

## ESSAY

# THE PAST, PRESENT, AND FUTURE OF LEGAL ETHICS: THREE COMMENTS FOR DAVID LUBAN

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David Luban helped invent the field of legal ethics some years ago; *Legal Ethics and Human Dignity* provides an opportunity to assess how it has developed. By way of both homage and critique, I offer three comments on central issues that the book raises: the nature of the moral foundations of lawyers' ethics; the relation of legal and ordinary moral norms in legal ethics decisions; and the relation of ethical norms and organization.

I associate the issue of moral foundations with the past because modern academic discussion of legal ethics began with this focus.<sup>1</sup> The relationship between law and morals is a more recent focus.<sup>2</sup> I predict, and hope, that the organizational focus will become dominant in the future. *Legal Ethics and Human Dignity* reflects this trajectory of preoccupation. The moral foundations discussion briefly resurfaces in the book in an exhausted state. The book brilliantly advances the discussion of law-and-morals in a way that makes it seem as if the subject had been brought to a close. The need for an organizational focus is a central implication of some of the most powerful parts of the book.

### I

#### PAST: IS LAWYERING ABOUT HUMAN DIGNITY?

The master value of Luban's first book, *Lawyers and Justice*, was "justice."<sup>3</sup> For unexplained reasons, *Legal Ethics and Human Dignity* replaces justice with "human dignity."<sup>4</sup> Luban notes that invoking dig-

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<sup>1</sup> See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM RTS. 1 (1975).

<sup>2</sup> See Stephen L. Pepper, *The Lawyer's Amoral Professional Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (1986); David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637 (1986).

<sup>3</sup> See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* xvii–xxvi (1988).

<sup>4</sup> See DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 1–15 (2007) [hereinafter *LEGAL ETHICS AND HUMAN DIGNITY*].

nity has the rhetorical advantage of suggesting an affinity between legal ethics and the increasingly prominent field of international human rights.<sup>5</sup> I wonder if part of the appeal of the change in terms is that moving away from “justice” distances the field from the decreasingly popular idea of social democracy.

The dignity idea does little work in most of the chapters, but it generates confusion wherever it surfaces. A central problem is that the idea, as Luban elaborates it, is in deep tension with Luban’s attachment to Warren Court criminal defense norms. Luban’s effort to reconcile ideal and practice pushes him to desperate contortions.

Luban defines dignity as the opportunity of individuals “to tell their stories” when confronting or invoking state power.<sup>6</sup> Telling one’s story means asserting oneself authentically. This is a plausible interpretation of dignity, but it is difficult to think of an important value less consistent with the established institutions and practices of American law. As Luban attempts to grapple with this problem, the concept is re-shaped to the point where it becomes unrecognizable.

The story a lawyer tells about her client is very often not the client’s story in the sense that Luban’s dignity idea connotes. This divergence is not due simply to the fact that the lawyer edits the story to emphasize the facts that the law makes relevant; it is also a consequence of the incentives the legal process creates to reshape the client’s own understanding into one that is more likely to invoke the sympathy of people with power over the client. Criminal defense lawyers often tell their clients how to dress, groom themselves, and talk. For the client to tell his story is often exactly what lawyers try to avoid.

Thus, in several classic novels—for example, *The Red and the Black*, *The Brothers Karamazov*, and *The Stranger*—lawyers appear as agents of the subversion of dignity in Luban’s sense of the word. Each of these books culminates in a trial scene in which the protagonist is forced to endure the double indignity of having to remain passive while his agent constructs an image of himself that he cannot recognize. These novels focus on the distance between the protagonist’s sense of self and the image other people have of him. The trial is portrayed as the most intense form of this alienation.

This reality might have led Luban to condemn conventional lawyering as inconsistent with his animating ideal. Yet, he does not do so. For Luban, the law vindicates dignity by creating a right for the individual to tell her story, but it imposes no duty to do so.<sup>7</sup> In the civil

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<sup>5</sup> See DAVID LUBAN, *Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It)*, in LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 4, at 65, 67–68 [hereinafter LUBAN, *Upholders of Human Dignity*].

<sup>6</sup> See *id.* at 68–69.

<sup>7</sup> See LUBAN, *Upholders of Human Dignity*, *supra* note 5, at 73.

sphere, the client has a duty to tell some story, but short of outright deception, the story does not have to be the client's own. Luban seems to accept that dramatic re-creation is part of the routine practice of advocacy.<sup>8</sup> However, if dignity is really the core of legal ethics, it is hard to see how he can be so complacent about the self-fictionalizing pressures of the system. As an illustration of the authentic self-assertion that lies at the heart of his conception of dignity, Luban tells an anecdote of a *Bartleby*-like litigant who responds to oppressive cross-examination by shouting a defiant obscenity.<sup>9</sup> But lawyers invariably discourage such gestures, and clients who are inclined to use them usually prefer to trade away such moments of authenticity for the increased likelihood of a favorable outcome.

Luban shrinks away from the radical romantic implications of his view of dignity-as-self-description most clearly when it comes to the criminal defense norms that he has long defended.<sup>10</sup> The privilege against self-incrimination is a right *not* to tell your story, and the prosecutor's high burden of proof, as Luban and most defense lawyers interpret it, implies a right of the defendant to tell a *false* story (either simply by pleading not guilty when the true story involves guilt or, more aggressively, by impeaching truthful witnesses and arguing false inferences).<sup>11</sup> Luban could have retreated here by suggesting that the best rationales for these practices are instrumental—for example, as restraints on abusive official conduct—and conceded that they are exceptions to the dignity interpretation. But apparently, libertarian criminal defense practices are too important to Luban to remit them to justifications outside the core of his theory. So, he is pushed to argue that human dignity requires, in the criminal context, that a defendant be afforded the opportunity not to assert himself or to assert himself falsely.

Luban argues that the criminal sphere is different because prosecution involves state officers in telling a story about the defendant, and the prosecutor's story implies collective moral condemnation of the defendant.<sup>12</sup> The prosecutor's story portrays the defendant in shameful terms. Because shaming is a threat to the defendant's dignity, it must be subjected to the most exacting standards, and allowing

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<sup>8</sup> See *id.* at 73.

<sup>9</sup> *Id.* at 84.

<sup>10</sup> Sentimentality toward libertarian criminal defense practices is Luban's greatest weakness. See David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993). Mine is contentiousness. See William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1707–13 (1993).

<sup>11</sup> See LUBAN, *Upholders of Human Dignity*, *supra* note 5, at 72–73.

<sup>12</sup> *Id.* at 73.

the defendant to tell a false story may be the best way to test the solidity of the prosecution's story.<sup>13</sup>

Note that this argument seems to turn instrumental at the end. The false story (surely a compromise of dignity) is accepted only to insure the accuracy of the prosecution's potentially true counter-story. The only work dignity does is give special weight to the concern about the danger of a false conviction. However, we don't really need dignity to explain why false convictions are bad. Moreover, Luban's idea of dignity seems to be equally threatened by rightful as by wrongful convictions. Both rightful and wrongful convictions restrict the defendant's capacity for self-description, and both tell a shameful counter-story about the defendant. The moral reasons for distinguishing between the two have much more to do with justice and the control of state power than with dignity.

Dignity norms do seem to underpin fundamental legal norms about civility and fair hearing. However, it is not clear that Luban's notion of telling one's story aptly describes the relevant intuition of dignity. For example, the key ingredient of due process is the right to assert one's claims and the reasons for them, but these claims and reasons do not necessarily involve a story about oneself. In addition, dignity values only take us a limited distance in explaining the potential good of law and lawyering. The legal system is fundamentally about conflict and power, and dignity values do not, even in principle, adequately discipline conflict and power. A good legal system has to give ultimate priority to the *true* story, not to whatever story a citizen wants to tell about herself.

## II

### PRESENT: THE TENSION BETWEEN LAW AND MORALS

A longstanding dialectic in legal ethics scholarship concerns the relative primacy of legal norms on the one hand and ordinary moral norms on the other. Should the limits of the lawyer's duty to the client be defined solely in terms of the law, or does ordinary morality, as understood by the lawyer, also impose limits?

In the classic exchange between Stephen Pepper and Luban, Pepper argued for an ethic of liberty bounded only by the law,<sup>14</sup> while Luban defended the claims of ordinary morality as a central component of professional responsibility.<sup>15</sup> In *The Practice of Justice*, I suggested that the problem with the "dominant view"—the "zealous advocacy within the bounds of the law" norm exemplified by Pep-

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<sup>13</sup> *Id.*

<sup>14</sup> See Pepper, *supra* note 2, at 615–19.

<sup>15</sup> See Luban, *supra* note 2, at 637–43.

per—lay less in its exclusion of ordinary morality than in its implausibly narrow and anachronistic conception of law.<sup>16</sup> As I saw it, many of the paradigmatic ethical scenarios were better seen in terms of competing legal values than in terms of a conflict between law and morality, and their correct resolution (on which Luban and I more often than not agree) requires not the triumph of morals over law, but the vindication of more-fundamental over less-fundamental legal values.<sup>17</sup>

For example, Pepper and Luban discussed the case of a wealthy testator who asks a lawyer to draw a will disinheriting his son because the son opposes American intervention in the Nicaraguan civil war.<sup>18</sup> If the law permits the lawyer to carry out the testator's request and the father's use of his wealth to punish his son's political views violates an ordinary moral norm, then the example is properly seen as a conflict between law and morals. For me, however, the most intensely debated issues of professional responsibility were more analogous to the problem of cross-examining the truthful witness. Here the conflict is best seen as between two legal norms: a procedural rule that authorizes impeachment and the rule's underlying purpose to promote accurate fact-finding (which would be frustrated by the invocation of the rule in this case). The question is which legal value has greater weight under the circumstances.

To the extent that both Luban's law-versus-morals and my balancing-of-legal-values characterizations were both semantically permissible, I thought mine rhetorically superior because it emphasized the continuity between the key concerns of legal ethics and the analytical skills that lawyers consider characteristic of legal work. Luban (and others) disagreed, suggesting that only a naïve conception of law could accommodate the range of values and resolutions we both associate with professional responsibility.<sup>19</sup> In the divide between the "legalist" and the "moralist" critics of the dominant view, Luban seemed to be a fairly consistent moralist.

Luban does not take up the law-versus-morals debate explicitly in *Legal Ethics and Human Dignity*, but five essays implicitly bear on it, and overall they suggest a way of putting the controversy to rest. Two pairs of essays re-enact the law-versus-morals dialectic, while deepening understanding of the opposed terms. A fifth essay suggests that it is a mistake to look for a theoretical resolution of the conflict.

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<sup>16</sup> See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 26–52 (1998).

<sup>17</sup> See *id.* at 138–69; see also David Luban, *Reason and Passion in Legal Ethics*, 51 *STAN. L. REV.* 873, 885–88 (1999) (critiquing *The Practice of Justice*).

<sup>18</sup> See Pepper, *supra* note 2, at 618; Luban, *supra* note 2, at 643. The example is drawn from Wasserstrom, *supra* note 1, at 7–8.

<sup>19</sup> See Luban, *supra* note 17, at 873–76.

The first pair of essays considers the jurisprudence of H.L.A. Hart<sup>20</sup> and Lon Fuller.<sup>21</sup> Hart argued for a vision of law as, most basically, constituted authority—authority constituted minimally by operating rules of change, application, and recognition.<sup>22</sup> Fuller insisted that, for authority to be recognized as law, authority needed to be more elaborately constituted.<sup>23</sup> In addition to Hart's operating rules, Fuller's legal authority entailed general values like autonomy and specific ones like generality and prospectivity.<sup>24</sup> Luban endorses Fuller's perspective but extends it to emphasize that the perspective requires and implies an ethic of lawyering.<sup>25</sup> Hart and (to a slightly lesser extent) Fuller were preoccupied with judges, but lawyers have the frontline responsibility for the application of law. A legal system could not operate effectively unless they, as well as judges, took some responsibility for the vindication of (or in Hart's terms, took the "internal point of view"<sup>26</sup> toward) its underlying norms.

Luban's elaboration of Fuller and critique of Hart seem like basic legalist moves that attenuate the law-versus-morals dialectic by insisting that any ethically relevant conception of law must incorporate some moral values. Thus, even an ethic grounded in purely legal obligation has to respect an important range of moral values. Nevertheless, the move toward legalism is a limited one. For Fuller, the moral values inherent in legal norms are basically procedural.<sup>27</sup> Although he has a morally thicker notion of authority than Hart, he still identifies law with constituted authority.

The Hart and Fuller essays complement two other essays that emphasize the limitations of ethics preoccupied with authority. These essays explore the findings of cognitive psychology on moral decisions.<sup>28</sup> Especially pertinent is Luban's discussion of the famous Milgram experiments, which explored the willingness of people to comply with authority norms (the orders of an instructor) where they conflicted with ordinary morality (required the infliction of unjustifiable pain).<sup>29</sup> One could argue about the proper jurisprudential char-

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<sup>20</sup> See DAVID LUBAN, *A Different Nightmare and a Different Dream*, in LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 4, at 131, 131–61.

<sup>21</sup> See DAVID LUBAN, *Natural Law as Professional Ethics: A Reading of Fuller*, in LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 4, at 99, 99–130 [hereinafter LUBAN, *Natural Law*].

<sup>22</sup> See H. L. A. HART, THE CONCEPT OF LAW 89–96 (1961).

<sup>23</sup> See LON L. FULLER, THE MORALITY OF LAW 133–51 (2d ed. 14th prtg. 1969).

<sup>24</sup> See *id.*

<sup>25</sup> See LUBAN, *Natural Law*, *supra* note 21, at 99–130.

<sup>26</sup> HART, *supra* note 22, at 112.

<sup>27</sup> See FULLER, *supra* note 23, at 39.

<sup>28</sup> See DAVID LUBAN, *The Ethics of Wrongful Obedience*, in LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 4, at 237, 237–66 [hereinafter LUBAN, *Wrongful Obedience*]; DAVID LUBAN, *Integrity: Its Causes and Cures*, in LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 4, at 267, 267–97 [hereinafter LUBAN, *Integrity*].

<sup>29</sup> See LUBAN, *Wrongful Obedience*, *supra* note 28, at 239–42.

acterization of the scenario in the Milgram experiments. Perhaps the instructor's orders were illegal in some sense. But such concerns are not important to either Milgram or Luban in these essays. For them, the experiments frame a contest between authority and ordinary morality in circumstances where ordinary morality should be preeminent. Milgram's and Luban's preoccupation is with fortifying ordinary morality against the oppressive encroachment of authority in any guise.

While Luban's Hart/Fuller essays and his experimental psychology essays do not speak directly to each other, the final essay in the book implies an interesting response to the implicit tension between legally constituted authority and ordinary morality. *A Midrash on Rabbi Shaffer and Rabbi Trollope* focuses on Anthony Trollope's novel *Orley Farm*.<sup>30</sup> It is one of the best essays ever written in legal ethics (and, I suspect, law and literature).

Coincidentally, the conflict in *Orley Farm* centers around a scenario that resembles the oppressive testator example discussed in Luban's exchange with Pepper.<sup>31</sup> A rich widower marries a younger woman late in life and has a child. Acting out of respect for the convention of primogeniture and callous indifference to his wife and baby, he makes a will leaving virtually all of his property to the grown son of his first marriage, even though the older son is already rich, and the will leaves the mother and child destitute. Facing destitution, the mother forges a codicil ostensibly leaving her child a modest portion of the estate—Orley Farm—on which she and the child have resided. The forgery remains undetected for years. The novel begins when an envious solicitor discovers evidence of the forgery and induces the cheated older son to initiate proceedings to expose it.

The novel elaborately dramatizes the conflict between legality (associated with constituted authority, property rules, and the rules against perjury and forgery) and ordinary morality (associated with distributive fairness, paternal and spousal responsibility, and maternal love). The conflict plays out in many dimensions, and Trollope assigns lawyers to make the case for both sides.

Luban is especially concerned with the religious dimension of the novel. He invokes a Jewish point of view to criticize an earlier Christian interpretation by Thomas Shaffer. Convention might lead us to expect that the Jewish perspective would be associated with legality and the Christian with maternal love, but the opposite turns out to be the case. Shaffer views the novel as turning on the mother's personal

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<sup>30</sup> See DAVID LUBAN, *A Midrash on Rabbi Shaffer and Rabbi Trollope*, in LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 4, at 301, 301–31 [hereinafter LUBAN, *Shaffer and Trollope*].

<sup>31</sup> ANTHONY TROLLOPE, *ORLEY FARM* (David Skilton ed., Oxford World Classics 4th ed. 2000) (1861); see *supra* note 18 and accompanying text.

redemption, which Shaffer sees as occurring through the Christian ministry of a character who convinces the mother to acknowledge her misdeed and restore the property.<sup>32</sup>

Luban's critique starts by pointing to an important subtheme in Judaism that excuses and even exalts legal transgressions in situations analogous to the circumstances of the novel, and he finds these themes playing an explicit role in the novel.<sup>33</sup> Moreover, he argues that they dominate the themes that Shaffer identified as Christian.<sup>34</sup> Trollope, he points out, suggests in many ways that things might have been better if the mother had not confessed and restored the property.<sup>35</sup>

While Luban presents his argument as literary criticism, his interpretation makes *Orley Farm* look like a powerful work of jurisprudence. As jurisprudence, the book's central message is that there is a tension within both legal and lay culture between legal and moral norms and that neither law nor ordinary morality can plausibly be seen in either realm as prior to or more fundamental than the other. (It is possible to read Luban as interpreting Trollope as siding categorically with ordinary morality, but that is not the reading that makes either work as good as it can be.) Trollope does this by creating characters and situations that induce us to sympathize alternately with one side and then the other and, ultimately, with both sides simultaneously. As a practical matter, we can only recognize the competing values, balance them in context, and take the often high risk of making the wrong choice. Contemplatively, the best we can do is to fully acknowledge the claims of each value and their conflict with each other. Law tends to judge categorically, and legal theory sometimes struggles for categorical resolutions, but the predisposition of ambitious fiction is to judge dialectically. Luban's account of *Orley Farm* makes it hard to resist the conclusion that the novel is better equipped to explore the conflict.

### III

#### FUTURE: ETHICAL DECISION AND SOCIAL CIRCUMSTANCES

In two essays, Luban confronts a disturbing lesson of experimental psychology: responses to ethical problems are highly correlated with social circumstances.<sup>36</sup> Given certain types of pressures, a large fraction of people make what detached observers agree is the ethically

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<sup>32</sup> THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT 51-52 (1983).

<sup>33</sup> LUBAN, *Shaffer and Trollope*, *supra* note 30, at 317-18.

<sup>34</sup> *Id.* at 319-21.

<sup>35</sup> *See id.* at 311-12.

<sup>36</sup> LUBAN, *Wrongful Obedience*, *supra* note 28, at 237-66; LUBAN, INTEGRITY, *supra* note 28, at 267-97.

wrong decision—they proceed to torture subjects on the command of an authority figure (the Milgram experiments); to abuse other subjects playing the roles of prisoners remitted to their custody (the Stanford prison experiment); or fail to offer help to apparently desperate people (the Darley-Latané experiments).<sup>37</sup>

The fact that small manipulations in the experimental situations—for example, introducing a role player who refuses to comply with orders to torture—can produce large favorable changes in behavior<sup>38</sup> is only partly comforting. For this qualification reinforces the central message that situation accounts for a greater influence on behavior than ethical knowledge, judgment, and character. Since knowledge, judgment, and character are what ethics teachers devote themselves to producing, this is a dispiriting message.

Luban's discussion of the experimental literature is masterly, and his insistence that we take serious account of it is overdue. However, his discussion of the implications of the literature for professional responsibility is not entirely satisfactory. He plausibly recommends humility and Stoic determination in the face of the bad news.<sup>39</sup> Beyond this, Luban suggests some psychological pre-commitment tactics—bright-line tripwires or miner's canaries—to condition us to withstand pressures in foreseeably challenging situations.<sup>40</sup>

However, Luban overlooks an implicit critique of legal ethics pedagogy that is both deeper and more obvious. If in practice judgment is swamped by the pressures of circumstance, perhaps we should spend less time focusing on judgment and more on circumstance. In particular, we should be studying and teaching about how practice can be structured in ways that make for ethically better decisions.

There is another way to put the point. There are at least two important tacit limitations on the experimental research. First, the experiments did not involve reflective judgment. All of them tested responses in which the subjects were discouraged or precluded from thinking about their decisions. Second, they all involved individual decisions. The subjects were not obliged or permitted to discuss or explain their ideas with others prior to acting.<sup>41</sup>

Most discussion of ethics—both normative and empirical—takes this individualist perspective for granted. Ethical decision making is conflated with individual decision making. The most resonant cul-

<sup>37</sup> See STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974); Craig Haney et al., *Interpersonal Dynamics of a Stimulated Prison*, 1 *INT'L J. CRIMINOLOGY & PENOLOGY* 69 (1973); John M. Darley & Bibb Latané, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 *J. PERSONALITY & SOC. PSYCH.* 377 (1968).

<sup>38</sup> See LUBAN, *Wrongful Obedience*, *supra* note 32, at 266.

<sup>39</sup> LUBAN, *Integrity*, *supra* note 28, at 291–94, 296–97.

<sup>40</sup> *Id.* at 291–97.

<sup>41</sup> See *id.*

tural image of it is the individual courageously standing for justice against the massed forces of corruption.

Lawyers once practiced alone; they now practice in groups. The organizational form does not require group decision making, but it encourages and facilitates it. The most creative and effective modern organizations tend to structure their processes to emphasize group decisions.<sup>42</sup> They do so not only because such decisions benefit from diverse perspectives, but because group decisions force participants to articulate and reflect on their notions in ways that they otherwise would not if they had made those decisions on their own.

The evidence for the thesis that self-conscious group-deliberation produces better decisions in the sphere of legal practice is mostly anecdotal and indirect, but it is striking. The thesis is a major tacit theme of Milton Regan's *Eat What You Kill*,<sup>43</sup> a riveting account of the misconduct of a Milbank Tweed bankruptcy lawyer that resulted in his conviction for perjury. The lawyer was a loner,<sup>44</sup> and the firm's structure was highly compartmentalized.<sup>45</sup> The key decisions seem to have been made tacitly and unreflectively.

Authority for the proposition that the tacit, individual style of decision making makes for poor decisions comes from the liability insurance industry. Insurance companies tend to promote "group practice" organization in which group members routinely discuss and document important decisions of all kinds.<sup>46</sup> They are suspicious of "lone wolves," who practice on their own outside the view of peers, and they often make them a focus of auditing efforts.

Of course, the type of risk management that insurers encourage is not necessarily the same thing as ethical reflection.<sup>47</sup> But there does seem to be an overlap. While the insurers' concerns are narrower than those of the ethicists, most of their concerns seem ethically plausible, even if reducing liability is their motivation.

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<sup>42</sup> See generally PETER M. SENGE, *THE FIFTH DISCIPLINE: THE ART AND PRACTICE OF THE LEARNING ORGANIZATION* (1990).

<sup>43</sup> MILTON C. REGAN JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004).

<sup>44</sup> *Id.* at 53.

<sup>45</sup> *Id.* at 304.

<sup>46</sup> See John A. Edginton, *Managing Lawyers' Risks at the Millennium*, 73 *TUL. L. REV.* 1987, 1990 (1988).

<sup>47</sup> See Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 *GEO. L.J.* 1909, 1910–11 (2006). Alfieri's piece is part of an emerging literature on the organization of legal practice, which provides a promising beginning for discussion of the relation between institutions and values. For other examples, see ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* (1988); Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 *ARIZ. L. REV.* 559 (2002); Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 *YALE J. ON REG.* 77 (2006).

One might also worry that the group practice regimes favored by insurers represent some Orwellian mechanism aimed at ferreting out creative nonconformity and inducing unreflective group-think. This is a possibility that should be investigated, but it is hardly an inevitable consequence of group decision making. The consequences of deliberation depend in part on how it is organized—how much it encourages open discussion, how transparent its workings are, and what mechanisms there are for reconciling and coordinating across groups.

Arguably, the most highly charged ethical scenarios for lawyers look less like the Milgram experiments and more like *Eat What You Kill*. In the Milgram experiments, the individuals are faced with a series of explicit commands from an authority figure. In *Eat What You Kill*, the individual is responding to much more ambiguous cues, and it is not at all clear that the relevant authority figures would be willing to take responsibility for an explicit command, especially if their decision would have to withstand peer scrutiny. If so, then the promising direction is not so much toward crafting psychological devices and heuristics to preserve the autonomy of individual response. Rather, it is toward the creation of institutional structures that encourage reflection, articulation, and transparency.

