistic sanctions. These sanctions have an effect virtually identical to that of the code of law. The source of externally administered rewards and punishments makes little difference to the person who is their object.

Thus, while a behavioralist system can increase the occurrence of socially desirable behavior, it cannot do so without the use of ultimately legalistic tools for encouraging compliance. Such a system should be called what it truly is—a coercive body of laws imposed by whoever has the power and authority to issue the sanctions involved. Because this system molds behavior through the application of treatments to an object, it cannot seriously be considered a system of ethics. An object is not accorded the respect and autonomy necessary to make meaningful ethical decisions. It is not surprising that Skinner's classic defense of behavioral psychology as a system of ethics

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74. For a discussion of classic behavioralist theory of psychology applying these basic precepts, see, for example, CLARK L. HULL, PRINCIPLES OF BEHAVIOR (Richard M. Elliot ed., 1943); Clark L. Hull, The Place of Innate Individual and Species Differences in a Natural Science Theory of Behavior, 52 PSYCH. REV. 55 (1945); Kenneth W. Spence, The Postulates and Methods of "Behaviorism," 55 PSYCH. REV. 67 (1948); B.F. Skinner, Are Theories of Learning Necessary?, 57 PSYCH. REV. 193 (1950).

75. See B.F. SKINNER, WALDEN TWO (1948) (using behavioral engineering to create a fictional utopian society). Skinner suggests that psychological management through positive reinforcement can result in more desirable behavior and, indirectly, a more ethically desirable society.

76. Both laws legitimated by correct systematic promulgation and operant conditioning are implemented by utilization of the force of a hierarchy of power. The dynamics of reward and punishment under law and behavior modification are philosophically indistinguishable.
justifyes itself as being "beyond freedom and dignity." Yet while codes of law and methods of social engineering can dispense with freedom and dignity, a system of ethics cannot.

Fulfillment models of psychology inhabit the territory diametric to the behavioral approach just examined. Fulfillment models emphasize the development of human potential, including moral development. In their efforts toward self-actualization, humans strive to enhance the quality of their own lives (which economists would describe as selfish indulgence of individual utility preference functions) and of others' lives (which efforts comprise the ethical, paradoxically selfless aspect of self-actualization). Carl Rogers observes that the process of self-actualization requires a self-concept as well as the need for positive self-regard. Unlike the behavioral models that define success solely in terms of the incidence of desired actions, Rogers's approach is predicated upon the continued, volitional growth of an inner self.

Abraham Maslow has identified a similar tendency toward self-actualization as the process of realizing inner human potential. Self-actualization represents for Maslow the final, ultimate stage in human development, one following a series of stages that represent physical and psychological survival. Maslow's approach is similar to Rogers's in its assumption that the highest level of human functioning, which is humanistic in its transcendence beyond purely selfish and self-centered motives, can occur only upon a foundation of trust and security in the self. A person's spiritual or altruistic level of thoughts and actions is built on a solid belief that one's physical safety is secure and that one's judgment is sound. The highest realm of human action—if not the spiritual, then certainly the ethical—is inseparable from the process of individual human development.

80. Carl Rogers, A Theory of Therapy, Personality, and Interpersonal Relationships, as Developed in the Client-Centered Framework, in 3 Psychology: A Study of Science 185, 222-23 (Sigmund Koch ed., 1959).
81. Id.
83. For a good discussion of these stages, see Salvatore R. Maddi, Personality Theories: A Comparative Analysis 93-102 (3d ed. 1976).
84. See id. at 79-92.
85. At this level, psychologists are joined by political philosophers who cast an ethical veil over the question of human fulfillment. Roberto Unger, for example, creates a categorical imperative for individuals to respect one another's transcendent natures. See Roberto M. Unger, Knowledge and Politics 191-235 (1975). Drucilla Cornell aptly suggests that Unger's philosophy is "a powerful, passionate reminder that if we are locked in an iron cage, it is at least in part a cage of our making." Drucilla Cornell, Beyond Tragedy and Complacency, 81
The work of Lawrence Kohlberg clarifies the nexus between fulfillment theories of psychology and developmental theories of morality. In his "stages of moral development," Kohlberg suggests that humans evince varying levels of moral maturity. Furthermore, these levels are a function of the sources to which they attribute the moral nature of action. During the preconventional stage of moral maturity, the moral nature of behavior is a function of the individual's experience with rewards and punishments. Preconventional morality formulates concepts of right and wrong based on externally induced consequences. Similarly, behavioral intervention seeks to eradicate undesirable behavior and elicit desirable behavior through the process of operant reinforcement. The behavioral approach to a moral world is thus aptly regarded, from the standpoint of human development, as the lowest form of moral reasoning.

The second level of moral development is the conventional level, at which consequences for individual actions are replaced by a more conceptual understanding of citizenship and acceptable behavior as the sources of moral identity. Kohlberg identifies conformity to legal, religious, and social codes as the foundation of moral reasoning during the conventional stage.

The highest level of moral maturity occurs at the post-conventional stage. At this level, values are determined independent of either immediate or abstract sources of authority. Post-conventional morality relies on individual selection and application of ethical principles in the solution of ethical problems. Post-conventional reasoning is supported by openness to a diversity of experience rather than strict curtailment under a mold of law and order.

Nw. U. L. Rev. 693, 693 (1987). While self-actualization is invariably affected by forces that include the learning prescribed by behavioralists, ethics becomes individualized through the human potential for responsible, autonomous action within the bounds of unavoidable, extrinsically imposed limitations.


88. Kohlberg et al., supra note 87.
89. Id.
90. Id.
91. Id.
92. Id. Kohlberg's post-conventional stage entails the personal affirmation and recognition of universal principles of justice. While his reference to universality evokes a potentially extrinsic source of truth, Kohlberg's primary emphasis is on individual development and is essentially noncoercive.

While primarily a theory of human development, Kohlberg's model incorporates the essential elements of fulfillment theories: maturity is a product of self-actualization and inevitably involves a movement from integration to differentiation. The implication is that maturity entails a shift from reliance on approval and disapproval of others to reliance on esteem of and eventually transcendence of the self. This is consistent with Maslow's conception of self-actualization, in which fulfillment of the need for love and esteem from others is followed by the hierarchically superior stage of fulfilling self-esteem needs and, finally, self-actualization.

Behavioral and fulfillment models from psychology, together with their perspectives on the question of morality, differ in an essential way. While behavioral models are legalistic in their effort to improve the quality of human behavior through a system of rewards and punishments, fulfillment models are ultimately nonlegalistic in their progression from low-level conformity to authority to a higher level of independent and individual responsibility and personal assessment. The behavioral model may be laudable for the improvement of net "good" behavior, however defined, or despicable from the viewpoint of the freedom and dignity beyond which Skinner claims to have progressed, depending on the critic's perspective. Benevolent or evil, applied behavioralism is a system of law, not ethics. It is a system of law because it reduces decisions to the choice between compliance and noncompliance with the forces of an external authority. For this reason it is aptly identified in Kohlberg's scheme as the lowest form of ethics (or more accurately, no ethics at all, but the system of compulsion necessarily applied to children before they are able to participate in a meaningful ethical system). In describing the movement away from authority and toward autonomous reasoning, Kohlberg captures the fundamental distinction between legalistic and nonlegalistic conceptions of ethics: the former are compulsory, or at best manipulative, and the latter are voluntary and occur within an arena of unrestricted choice.

E. Canonization Versus Contingency of Values

Questions of right and wrong and of leading a good life have always played a central role in both literature and literary theory and analysis.

94. KOHLBERG ET AL., supra note 87. The concepts of integration and differentiation are addressed by the psychologist Otto Rank, who defines integration in terms of the social drive and differentiation in terms of the drive toward independence and the creation of a distinct character beyond the socially defined identity. For a discussion of Rank's theory, see Otto RANK, WILL THERAPY AND TRUTH AND REALITY (Jesse Taft trans., 1945).
95. KOHLBERG ET AL., supra note 87; see also Maslow, supra note 82.
96. KOHLBERG ET AL., supra note 87.
97. Id.
Legalistic interpretations of literary values are characteristic of proponents of a canon of superior works. The veneration of an ostensibly incomparable body of literature tends to effect a dynamic of moral compulsion, either explicit or latent, particularly during the socializing process of formal education. Nonlegalistic interpretations regard literary values as ultimately contingent. In their ideal form, literary values are noncoercive.

Proponents of a received literary canon of classic and transcendent proportions contend that eternal truths are contained in the works described as being timeless. They suggest that a work of classical literature derives its exalted status from the universal character of the principles and truths contained therein. Law, like literature, is seen within the canonical perspective as containing a core of enduring principles that purportedly capture the wisdom of the ages.

Modern supporters of the canon generally share two unifying beliefs: that the classical texts are a crucial vessel for the communication of culture.

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99. The sociologist Talcott Parsons defines socialization as the process of internalization of values. See Jonathan H. Turner, The Structure of Sociological Theory 67 (4th ed. 1986). The socialization that occurs through the recognition of and teaching of a canon is exacerbated by the insularity of the collection of texts taught. Because the canon is generally construed as either closed or evolving at a very slow speed, it is naturally conservative of a received and limited set of values.

100. The concept of "contingency of value" is borrowed from Barbara Herrnstein Smith. Smith suggests that the value of a text is "radically relative" and therefore "constantly variable"—in other words, a product of context. Barbara H. Smith, Contingencies of Value: Alternative Perspectives for Critical Theory 11 (1988).

101. The idea of a literary canon dates at least as far back as ancient Egypt in the third century B.C., when scholars in the library in Alexandria not only collected and organized works of literature, but also established standards and guidelines listing the best of those works. For a discussion of the history of canon development, see George A. Kennedy, Classics and Canons, in The Politics of Liberal Education 223, 225 (Darryl J. Gless & Barbara H. Smith eds., 1992).

102. Canonical literary perspectives remained relatively uncontested well into the twentieth century, and informed the critical works of Samuel Johnson, Matthew Arnold, William Hazlitt, and Lionel Trilling.

103. See Richard A. Posner, Law and Literature: A Misunderstood Relation 20 (1988) (noting in a passing comment that "[l]awyers, judges, and law professors . . . [decide] which of the hundreds of thousands of reported cases shall be admitted to the canon of 'leading' cases, the others being largely forgotten").

104. Supporters of the canon have tended to be journalists or academics writing in the journalistic tradition of the exposé, while the contingency approaches they attack have been developed within the academic literature. For detailed exposition of the arguments in support of a canon, see infra notes 106-07. See also Dinesh D'Souza, Illiberal Education: The Politics of Race and Sex on Campus (1991); Roger Kimball, Tenured Radicals: How Politics Has Corrupted Our Higher Education (1990); Page Smith, Killing the Spirit: Higher Education in America (1990); Charles J. Sykes, ProfsCam: Professors and the Demise of Higher Education (1988).

105. I refer to "the canon" rather than "a canon" to reflect the notion, central to canonical belief, that a particular collection of texts is inherently and uncontestably superior, nearly to the point of elevation to mystical status. In this regard, canon-based systems of ethics are akin to natural law theories which purport to derive their authority from some order higher than mere human preference or evaluation.
and its values,106 and that the decline in respect for the canon is associated with an erosion of values in society.107 Because canonical value systems are formally transmitted primarily through the process of education, the recent contest over the canon has occurred in the arena of the academy.108 Those who support a version of the canon comprising Western classics believe that fundamental values have accrued within that canon, subject to the rigorous critical scrutiny109 of the best minds over an impressive span of time.110 Their belief in the canon often approaches elevation of a collection of works to the level of the sacred, so that the content therein may be analogous to some form of natural law within a moral sphere. The exclusivity of the canon is controversial because of the role it has traditionally played in the inculcation of classically liberal values. This process is coercive by virtue of its supporters' insistence that the canon is the one right answer recommended for universal application.111

The contingency approach to the analysis of texts112 presumes that ostensibly transcendent, natural, or universal values reflect the social construction

106. See, e.g., E.D. HIRSCH, JR., CULTURAL LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW (1987) (contending that Americans share a national culture, and that a basic fund of knowledge is necessary for meaningful participation therein).
108. Probably the most highly publicized battle took place at Stanford University, and concerned curricular proposals for the modification of the Western Culture requirement. Critics of the movement to increase multicultural representation in the curriculum believed that fundamental values of the old Western Culture requirement were being supplanted by special interest topics related to the political agenda of particular groups. See Richard Bernstein, In Dispute on Bias, Stanford is Likely to Alter Western Culture Program, N.Y. TIMES, Jan. 19, 1988, at A12.
109. While canonists defend their lists of classics as proven by this scrutiny over time, they seem to imply that critical analysis in the present is somehow inferior, so that contemporary scrutiny suggestive of canonical changes is considered unacceptable.
110. See, e.g., Matthew Arnold, The Function of Criticism at the Present Time, in CRITICAL THEORY SINCE PLATO 588 (Hazel Adams ed., 1971) (stating that literary criticism should concern itself with knowing "the best that is known and thought in the world").
111. Canon supporters justifiably attack some multiculturalists who also claim to have the one right answer, and who also would like to teach their answer with such universality as to approach coercive socialization. While individuals on both the canonical and the contingency side of values may be susceptible to a human desire, particularly pronounced among professors, to win converts, the approaches themselves are not equally conducive to coerciveness. Whereas the insistence of canonists upon the moral superiority of one canon is, if accepted, an intellectual ground for exclusion of other perspectives and resultant legalistic coercion within the realm of morality, contingent approaches by definition admit to cultural and other relativity. While individuals within a noncanonical value system may act coercively, the system respects a variety of culturally determined perspectives. When individuals communicate conflicting contingent viewpoints, even with Machiavellian coerciveness, in a system that ultimately accepts contingency, the resulting variety of perspectives inhibits the development of a universal army of canonists, all teaching one dogma.
112. The phrase "text" is used here to denote the similarity between law and literature.
Contingency approaches often fall within the rubric of critical legal studies (if the text is the law) or deconstruction (if the text is literature). Because critical legal studies and deconstruction both embody the same spirit of contingency, they are considered together in the discussion that follows.

Stephen Brainerd depicts rationality in light of contingency-based approaches, stating:

Critical Legal Studies (CLS) has effectively drawn all forms of discourse that claim the support of a single, a prioristic "rationality" into an uncomfortable light—a light that reveals the pale and confused concept of reason squirming to crawl back into the well shaded crevasses of "the way things should be." Stated less colorfully, assertions of objective truth or reality are invariably subjective constructions parading, either in bad faith or in misinformed good faith, as objectivity.

Contingency approaches to values reject the purported objectivity of the canon or of any canon as impossible. Interpretive communities, even if they strain most earnestly toward impartiality in the rational deduction or induction of truth, impart their own biases, cultural presumptions, and economic and political interests into the process. The phenomenon is exacerbated as self-motivated individuals in positions of power frequently discard a mandate of good faith in the intellectual rendering of ostensibly objective truth. The consecration of the canon must be suspect if (a) intended human impartiality is imperfect, or (b) perfect impartiality is subject to manipulative, selective distortion by those who can and will put forth conceptions of truth that protect vested rights and interests.

Whereas canonical accounts of moral behavior are legalistic in proclaiming the enforceable righteousness of their own universal application, contingency relevant to a discussion of how they affect ethical theory. Law and literature are both viewed from the canonical perspective as normative texts of enduring value in informing us of the nature of a virtuous life.

113. For a discussion of modern literary criticism within this vein, see René Wellek & Austin Warren, Theory of Literature (3d ed. 1977).


115. For a discussion of the effects of interpretive communities, see Stanley Fish, Is There a Text in This Class? 14 (1980).

116. The failure of intended human rationality is likely to result in imperfect intended impartiality. For a discussion explaining the nature of bounded human rationality, see James G. March & Herbert A. Simon, Organizations 136-71, 203-10 (1958).

117. Stanley Fish observes in this regard that canonical ethicists "are not the ethicists, in the sense of being the sole proprietors of a moral vision in a world of shameless relativists; rather, they are the purveyors of a particular moral vision that must make its way in the face of competition from other moral visions that come attached to texts no less inherently worthy than [others]." Stanley Fish, The Common Touch, Or, One Size Fits All, in The Politics of Liberal Education, supra note 101, at 241, 254 (emphasis in original).
approaches are regarded by canonists as dangerous and lawless not only in their failure to take a stand, but, more to the point, in their failure to take the stand.

Critical legal studies has been discussed in terms of "guerilla warfare," and deconstruction of literary texts is viewed by detractors as essentially nihilistic. Yet the refusal to accept one perfect embodiment of truth should not be confused with lawlessness, but rather recognized as the acknowledgment that law and ethics operate in fundamentally different, if sometimes overlapping, realms. Ethics can be nonlegalistic without being either lawless or nihilistic, if one recognizes the different conditions under which law and ethics operate. While laws may bring the unwelcome authoritative enforcement of particular behaviors upon a protesting participant of society, ethics is at heart antithetic to the ideas of force and enforcement. The notion of one fixed canon cannot be derived in a vacuum, however eager its proponents are to imply its sanctity to the point of suggesting its immaculate conception. So long as human beings with human interests and human weaknesses champion the cause of one canon, the implication of human ethical coercion is inescapable. Ironically, supporters of a Euro-American canon, who often claim individual liberty and freedom among its most inviolable values, defend the authoritarian incultation of morals elevated beyond the reach of an open marketplace of ideas.

F. Legal Positivism Versus Legal Realism

Two central currents in jurisprudence—legal positivism and legal realism—have long occupied opposing ground regarding the relationship between normative philosophy and the law. Positivist perspectives regard the law as a mechanism of rule that is largely self-justifying by virtue of the power

119. See, e.g., Charles L. Griswold, Deconstruction, the Nazis and Paul de Man, N.Y. Rev. Books, Oct. 12, 1989, at 69 (stating that deconstruction "renders theoretically unintelligible basic moral terms such as good and evil").
120. Thus Gerald Graff's edict, "Teach the Conflicts," suggests that the truest means of allowing students to assess arguments for and against a canon is to expose them to all sides of the debate. See Gerald Graff, Teach the Conflicts, in The Politics of Liberal Education, supra note 101, at 57. Graff's philosophy comprises a good faith effort to implement the ideals of a free marketplace of ideas under controversial conditions. Proponents of the canon, virtually always theoretical defenders of the classical concepts of free markets and free speech, ironically recommend the severe limitation of discourse through the tight binding of an accepted canon of textual material to be examined.
121. For a detailed discussion of these two perspectives, see Steven R. Salbu, Differentiated Perspectives on Insider Trading, 66 St. John's L. Rev. 373 (1992).
behind it. Realist viewpoints are more analytical and critical, and focus on understanding the political and economic interests that can become ingredients in the creation and development of laws.

For the purposes of this Article, the essential distinction between positivist and realist paradigms consists of the critical or analytical position taken by each. For the positivist, command, authority, and rule are the components of law. This pragmatic emphasis creates a nonanalytical, noncritical mindset that is legalistic in stressing the compulsory nature of jurisprudence. For the realist, command and authority should be continually and critically evaluated, to understand the sources and biases of the rules that govern us. It is nonlegalistic in its emphasis on the nature and derivation of laws rather than on the edict of laws.

Differences between positivist and realist assessments of law affect the way one understands ethical processes. In Part I, I argued that there are no real codes of ethics. One knows that sets of rules exist that are both labelled and widely accepted as ethical codes. However, observations in Part I lead to the conclusion that such codes, like all codes, are of law and not of ethics. Positivist and realist approaches to understanding codes can help illuminate important differences between these two positions.

122. The positivist conception affirms the legitimacy of law beyond the realm of ethical justification. The positivist separates the spheres of law and ethics by insisting that the former can exist independently of the latter. This bifurcation of law and ethics is not identical to the separation that I am recommending in this Article. Whereas my contention is that ethics should be envisioned as transcending mere force of code or compromise via contract, the positivists contend the reverse—that law transcends the individualized rendering of ethical conclusions. While these viewpoints are potentially at odds with each other, they address separate questions: the effect laws should have on defining ethics, and the effects ethics should have on defining and complying with laws.

123. See Salbu, supra note 121. Salbu observes that:

Where the positivist perceives the law to be a given according to an extant command or rule, the realist examines actual relationships and behavior to determine the underlying structural and systemic dynamics, which are not presumed to be value neutral. The critical matrix that such examination places over the unquestioning positivism it seeks to supplant entails both the scrutiny of the laws themselves and the examination of the courts and their participants.

Id. at 379.

124. Lon Fuller has described the positivist position as treating the law as "a manifested fact of social authority or power, to be studied for what it is and does, and not for what it is trying to do or become." LON FULLER, THE MORALITY OF LAW 145 (rev. ed. 1969).

125. Positivist conceptions are generally compatible with natural law and canonical viewpoints, whereas realist approaches are consistent with the analytical character of relativist and critical viewpoints. Where the positivists settle upon one received set of inviolable values, realism entails the continuous process of reassessment of assumptions, manifest and latent dynamics, and resulting effects.

126. What follows are not the renderings of existing positivist and realist assessments of codes of ethics. Rather, they are my own renditions of the ways in which one might typically evaluate codes of ethics from each paradigm, conveyed to the reader for purposes of illustration.
For the positivist, any code of law is understood in terms of command and legitimacy of command. Laws created by the empowered sovereign derive their validity from the very nature of the idea of sovereignty. Applied to the codification of ethics, canons for professionals have the force of compulsion because practitioners voluntarily submit themselves to the force of rule within the profession. Likewise, the positivist would limit assessment of a corporate code of ethics to questions of legitimacy of the governance structure: provided that all members of the organization participate therein under mutually accepted contract, the bureaucratic hierarchy is the legitimate source of internal sovereignty. The codes of ethics formulated within professions and organizations are, like any codes of law, an amalgamation of norms made formal by a valid source of command.

A realist would evaluate any legalistic formulation of ethics critically, going beneath the surface or the appearance of the law's intentions and effects, seeking to identify latent dynamics in the formulation of the code. Inherent in this approach is an essential departure from the positivist view—for the realist, the virtue of law is not presumed to follow from the legitimacy of the source of law. The realist recognizes the motives and opportunities available to persons in power to establish self-serving laws, laws that resist change and maintain the existing order. Politically motivated, these laws may be viewed by those engaged in critical analysis as morally bad laws. If one starts from the position that areas of ethical controversy exist, and that those who create professional or organizational policy may have an interest in the manner in which such controversy may reach ultimate resolution, one must conclude that definitive renderings of the particular shape and structure of ethics are vulnerable to corruption. The realist recognizes the motives and opportunities for the coercive process to taint the ethical character of substantive laws.

The positivist accepts a legalistic conception of ethics, along with the inevitable establishment of norms, rules, and standards by legitimate sources of authority. Yet, once legislated, the ethics that result are so unquestioned as to be indistinguishable from value-free laws that comprise pure policy.

127. This includes those codes that are labelled codes of ethics but that nonetheless comprise codes of law because their contents are mandatory rather than precatory.
128. See generally John Austin, The Province of Jurisprudence Determined (1861).
130. For a classic discussion of the ways in which the realist views the law, see O.W. Holmes, The Path of Law, 10 Harv. L. Rev. 457 (1897) (favoring critical analysis which breaks down unquestioning compliance with the law by attempting to demystify it).
131. In this vein, realism and concepts of deconstruction, as discussed infra Part III, are closely related. Legal codes and their judicial interpretation are easily enlisted as partisan tools for gaining resources or power, given the indeterminacy of language.
132. “Pure policy” is an ideal type. It refers to an approach to the limit at which decisions have no distinction based on value, and must be made simply because a rule is necessary to create order.
Rules requiring physicians to divulge exceptional types of otherwise confidential information\textsuperscript{133} are no different under this scheme than rules that require driving on the right rather than the left side of the road.

The realist is more likely to recognize pernicious effects of the process of coercion. From a realist perspective, the force of law is always in question. Because there can be no presumed objectivity of edict, there can be no relinquishment of corruption when controversial issues of morality are converted into laws. Legalistic forms of ethics demand conformity to authoritative standards in hard cases, those cases in which the relinquishment of autonomous decision making is most painful. To make matters worse, the process by which the standards are developed is vulnerable to the intervention of authoritative self-interest. Under realist assumptions, legislated codes of ethics\textsuperscript{134} are flawed in two ways: (1) they force controversial moral stances upon those who contest the validity of those stances, and (2) they formulate moral policy under conditions in which it is possible and likely that good faith will sometimes be abdicated in furtherance of self-interest.

III. CONFORMITY, CONSENSUS, AND CONFLICT: A CONCEPTUAL FRAMEWORK FOR UNDERSTANDING THE APPROPRIATE SPHERE FOR ETHICAL ANALYSIS

In Part II, I compared six dualities, examining the ways in which scholars conceptualize ethics from different disciplinary bases. In each instance, the extreme idealized types comprise a conformity-oriented view\textsuperscript{135} and a conflict-oriented view\textsuperscript{136} of the fundamental nature of ethics, as designated below:

<table>
<thead>
<tr>
<th>Conformity-Oriented View</th>
<th>Conflict-Oriented View</th>
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<td>Relativism</td>
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<td>Classical Approaches</td>
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<td>Legal Positivism</td>
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\textsuperscript{133} See, e.g., Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (1976).

\textsuperscript{134} Here, as throughout this analysis, my concept of ethical spheres is limited to those I consider controversial. Realists are less concerned with codification of universally accepted norms than with codification of moral viewpoints regarding which reasonable minds may differ.

\textsuperscript{135} The term “conformity-oriented views” means ethical paradigms that attempt to increase compliance with a received and undisputed set of ethical standards.

\textsuperscript{136} The term “conflict-oriented views” means those paradigms that recognize the possibility of rational divergence in the valuation of moral alternatives, and encourage discourse highlighting conflicts of approach so that individuals can make personal, independent, and informed ethical decisions.
Conformity-oriented models share several characteristics: they acknowledge the existence of an objectively superior choice within the context of an ethical decision, they assume the existence of a human capacity to understand the nature of the superiority and inferiority of ethical choices, and they welcome as part of the implementation of moral behavior the legislation of compliance through the use of rules or norms associated with the rewards and punishments necessary to the execution of law.

Conflict-oriented models can be compared to conformity-oriented models by responding, point by point, to the assumptions contained in the latter. A conflict-oriented model questions the soundness of ethics-via-conformity by concluding that any or all of these assumptions are false. The model may decline to recognize the existence of an objectively superior choice, or it may deny the human capability to ascertain any intrinsic superiority, or it may disavow the ethical nature of enforcing controversial positions through legal or legalistic coercion.

Throughout the discussions of each dichotomy in Part II, I have addressed the particular manner in which each of the couplets can be characterized as essentially conformity-oriented or conflict-oriented, and have suggested that the latter conception is truer to the sense of what ethics should entail than is the former. What remains is to examine why this is so.

To evaluate the merits of conformity and conflict in the realm of ethics, one must focus on what is the essence of moral reasoning. Ethics can be defined in terms of what is "good" or "right," concepts that can further be refined in the nuances of definition. For Aristotle, the good was a function of the realization or achievement of one's function in the world. A good person in the Aristotelian sense is a good mother, or banker, or teacher, or doctor, if one defines good as effective. Aristotle also spoke of virtues, a set of attributes characteristic of the good—courage, temperance, liberality, magnificence, pride, good temper, friendliness, truthfulness, witlessness, shame, and justice. Because these virtues are uncontroversial, and because Aristotle did not suggest which virtues applied when virtues were in conflict, Aristotelian ethics are of limited value when applied to hard ethical situations.

137. Legal coercion refers to compulsion under the laws of the state; legalistic coercion refers to informal means of pressuring conformity through the application of rewards and punishments which operate to compel a particular action in a manner analogous to the enforcement of law. Behavioralism, for example, is viewed here as legalistic because the application of rewards and punishments extrinsically models behavior in the same way that threat of negative legal sanctions and promise of positive ones exacts compliance under actual laws.

138. ARISTOTLE, THE ETHICS OF ARISTOTLE 47 (J.A.K. Thompson trans., 1953). Aristotle's rendering of the good life suggests that because all things have a purpose, the good is furthered by striving for excellence in the achievement of one's functions in life.

139. For Aristotle, virtues are attributes, the attainment of which supports one's excellence in functioning for the good of society. See id. at 52-60.
Conformity-oriented models of ethics arise from Aristotle's variety of thinking, and are defined in terms of role fulfillment. To be good or to do right is to behave in a manner prescribed. The notion of a role necessitates an element of prescription, and the idea of prescription can only exist as a function of some source. While roles that are internalized can be viewed as self-prescribed, the norms which underlie prescriptive roles are fundamentally social constructs. The conception of ethics based on role fulfillment is an impoverished and inferior one for several reasons. Most crucially, role-driven ethics negates the possibility and advantage of evaluating the underlying roles themselves. For example, a good lawyer is one who practices the received art and science of law effectively. The execution is the key, leaving the deeper question unanswered—namely, whether the activities of an effective lawyer are good ones or bad ones. In other words, role-effectiveness models of ethics provide no mechanism for truly evaluating the basic activities that occur within a society.

In the context of defining ethics, consensus in the form of a social contract can be viewed as the evolutionary link between Aristotelian role-conceptions and modern indeterminate models. Because the rigidity of static role-compliance renderings of ethics denies the option of continuous evaluation of premises underlying the roles, consensus developed as a means of fashioning changes in the rules that form the basis of role compliance. Contract, as a means of infusing the opportunity to engage in consensual adjustment of roles, arose because the evaluative process of ever adjusting our sense of good and right behavior is absolutely fundamental to ethics. Conformity to expectations can never comprise the whole of human ethics precisely because this drive to evaluate is so crucial a component of the ethical process. Legalistic exaction of compliance occurs all the time, and is central to the very nature of law. Legalistic models of ethics, however, defy so basically the elective nature and evaluatory function of morality as to be disqualified from the realm.

The development of contractual mechanisms for consensus is a bridge that leads directly to the conceptions of virtue from which conflict-oriented systems of ethics derive their power. As humans move from goodness-as-obedience to goodness-negotiated-under-contract, we notice the landscape beyond, in which goodness is defined independently through processes of individual synthesis, analysis, and assessment of the merits of arguments arising from human discourse. Where conformity-oriented ethics are ethics by monologue, consensus-oriented ethics are derived from a dialogue, and

141. Id.
142. Id. at 189.
143. See supra notes 57-58 and accompanying text.
conflict-oriented ethics are products of all possible strands of human conversation. Expectations of conformity as a source of ethics thereby yield the most restrictive and dehumanizing versions of morality, whereas expectations of conflict and debate create the most enabling and empowering renditions. The trouble with law-based conceptions of ethics is their constriction relative to the basic evaluative potential of human beings in a free society.

CONCLUSION

Our attempts to establish definitive codes or principles of ethics are usually made in good faith, yet they are misguided for three reasons. First, they are premised upon a conception of ethics that is ultimately reduced to some variety of behavior or compliance. This is a low conception of ethics compared to its alternative, the expectation of continuous individual thought, analysis, and deliberation. It is likewise a dangerous conception of ethics. The replacement of personal authorship with centralized social authorship establishes ethical validation through authority and increases the potential occurrence of mindless behavior. Thus, Reinhold Niebuhr observes the potential within social forms of morality for massive acts of atrocity.

Second, codified versions of ethics, such as professional and corporate codes, inadvertently suggest that because the code has considered the important moral questions, compliance with the code is a sufficient fulfillment of ethical consideration. So-called codes of ethics that actually comprise the rules or laws of a profession or an organization can thereby come to replace any impetus to consider the ethical issues that would otherwise arise outside their limited purview. The misnomer of labelling law as ethics thereby degrades and devalues the importance and expectation of carefully considering what are often difficult and daunting questions. The codification intended to establish minimum requirements of performance can instead create a de facto maximum as participants in the system equate ethical action and compliance with a very basic code of rules.

144. See supra notes 86-92 and accompanying text.
145. Thus, Hannah Arendt describes the atrocities of Nazi Germany in terms of the oppressive control of totalitarian ethics. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (rev. & enlarged ed. 1963).
146. REINHOLD NIEBUHR, MORAL MAN AND IMORAL SOCIETY 117 (1932).
147. See MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962). The situation in which compliance with the law is equated with fulfillment of ethical obligations is consistent with Milton Friedman's philosophy that business's social obligation is profit maximization. That argument suggests that once a business organization assures itself that it is following the basic rules of the game, its ethical obligation is to maximize the wealth of its shareholders. While functioning in this way might fulfill Aristotle's ethical ideal of best fulfilling one's social role, it forecloses consideration of right and wrong, equating legal compliance with moral fortitude. When one witnesses egregious business practices that occur within the law, one can evaluate the degree to which law-based conceptions of ethics are either functional or dysfunctional.
Third, the equation of compliance with legalistic ethical catalogues is incompatible with the highest order of human dignity and potential. This observation is predicated on assumptions that human dignity is most compatible with maximization of freedom, and that human potential is best exercised under conditions that recognize and permit the employment of free will and self-determination. While public discourse regarding the merits of different approaches is indispensable, the standardization of appropriate ethical answers and attempts to indoctrinate those answers are most inappropriate when they do not infringe on controversial ethical issues.

Where reasonable minds can differ, they should be permitted to do so. Where reasonable minds would agree, we should establish laws and call them laws to effectuate the collective reason. We should remember that they are laws and recognize them as such. In doing so, we leave true ethical issues inviolate, the realm of responsible and ultimately individual analysis and decision.