1-1-2011


W. Bradley Wendel
Cornell Law School, wbw9@cornell.edu

Follow this and additional works at: http://scholarship.law.cornell.edu/facpub
Part of the Ethics and Professional Responsibility Commons, and the Legal Education Commons

Recommended Citation
http://scholarship.law.cornell.edu/facpub/632

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Publications by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
ARTICLE

SHOULD LAW SCHOOLS TEACH PROFESSIONAL DUTIES, PROFESSIONAL VIRTUES, OR SOMETHING ELSE?
A CRITIQUE OF THE CARNEGIE REPORT ON EDUCATING LAWYERS

W. BRADLEY WENDEL*

INTRODUCTION

There has been a lot of talk lately in the legal education literature about “professional identity” and “professional formation,” in addition to that hardy perennial, “professionalism.” Arguably, this may be a propitious moment to reconsider the subject of professionalism education because the American Bar Association (ABA) Standards Review Committee has proposed evaluating law schools on, among other criteria, how well graduates demonstrate competence in “the exercise of professional judgment consistent with the values of the legal profession and professional duties to society”1 and “knowledge, understanding and appreciation of” various professional values.2 This recommendation follows on the report of the Carnegie Foundation for the Advancement of Teaching, which faulted ethics teaching in law schools for emphasizing the law of lawyering over “its apprenticeship of professional identity.”3 Legal education as it is currently practiced suffers from a preoccupation with “the procedural and formal qualities of legal reasoning” to the exclusion of “the moral and social dimensions.”4 Law schools must therefore keep the analytical and the moral in dialogue.5

* Professor of Law, Cornell University.
2. Id. Proposed Standard 302(b)(4).
4. Id. at 145.
5. Id. at 142.
The claim of my contribution to this symposium on professional education is that moral and social dimensions of legal reasoning are already embedded within legal reasoning. Legal practice can best be understood as a craft—that is, a distinctive way of doing something called deliberation, practical reasoning, or the exercise of judgment. The Carnegie Report describes three distinct kinds of competence that practitioners must possess. The first is formal or theoretical knowledge. For lawyers this means legal analysis: “the categorizing and grasping of particular matters in terms of general principles and doctrines.” Critically, however, formal knowledge is not prior to practice; rather, it gains content and intelligibility only in the context of practical engagement with the problems of clients. From the outset there is no way to separate theoretical and practical modes of understanding. The late philosopher of education Donald Schöhn contends that a great deal of professional knowledge is best understood not as “knowing that” but rather as “knowing how.” That is, much of what professionals do involves tacit knowledge, which shows up in patterns of action but is difficult to describe. He observes: “Every competent practitioner . . . makes innumerable judgments of quality for which he cannot state adequate criteria, and he displays skills for which he cannot state the rules and procedures.” Legal education must therefore be concerned with imparting this kind of practical knowledge that cannot be reduced to abstract theoretical considerations.

A reader of the Carnegie Report who is concerned with legal ethics would be pleased to note the attention given to “wider issues, many of which would be understood as moral or ethical matters in everyday understanding or in philosophical discourse.” The Report calls upon law schools to take up the challenge of educating lawyers to “strengthen the profession’s sense of public purpose.” It is hard to disagree with this recommendation, but it is important that legal educators should not overdraw the distinctions made in the Carnegie Report between the cognitive expert knowledge and identity-and-purpose apprenticeships that comprise legal education. Professional identity for lawyers simply is performing the complex task of representing clients effectively within the bounds of the law. The principal target of the argument in this paper is the dichotomizing ten-

6. For the argument that ethical lawyering is fundamentally a matter of excellence in practical deliberation, see ANTHONY T. KRONMAN, THE LOST LAWYER (1993). A less well known, but an elegant argument for a similar conception of the virtues of legal practice, is JACK L. SAMMONS, JR., LAWYER PROFESSIONALISM (1988).
7. CARNEGIE REPORT, supra note 3, at 13.
8. Id. at 117–18.
10. CARNEGIE REPORT, supra note 3, at 129.
11. Id. at 30.
12. Id. at 28.
dency one sometimes observes, separating positive law and legal practice from concerns about ethics and social justice. The Carnegie Report provides one causal explanation in terms of the prestige enjoyed by the institution of the German university in the Nineteenth Century, which was based on the university’s claim to be a center of value-neutral technical expertise. Legal education, which had formerly been conveyed through Abraham Lincoln-style apprenticeships, aspired to the prestige of the university and therefore developed its own conception of “scientific,” and hence value-free, expertise, personified forever after in Christopher Columbus Langdell. Historically, professional prestige and the respectability of a practical discipline can be traced back to its epistemological foundations. Law schools could seek prestige on the same terms as other departments of the university rather than being looked down upon as “trade schools.” In addition, the dichotomizing tendency has its roots in a basic jurisprudential mistake. Positive law is sometimes misunderstood as morally neutral so that representing clients within the bounds of the law is itself a morally neutral activity. This jurisprudential confusion has led to a substantial debate within the field of academic legal ethics, defending or criticizing the notion that pursuing the interests of one’s client through lawful means is a morally valuable thing to do; this debate gains traction in the first place only if it is assumed that the law and morality are separate domains.

The central normative problem of legal ethics would arise in a different way, however, if one began with a different foundational assumption about the morality of law. That is, if it were assumed that there is something morally valuable about the rule of law itself, then the moral significance of the work of lawyers could be understood derivatively as contributing to the functioning of a legal system that possesses the virtues associated with legality. One might argue, for example, that legal reasoning underwrites a

14. See generally Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s (1983) (giving an excellent history of the evolution of American legal education from an informal apprenticeship to a program of study within the university).
16. As Langdell said, “If law be not a science, a university will best consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices.” Stevens, supra note 14, at 52.
17. The Carnegie Report makes a common mistake when it equates legal positivism, which is the thesis of the analytic separability of law, with logical positivism, which is a set of claims about language, meaning, and knowledge. See id. at 5 (blurring these lines); John Passmore, Logical Positivism, in 5 The Encyclopedia of Philosophy 52, 52–57 (1967) (describing logical positivism); Joseph Raz, The Authority of Law: Essays on Law and Morality 45–52 (1979) (defending the thesis that legal positivism is the position that the content and existence of a law can be determined without using moral arguments).
distinction between raw power and rightful power, which is of the utmost importance in a society characterized by diversity, moral pluralism, and conflict. It is therefore a conceptual mistake to believe that issues of social responsibility are somehow external to law or that law is merely a tool that may be used, for good or for ill, and that lawyers need to be told to use it for good. While I would not go quite as far as the great English historian E.P. Thompson and say the rule of law is “an unqualified human good,” I do believe the difference between arbitrary power and lawful power is an extremely important one and that the rule of law establishes a moral relationship between citizens and government. If legally constrained reasoning has the capacity to regularize, and therefore make more just the use of power in society, then there would be moral significance to simply doing what lawyers do, provided of course that they do it properly.

If this is the case, then the ethical practice of law should be understood as an engagement with ethical and policy issues using a distinctive style of reasoning different from the technical rationality of a discipline such as engineering but also different from reasoning directly about ethics, as one might learn in a class on moral philosophy. One of the most important aspects of the craft that law students learn is how to interpret the law when representing and advising clients, and doing a professionally responsible job at this task requires students, and ultimately lawyers, to grasp the law from a particular interpretive standpoint. The Carnegie Report gets this just right, I believe, when it distinguishes not between positive law and morality but between engagement with practice and “detached objectivity.” Legal education needs to shake off its preoccupation with external, objective analysis and critique of legal doctrines, treating them as something worth studying from an external point of view, and spend more time preparing students to be practitioners, viewing the professional practice from the inside out, as it were. The Carnegie Report does not use the terminology of external and internal points of view, which was made prominent by H.L.A. Hart, but it argues for taking as central to professional forma-

23. See H.L.A. Hart, The Concept of Law 89 (2d ed. 1994). See also Raz, supra note 17, at 154 (differentiating external statements about law, which are “statements about people’s practices and actions, attitudes and beliefs concerning the law,” from internal statements which are used “as a standard by which to evaluate, guide, or criticize behaviour”). An external statement may have normative content without expressing the speaker’s own commitment to the standards it reflects. So-called detached normative statements share the cognitive aspect of internal statements, and appreciate their volitional dimension, but do not reveal the speaker as endorsing the volitional dimension, that is, preferring it as a standard for herself. An example of a detached normative statement would be one made by Brad, a meat eater, to Sherry, a vegan: “You shouldn’t eat that
tion the perspective of someone who sought not to understand a practice but to perform it. Lawyers, as I have argued (following Hart), understand the law as creating genuine obligations, not merely enabling predictions of when officials will impose sanctions on their clients. The idea of being a good lawyer is therefore built into the distinctive internal regulative standards that both constitute the craft of the practice of law and define the standards of excellence that one aims for in realizing the ends of the craft.24

If there is some relationship between the standards regulating the practice of the craft of lawyering and more general moral standards, as I suggest here, then comprehensive reform of the law school curriculum may not be required in order to contribute to the socially responsible practice of law. Law teachers simply have to continue teaching their students to be good lawyers. Unfortunately, the Carnegie Report obscures this simple, powerful message by considering a jumble of concepts that are often lumped together under the general heading of legal ethics, professionalism, professional responsibility, or some cognate term. When we talk about educating ethical lawyers and measuring the success of the education process, a number of different ideas could be implicated, and it is important to keep our conceptual vocabulary straight. Section I of this paper will therefore consider what accrediting agencies like the ABA and expert reviewers such as the reporters for the Carnegie Foundation might mean when they call upon law schools to invest more effort and resources into the ethical professional development of lawyers. If ethical lawyering required that lawyers be made into virtuous human beings, for example, that would be a very different challenge than training lawyers to perform a specific activity to a high standard of excellence.

Talking about a craft—i.e., the idea of a practice with its own internal standards of excellence in the realization of the ends of that activity—and the relationship of those craft standards to general morality can sound a bit mysterious. Section II of this paper therefore works carefully through an example of the craft of lawyering and legal advising in action to show that it is possible for lawyers to differentiate between genuine legal entitlements and spurious interpretations that distort or manipulate the law. The example comes from the controversy over the advice given by lawyers for the U.S. Department of Justice to the government officials, at Guantánamo Bay and elsewhere, involved in questioning detainees suspected of having information about future acts of terrorism. The lawyers were called upon to deter-

24. See generally ALASDAIR MACINTYRE, AFTER VIRTUE (2d ed. 1984) (critiquing contempo-
rary moral philosophy).
mine whether aggressive interrogation techniques amounted to legally prohibited torture and concluded that they did not. Many observers (myself included) believed the legal advice given was flawed as legal advice, quite apart from the immorality of torture. 25 Thus, the lawyers could be criticized in ethical terms, as lawyers, for failing to observe the standards that define the appropriate pursuit of the craft of lawyering. The example of advising on torture is helpful for several reasons. For one, the reasoning of lawyers advising the government was spelled out in detail, so there are actual legal arguments available to analyze. 26 Second, the torture debate throws into sharp relief the analytic distinction between law and morality. When observers of legal education, such as the researchers of the Carnegie Report, call for law schools to do more to educate lawyers for professional development, one can use a case like the torture memos to ask what, exactly, is the observed deficiency in ethics or professionalism. Is it the willingness to assist government officials in the implementation of a policy that involves grave violations of human rights? Or is it the willingness to distort the law to produce a spurious legal permission to do something that is, in fact, unlawful?

One may ask whether the distinction between law and morality is as sharp as the traditional idea that the rule of law holds. Returning to the torture controversy, some supporters of the Bush administration have argued that critics of the government’s lawyers are “ politicizing” the process of legal advising and smuggling in contestable human rights norms under


26. The initial set of government memos, leaked during the Abu Ghraib prisoner-abuse scandal, was published along with other documents in the public record. See The Torture Papers: The Road to Abu Ghraib (Karen J. Greenberg & Joshua L. Dratel eds., 2005). In 2009 the U.S. Department of Justice released four previously classified memos, which shed additional light on the reasoning used by the lawyers in an attempt to justify torture. These memos, which the American Civil Liberties Union sued to obtain their disclosure, are available at http://www.aclu.org/accountability/olc.html.

After the killing of an American citizen, Anwar al-Awlaki, by a drone strike in Yemen, it was reported that OLC lawyers had prepared a memo authorizing the target assassination of U.S. citizens abroad, without trial, and notwithstanding an executive order banning assassinations, as long as the President certified that the target posed a significant threat to American citizens and could not be captured alive. See Charlie Savage, Secret U.S. Memo Made Legal Case to Kill a Citizen, N.Y. Times, Oct. 8, 2011, at A1, available at http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?scp=1&sq=Secret%20U.S.%20Memo%20Made%20Legal%20Case%20to%20Kill%20a%20Citizen&st=cse. The memo remains classified, but its contents were described by people familiar with it, on the condition of anonymity. It should go without saying that if the memo is disclosed, it should be analyzed in the same way as the torture memos discussed in this paper—i.e., for whether its legal reasoning is sound—without regard for whether it was prepared by the OLC under President Obama instead of President Bush.
the guise of legal interpretation. Similar criticisms have been made of purportedly neutral legal arguments such as challenges to capital punishment or support for reproductive rights. This poses a challenge to one conception of the law as an apolitical discourse. Thus, one unappreciated aspect of the debate over ethics education is whether it carries with it an implicit ideological agenda and is therefore open to attack by critics from the right or the left as merely politics by other means.

Throughout this paper I will argue that the law is not neutral in the sense of having nothing to do with moral values. Even something as mundane as the duty of reasonable care in torts or the obligation of good faith and fair dealing in commercial law embodies principles for how we should relate to one another. These principles may overlap extensionally with ordinary ethical norms, and in this way the law and ethics may align. Nevertheless, it is a central commitment of legal positivism that, in principle, the content of legal norms may be determined without resort to moral argumentation. That is, it is possible to determine what legal duty one owes to another without determining whether this is the legal duty one ought to owe. Ethics and law are, in this way, analytically separable even if not separate, and it is necessary for critics to take this separability into account when urging reforms of legal ethics education.

27. I participated in an extremely frustrating debate at the annual meeting of the Federalist Society with Miguel Estrada, the lawyer representing former OLC lawyer John Yoo. Estrada accused Yoo’s critics of using legal procedures, including an investigation by the Justice Department’s Office of Professional Responsibility and a Bivens action filed by a victim of torture, essentially as a means of settling political scores. Yoo himself has accused lawyers and judges of essentially being tools of terrorists, who use constitutional and other legal rights as part of a strategy of “lawfare” to weaken the United States. See John Yoo, Terror Suspects are Waging “Lawfare” on U.S., PHILA. INQUIRER, Jan. 16, 2008, at A15.


29. Methodologically, this paper is a contribution to the philosophy of legal education and legal practice. Unlike some recent scholarship following the Carnegie Report, it does not make empirical claims about why people comply with ethical norms (or fail to do so), nor does it rely on the findings of social psychologists or learning theorists to suggest ways to improve legal education. See, e.g., Neil Hamilton & Verna Monson, The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law, 24 GEO. J. LEGAL ETHICS 137 (2011); Neil Hamilton & Verna Monson, Answering the Skeptics on Fostering Ethical Professional Formation (Professionalism), 20 PROF. LAW. 3 (2011). The aim of this paper is, instead, to clarify the relationship between law and morality in law in legal practice, and therefore in legal education.
I. DEFINING OUR TERMS

A. Legal Norms Governing the Conduct of Lawyers

Lawyers are regulated by rules of professional conduct, generally based on the ABA’s Model Rules, adopted and enforced by state courts, and subjecting lawyers to professional discipline, as well as by aspects of the general law of agency, torts, contracts, evidence, procedure, etc., which create legal obligations to clients, tribunals, and third parties. Taken together, these regulatory norms constitute the law governing lawyers. The law governing lawyers is significantly broader than state rules patterned on the ABA Model Rules. The Carnegie Report makes a common but significant mistake when it talks about casebooks structured around “cases that concern alleged violations of the Model Rules.” In fact, however, sophisticated professional responsibility casebooks are mostly structured around cases in which lawyers are sued by clients or non-clients for breaches of duty imposed by tort, agency, and contract law; assert privileges arising under evidence and procedural law; are accused by clients of ineffective assistance of counsel; or are litigating disqualification motions—most conflicts of interest cases are not really about violations of the Model Rules (i.e., state disciplinary rules) but about remedies crafted by courts under their inherent power to protect the integrity of the litigation process. There are a few cases arising out of disciplinary proceedings in most casebooks, but, with very few exceptions, the canon of central cases in the subject is not comprised of disciplinary cases.

30. MODEL RULES OF PROF’L. CONDUCT (2011) [hereinafter MODEL RULES R. xx]. The Model Rules are reprinted in numerous rules supplements for classroom use. They were extensively amended in 2002 and 2003 after extensive study by the Ethics 2000 Commission and less extensively at intervals thereafter. The ABA’s Commission on Ethics 20/20 is considering amendments to the rules to reflect some of the challenges posed for lawyers by technology and the globalization of legal practice, but unlike the Ethics 2000 Commission’s product, the changes proposed by the Ethics 20/20 Commission will not be comprehensive.

31. CARNEGIE REPORT, supra note 3, at 148.

32. It would take a great deal of space to defend the definition of a canonical case and argue for cases that should be included, but for the time being I will propose a short list of cases that all teachers in the area know and can discuss in detail: Togstad v. Vesely, 291 N.W.2d 686 (Minn. 1980); Jones v. Barnes, 463 U.S. 745 (1983); In re Fordham, 668 N.E.2d 816 (Mass. 1996) (a disciplinary case); Upjohn Co. v. United States, 449 U.S. 383 (1981); Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974); Nix v. Whiteside, 475 U.S. 157 (1986); Grey, Inc. v. Proud, 826 F.2d 1560 (7th Cir. 1987); Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978); Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir. 1987); Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (7th Cir. 1983); Birbrower, Montalbano, Condon & Frank, P.C. v. Super. Ct. of Santa Clara Cnty., 17 Cal. 4th 119 (Cal. 1998); Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) (originally a disciplinary action, but one that turned into a constitutional challenge to the rule); Morrell v. State, 575 P.2d 1200 (Alaska 1978) (physical-evidence case); In re Ryder, 263 F. Supp. 360 (E.D. Va. 1967); Commonwealth v. Stenbach, 534 A.2d 769 (Pa. Super. Ct. 1986); People v. Meredith, 29 Cal. 3d 682 (Cal. 1981); In re O.P.M. Leasing Servs., Inc., 769 F.2d 911 (2d Cir. 1985), the litigation arising out of the savings-and-loan crisis, and the recent developments in Enron, Refco, etc. I would be happy to entertain suggestions for additions or deletions to the canon, but the point is, any list that a teacher in the area would
Lawyers have an unfortunate habit of referring to this body of law as "legal ethics," but it is really no more or less about ethics than, say, torts or contracts. On one view, contract law fundamentally concerns the legal enforceability of promises; alternatively, contract law may be seen as a practice that facilitates economically efficient transactions. In either case, the law tracks ordinary moral considerations to some extent, although legal principles may not always perfectly overlap with substantive morality because of institutional and procedural considerations. Nevertheless, no one refers to contract law as "transactional ethics." The law governing lawyers is pervaded by principles that have analogues in ordinary morality. For example, lawyers are fiduciaries of their clients, which means they must exercise the highest degree of care and loyalty in the representation of clients, refrain from self-dealing, keep client secrets and not use confidential information to the disadvantage of clients, and not take advantage of their superior knowledge and expertise in business dealings with clients. These legal principles overlap with moral ideals of trust, loyalty, faithfulness, and caretaking. Indeed, a life spent being a faithful agent, a loyal friend, a steadfast supporter, or a champion is enormously appealing as a vocation.

Come up with is likely to be overwhelmingly weighted against disciplinary cases, and it is embarrassing that the Carnegie Report does not appreciate this very basic point.

33. See, e.g., Thomas L. Shaffer, The Legal Ethics of Radical Individualism, 65 Tex. L. Rev. 963, 963 (1987) ("Most of what American lawyers and law teachers call legal ethics is not ethics. Most of what is called legal ethics is similar to rules made by administrative agencies.").


35. See, e.g., Model Rules R. 1.1 (competence); Model Rules R. 1.2(a) (fidelity to client objectives); Model Rules R. 1.3 (diligence); Model Rules R. 1.6(a) (confidentiality); Model Rules R. 1.8(a) (heightened scrutiny of business transactions with clients); Model Rules R. 1.8(b) (no adverse use of confidential information); see generally Geoffrey C. Hazard, Jr. et al., The Law and Ethics of Lawyering 770–858 (5th ed. 2010) (reprinting and summarizing numerous cases and rules establishing stringent fiduciary duties owed by lawyers to clients).

36. Daniel Markovits argues that although the role of lawyer is justified impartially (that is, on agent-neutral reasons), it fails on subjective, personal, or agent-relative terms. It may be morally permissible to serve as a representative of clients—i.e., the adversary system excuse is a sound argument—but this is not a suitable object of one’s own commitment. See Daniel Markovits, A Modern Legal Ethics: Adversary Advocacy in a Democratic Age 103–17 (2008). He therefore offers a reconstruction of the lawyer’s role in terms of the value of what he calls fidelity, which is very different from what I mean by fidelity to law. Fidelity, for Markovits, is fidelity to the client’s story, but it is also a peculiar kind of agency relationship, in which the lawyer-agent exercises no judgment of her own. Id. at 164–69. It is therefore not the conception of fidelity in representation that is embodied in the existing law of lawyering, which emphasizes in many places the right and indeed the obligation of the lawyer to exercise independent professional judgment. See, e.g., Model Rules R. 1.2(a) (recognizing authority of lawyer to determine the means by which the client’s objectives will be pursued); Model Rules R. 1.16(b)(4) (permitting lawyer to withdraw from representation when client and lawyer have “a fundamental disagreement”); Model Rules R. 2.1 (requiring lawyer to exercise independent professional judgment and permitting lawyer to counsel client based on “moral, economic, social and political factors”). While Markovits rightly focuses on the importance of being able to endorse one’s actions from the point of view of one’s personal commitments and ground projects, the ideal he offers as a suitable object of that commitment is foreign to the existing law of lawyering (which Markovits might concede) and, in my view, either devoid of ethical content or covertly appealing to the very notion
Lawyers, prospective lawyers, and non-lawyers alike are drawn to archetypes in literature like Atticus Finch who embody these virtues.\textsuperscript{37} A lawyer need not necessarily embody ordinary moral virtues, however. As Bernard Williams observed in a classic essay: “Among political acts are some for which there are good political reasons, as that important and worthy political projects would fail without these acts, but which are acts that honourable and scrupulous people might, \textit{prima facie} at least, be disinclined to do.”\textsuperscript{38} There are “good political reasons,” in Williams’s terms, for many of the things that lawyers do, but decent, humane people might nevertheless feel a bit disinclined to do them. There is a vivid story in the last chapter of Seymour Wishman’s \textit{Confessions of a Criminal Lawyer} of having been the accused at a trial lacking even the rudiments of due process, at a youth camp in the Soviet Union. As a result he understandably came to appreciate the significance of procedural (or, one might say political) values of the right to notice of the charges brought, a general statement of the elements of a crime of which one is accused, the right to confront witnesses, some transparency of procedures, determination of guilt by an impartial decision-maker, and so on.

Wishman brilliantly juxtaposes this story with the moral costs he experienced as a result of a career as a criminal defense lawyer, including pervasive cynicism, distrustfulness of people, arrogance, “cold detachment”—i.e., a distance from normal emotional responses to violence and suffering—and a capacity to engage in contrived and even deceitful performance of emotions on cue.\textsuperscript{39} Wishman does not question the justification of his actions as a lawyer. As Williams would say, there are good political

\textsuperscript{37} See \textit{Tim Dare, The Counsel of Rogues? A Defense of the Standard Conception of the Lawyer’s Role} 106–22 (2009) (considering how Atticus Finch, the hero of Harper Lee’s novel \textit{To Kill a Mockingbird}, has become a professional ideal).


reasons for what he did, reasons that Wishman himself could appreciate as a result of his experience at the Soviet youth camp, but there were also long- term, corrosive effects on Wishman’s moral character. Legal justification and ordinary moral virtue do not always line up as neatly as in the character of Atticus Finch.

This point matters for several reasons. First, I think there is no more dangerous advice for graduates entering law practice than “consult your moral compass.” Professional responsibility casebooks are littered with examples of lawyers who tried to do the right thing, in ordinary moral terms, but nevertheless failed to comply with the standards of the law governing lawyers. For example, one casebook has a principal case and a note case on business transactions with clients.\textsuperscript{40} In neither case did the lawyer overreach and take advantage of the fiduciary relationship with the client. The client was no worse off, and may have been better off, because of the lawyer’s role in the transaction. In “moral compass” terms, the lawyers behaved as loyal agents. In law of lawyering terms, however, the lawyers failed to obtain the informed consent of their clients after adequate disclosure. Those lawyers needed to hear the message that they should carefully consult the applicable law on business transactions with clients, and, beyond treating the client with substantive fairness, they should provide adequate disclosure, recommend that the client seek the advice of independent counsel, and obtain the client’s informed consent in writing.\textsuperscript{41}

In addition, the Carnegie Report is potentially misleading in two respects concerning the subject of the law of lawyering and its relationship with general ethical norms. One is that the Model Rules and disciplinary cases represent the profession’s ethical values.\textsuperscript{42} As Susan Koniak has argued in an influential paper, however, the law of lawyering is the locus of conflict between the profession and society, with the latter represented by courts, legislatures, and administrative agencies, as against the bar’s self-serving rules, which do more to protect lawyers than clients, other institutions in the legal system assert the rights of non-lawyers and, to some extent, non-clients.\textsuperscript{43} The second is that the principles of the law of lawyering are morally neutral. The authors of the Report cannot mean this because at the same time they criticize law school professional responsibility courses for not giving sufficient attention to the question of whether the duties of lawyers conflict with other obligations, such as the obligation to tell the truth or protect others from harm. There could only be a conflict if the law

\textsuperscript{40} See Hazard et al., supra note 35, at 813–16 (reprinting Comm’r on Prof’1 Ethics & Conduct of Iowa State Bar Ass’n v. Mershon, 316 N.W.2d 895 (Iowa 1982), and discussing Passante v. McWilliam, 62 Cal. Rptr. 2d 298 (Cal. Ct. App. 1997)).

\textsuperscript{41} See Model Rules R. 1.8(a).

\textsuperscript{42} See Carnegie Report, supra note 3, at 148.

took a position, such as the requirement that lawyers keep client confidences notwithstanding the harm to others. This duty may be a good or a bad thing, but it is certainly not morally neutral.

B. Extralegal Moral Norms Governing the Conduct of Lawyers

The Carnegie Report asks a version of one of the central questions in critical (or theoretical or philosophical) legal ethics: “Does the responsibility to pursue substantive justice in individual cases and to consider the broader impact of one’s actions conflict with advocacy on behalf of one’s client?” To put the question somewhat differently, are professional roles morally differentiated from ordinary morality? Philosophically-minded legal ethics scholars insist that there must be an irreducible element of moral agency in professional ethics. No matter what, a person must give due consideration to values such as honesty, fairness, human dignity, and truth, and therefore, it may be the case that professional ethics is simply an application of these everyday moral values to dilemmas that arise in the course of one’s practice. As any law student soon realizes, however, the role of lawyer sometimes seems to require lawyers to act contrary to these ordinary values. This is known as the problem of role-differentiated morality. For example, as long as she does not introduce false evidence, a criminal defense lawyer may argue for the acquittal of a client whom the lawyer knows is guilty of the offense charged. Most lawyers would have little trouble coming up with reasons why it is not really unethical, even in ordinary moral terms, to argue for the acquittal of a guilty client. Familiar considerations such as safeguarding the dignity and autonomy of persons who encounter the criminal justice system, checking the power of the state by requiring the government to prove its case beyond a reasonable doubt, and preventing lawyers from prejudging their clients’ cases and providing less zealous advocacy all tell in favor of a moral as well as a legal obligation to defend the guilty. In other cases, however, the moral case for the role-specific obligations of lawyers is more difficult to make, and some scholars

44. Carnegie Report, supra note 3, at 131. Elsewhere the Report suggests that law students might benefit from “more connections with the arts and sciences in the larger academic context.” Id. at 32. I certainly have no objection to law students learning more about history, philosophy, political science, or economics, and it seems reasonable to believe that moral reflection might be enhanced by a broad liberal arts education. Nevertheless, at least one object of moral reflection for law students must be justice and morality as pursued through the law. Therefore the question of the relationship between law and morality cannot be avoided.


46. I believe this term was introduced into professional ethics by Alan Goldman, but it has since become a standard way of framing an important question in legal ethics. See generally ALAN H. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS (1980).
fault the so-called standard conception of legal ethics for subordinating substantive justice or the rights of non-clients to the interests of clients.47

Apparently some law school faculty members worry about teaching the role of extralegal moral principles because they perceive it as “indoctrination” or “having an agenda.”48 I have never understood this objection to taking a critical, external perspective on the values underlying some area of law or practice. One professor quoted in the Carnegie Report says, “I consider [students] to be adults and would prefer them to bring their own values to law school than to try to inculcate them with my values.”49 But surely the point of critical scrutiny of the legal profession’s values is not, at least primarily, to compel students to endorse a particular evaluative position. Rather, it is to examine carefully the arguments given in support of a conception of professional ethics that permits or requires departures from standards of ordinary morality. Take a simple case, a chestnut in legal ethics scholarship, in which a debtor directs a lawyer to assert the statute of limitations as a defense to an action for breach of contract where the debtor admits that he in fact promised to repay the loan.50 It does not require indoctrination or imposing one’s values on students to reach the point of recognizing a moral obligation to repay an acknowledged debt. The interesting moral question is, instead, whether there are good moral reasons to permit lawyers to assert procedural defenses to defeat claims based on substantive entitlements. Most legal ethics scholars believe there is—it is hard to find anyone who would criticize the lawyer in the statute of limitations case in moral terms for asserting the statute of limitations.51

But regardless of how one comes out on this case, it is no more a process of “indoctrination” to critique the argument for permission to assert the statute of limitations than it would be to ask a similar question about, say, the absence of a duty to rescue in torts. Virtually any interesting law school class—i.e., one that aspires to be more than simply preparation for

48. CARNEGIE REPORT, supra note 3, at 135–36; see also id. at 148 (“many law teachers are concerned about imposing their moral beliefs on students”).
49. Id. at 136.
50. See Zabella v. Pakel, 242 F.2d 452, 453 (7th Cir. 1957).
51. An exception might be William Simon, who is quoted in the Carnegie Report as urging lawyers to take actions that seem most likely to promote justice. See CARNEGIE REPORT, supra note 3, at 131 (quoting SIMON, supra note 47, at 9). Simon asserts that a lawyer should decide whether or not to plead the statute of limitations based on the lawyer’s assessment of what end the statute is intended to serve and whether that end would be vindicated by pleading it in this particular case. For example, if the purpose of the statute, in the lawyer’s judgment, is to prevent the introduction of stale, unreliable evidence, and there is no danger of unreliable evidence being introduced in this case (because it is all documentary or because all the parties agree on the relevant facts), then the lawyer is not justified in asserting the statute as a defense. See SIMON, supra note 47, at 33. I say Simon “might” be an exception because he argues that ethical decision making is contextual, so there may be a case like Zabella, tweaked in relevant ways, in which the lawyer would be permitted to assert the statute of limitations.
the bar exam—takes a critical look at the moral, social, and economic policies that underlie legal doctrines. I have not heard anyone seriously contend that it is illegitimate to question something like Calabresi’s argument that negligence rules should minimize the sum of accident and prevention costs. That is an extralegal policy argument but one that is rightly considered part of the subject of torts, as it should be taught in law schools. The same is true of critical scrutiny of claims about legal ethics, such as the commonly held view that there is nothing wrong with asserting a procedural defense to defeat a substantively valid claim.

In addition to considering moral values as “policy” arguments within the general purview of law, many law school professional responsibility courses go further and acknowledge a critical perspective outside the law, based in general morality. Many books include classic cases such as Spaulding v. Zimmerman\(^5\) or the Lake Pleasant hidden bodies case,\(^5\) which allow teachers to ask whether a lawyer is morally justified in complying with the law requiring, in both cases, keeping client confidences when disclosure would alleviate the suffering of others. Again, this is not indoctrination but the scrutiny of arguments to see whether they hold up, whether they have troublesome implications, or whether there is an inconsistency in the position asserted.

Regarding confidentiality, critics have noted that the profession’s commitment to confidentiality is not absolute and that lawyers are quite willing to disclose client confidences in self-defense or in order to collect a fee;\(^5\) that the organized bar has asserted a duty of confidentiality that is much stronger than that recognized in general agency law;\(^5\) that confidentiality duties are essentially self-serving and not in the interests of clients;\(^5\) that confidentiality is not required to enable lawyers to counsel clients to comply with the law;\(^5\) and that no duty is absolute, and in some cases must

---

510 UNIVERSITY OF ST. THOMAS LAW JOURNAL [Vol. 9:2


54. See, e.g., Deborah L. Rhode, In the Interests of Justice 110–11 (2000); see Model Rules R. 1.6(b)(5); Model Rules R. 1.6 cmt. 11 (modern rule recognizing the exception); Model Code of Prof’l Responsibility DR 4-101(C)(4) (2010) (more clearly identifying fee collection as a ground for disclosing confidential information). The delegation to the comments by the ABA of the permission to disclose to collect a fee suggests that the organized bar was embarrassed at the explicit recognition of the financial interests of lawyers as a reason to disclose confidential client information.


57. Simon, supra note 47, at 55–57; Zacharias, supra note 55, at 369–70.
yield to other obligations, such as saving the life of another.® The Carnegie Report notes that non-specialists in the law of lawyering believe themselves to be unqualified to introduce ethical issues (in the legal sense) in their classes.®

It might have also observed that even specialists in the law of lawyering might feel uncomfortable tackling issues of critical morality from a non-legal perspective. A teacher might be concerned that class discussion of Spaulding might turn into a technical exercise in moral philosophy. One plausible account of Spaulding is that it involves a conflict of duties, between a duty to warn the young plaintiff of his potentially life-threatening injury and the duty of confidentiality imposed by law to keep the information secret. Even this simple perspective on the case discloses potentially complex issues, such as the distinction between actively harming someone and merely taking no action to prevent their harm® and the metaethical issue of whether it is coherent at all to talk about duties being in conflict.® An instructor may not be prepared to deal with the ramifications of class discussion of this case in terms of moral philosophy, may believe that it is better not to treat an issue at all if any treatment were bound to be superficial, or may simply not have sufficient time in the semester to devote to theoretical issues that, in the end, do not explain the result of the Spaulding decision itself (which actually went off on the necessity of obtaining court approval for a settlement of a minor’s claim) or enable a lawyer to understand the principles underlying the legal duty of confidentiality.

58. Rhode, supra note 54, at 110 (arguing that concerns about the rights of clients do not “explain why the rights of clients should always take precedence over the rights of everyone else, particularly where health and safety are at stake”).

59. See Carnegie Report, supra note 3, at 149. The Report goes on to recommend more ethics teaching by the pervasive method, meaning an integration of professional responsibility issues into other courses. Id. at 151–52. Credit for popularizing and advocating for pervasive-method teaching belongs primarily to Deborah Rhode, and her casebook for pervasive teaching is very good. See Deborah L. Rhode, Professional Responsibility: Ethics by the Pervasive Method (2d ed. 1998). The problem with the pervasive method is that the law of lawyering really is its own legal subject and one which non-specialists do not always get right. (My anecdotal support for this proposition comes from the questions I field from my colleagues who are attempting to integrate ethics issues into their classes.) The Carnegie Report cites a pervasive-method civil procedure course incorporating a significant component of professional responsibility, but significantly the teacher, Charles Silver, is a bona fide professional responsibility scholar in addition to his other areas of expertise. Carnegie Report, supra note 3, at 152.

60. This is the theme of several classic examples in moral philosophy, including the Trolley Problem and Jim and the Indians. See Philippa Foot, The Problem of Abortion and the Doctrine of Double Effect, in Virtues and Vices 19, 23 (1978) (trolley problem); Bernard Williams, A Critique of Utilitarianism, in Utilitarianism: For and Against 77, 98–99 (J.J.C. Smart & Bernard Williams eds., 1973) (problem where a traveler must kill one of twenty captives or all captives will be killed).

A different way to take a critical evaluative perspective, without indoctrination and without having to grapple with specialized issues in moral philosophy, would be to consider claims about the immanent normative structure of professional ethics. Immanence claims in law hold that a particular area of legal doctrine is structured around certain values, ideals, or ends, and the rules and principles that make up that area of law can be seen as instantiations or particular applications of those principles. These arguments bridge the is/ought gap by beginning with an observation about the content of legal norms, then asking what social value or purpose the norms can be seen as serving. Legal interpretation and adjudication can then make use of these immanent values to justify a conclusion about the content of the law. A familiar immanence claim in torts is Posner’s argument that the negligence standard embodies an ideal of economic efficiency. One could perform a similar analysis on the law governing lawyers, seeking to establish that the existing framework of law can best be understood as embodying certain values or ends.

This is, in part, the argumentative strategy of Daniel Markovits’s recent book. On one reading of the book, Markovits can be understood as making a two-part immanence argument. First, he contends that the law governing lawyers, considered in terms of “broad and organic ethics rules” and the “genetic structure” of the relevant law, requires lawyers to engage in the vices of lying and cheating. (These are terms of art for Markovits: He defines lying as promoting beliefs in others that one reasonably believes to be false and cheating as exploiting an advantage to which one is not entitled.) This is a classic immanence argument, because Markovits dismisses explicit legal limitations on lying and cheating (such as the duty of candor in Rule 3.3) as “self-consciously and insistently technical” and insufficient to counteract the general tendency in the law toward commanding lying and cheating. He follows this up with a second, critical immanence argument, which is that in contrast to the vices demanded by the currently dominant understanding of the sense and purpose underlying the law of lawyering, the ethical obligations of lawyers should be reoriented around a kind of suppressed or forgotten ethical ideal, which is nonetheless already immanent within the law. This ideal is that of negative capability. Lawyers should serve as mouthpieces (in a good sense) for clients, allowing them to participate in the process of democratic self-government at a “re-

64. MARKOVITS, supra note 37.
65. Id. at 42.
66. Id. at 44.
67. Id. at 36–41.
68. Id. at 47.
tail” level and thereby enhance the legitimacy of the law. Markovits does not explicitly frame this as an immanence argument, but he does identify it as an “alternative tradition” and a redescription of existing practices.

I find Markovits’s first claim to be utterly astonishing and unrecognizable as an interpretation of the law governing lawyers. Other scholars, whose immanence claims I find much more persuasive, conclude that the law of lawyering imposes significant, structural, “organic,” “genetic,” or what have you limitations on lying and cheating. But the trouble with immanence arguments is that one must be immersed in the field to evaluate them. Any given case can be dismissed as a “technical limitation” and not part of the law’s “genetic structure.” Overall sense and rationality emerges only from consideration of dozens of leading cases, knowledge of the history of the development of legal doctrines, and engagement with current developments in the law. Yet it is difficult to, say, “read a bunch of cases” as a response to an argument that the underlying rationality and purpose of the law is some end—gatekeeping, lying and cheating, zealous advocacy of client interests, moral counseling, or whatever. More to the point of this paper, making an immanence claim is essentially a matter of doing, just in the same way that ethical practice is a matter of doing. I find Markovits’s argument unpersuasive because it does not describe the same craft I engaged in as a lawyer and continue to engage in (albeit somewhat more peripherally) as a teacher of future lawyers. Critically evaluating ethical arguments in a professional domain requires engagement in a practice, not merely detached observation. In this way, both practice and its regulative standards are a matter of knowing-how, not knowing-that.

C. The Morality of Law

A common theme in the critique of American legal education has been that law schools socialize students to understand social problems in purely legal terms, abstracted from moral considerations such as honesty, fairness, or justice. Karl Llewellyn thought it was a good thing that professors in first-year courses aim “to knock your ethics into temporary anesthesia... along with woozy thinking,” but it is important to consider the point he was trying to make, which is that terms like “reasonable” and “good faith” are terms of art in the law and may not have the same meaning in legal discourse as they do in ordinary ethics. Nevertheless, law students and ob-

69. Id. at 196–201.
70. Id. at 155.
71. Id. at 161–63; see also id. at 165 (arguing that this alternative ideal “is no makeshift construction, cobbled together out of sealing wax and string to put a brave face on a fundamentally dismal form of life”).
72. See, e.g., Susan P. Koniak, When the Hurlyburly’s Done: The Bar’s Struggle with the SEC, 103 COLUM. L. REV. 1236 (2003); Geoffrey C. Hazard, Jr., Lawyers and Client Fraud: They Still Don’t Get It, 6 GEO. J. LEGAL ETHICS 701 (1993).
73. KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 116 (1930).
servers of legal education worry that the analytic separability between legal and moral reasoning (which is all that is meant by legal positivism) can too easily become a hermetic separation. The Carnegie Report quotes law students describing the tacit messages they received from their first-year courses about the relationship between law and morality:

When I took criminal law, I started to think of it in technical terms and stopped looking at the human side. Most teachers don’t bring in ethical issues. You are supposed to divorce yourself from those concerns.74

Roger Cramton’s classic essay on the implicit value system of legal education similarly faults law teachers for encouraging students to take a purely instrumental attitude toward legal reasoning that uses the law merely as a means through which the client can achieve his or her goals.75 Students accordingly adopt a crude relativism with respect to ethics and an attitude toward legal determinacy, certainty, neutrality, and stability that could be a caricature of Critical Legal Studies.77 As a result, they tend to resent any explicit discussion of values as “preaching” or “indoctrination.”78

The Carnegie Report recommends integration of substantive moral considerations into law school courses. It describes an introductory section from the Fuller and Eisenberg contracts casebook, on the consideration doctrine, in which an excerpt from the classic case of Dougherty v. Salt79 is followed by a note on the moral obligation to keep one’s promises.80 The Report faults instructors for telling students “that their concerns about fairness or other moral concerns are not relevant to legal analysis” and notes that “many students find it bewildering rather than clarifying” to be told that, for example, the aunt in the consideration case could break her promise without incurring legal liability because it was wholly gratuitous.81 Here I think the authors of the Report are the ones engaging in crude caricatures. I am not a contracts teacher, but I assume any competent first-year professor would use a case like Dougherty to elucidate the functions of contract law by probing into the reasons why some promises can be legally enforced and others are left to informal social sanctions for enforcement. In the first-year subject I do teach, torts, students look at questions about the relationship between law and morality, such as the absence of a general duty to rescue, as a way of understanding legal-process considerations, which themselves have moral significance. Reasons commonly given for courts’

74. Carnegie Report, supra note 3, at 141.
76. Id. at 254.
77. Id. at 254–55.
78. Id. at 256.
79. 125 N.E. 94 (N.Y. 1919).
81. Id. at 144.
refusal to recognize a duty to rescue include (1) line-drawing problems with respect to which of potentially numerous onlookers should be potentially liable for failing to come to the plaintiff’s assistance;\footnote{See, e.g., Richard A. Epstein, \textit{Torts} § 12.3, at 317 (1999); W. Page Keeton et al., \textit{Prosser and Keeton on Torts} § 56, at 376 (5th ed. 1984); Kenneth S. Abraham, \textit{The Forms and Functions of Tort Law} 234–35 (3d ed. 2007).} (2) line-drawing problems with respect to what affirmative acts will be required of would-be rescuers;\footnote{Lord Macaulay’s concern about the elasticity of the duty to rescue is classic: It will hardly be maintained that a surgeon ought to be treated as a murderer for refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that if it were not performed, the person who required it would die. Quoted in Jeremy Waldron, \textit{On the Road: Good Samaritans and Compelling Duties}, 40 Santa Clara L. Rev. 1053, 1069 (2000).} (3) concern with not interfering with the moral autonomy of potential rescuers;\footnote{Epstein, supra note 82, § 11.2, at 288 (“the object of the law is to maximize the sphere of individual autonomy and choice, which it does by minimizing the level of coercive legal interactions imposed upon unsuspecting bystanders.”).} (4) a view that there is no causal connection between non-rescue and the resulting harm;\footnote{Keeton et al., supra note 82, § 56, at 373 (“The reason for the distinction may be said to lie in the fact that by ‘misfeasance’ the defendant has created a new risk of harm to the plaintiff, while by ‘nonfeasance’ he has at least made his situation no worse.”).} and (5) concern about the incentive effects of a duty to rescue.\footnote{Epstein, supra note 82, § 11.2, at 288 (“[D]efenders of the common law rule fear that imposing a duty to rescue will, perversely, induce individuals to stay far removed from harm’s way lest they be saddled with onerous liabilities.”).} These are all standard so-called policy arguments, many of which refer to considerations of what might be called legal morality, that is, the reasons why legal norms might have particular properties, such as generality, ex ante certainty, stability, and ease of application. Their status as normative arguments does not exclude them from the first-year classroom; in fact, any teacher who did not consider the reasons commonly given for not recognizing a duty to rescue in torts, or for maintaining the consideration requirement in contracts, would be unusual in these courses.

Considerations related to the value of the rule of law may justify departures from what would otherwise be the standards of ordinary morality. The aunt in \textit{Doughtery} might be blameworthy in ordinary moral terms for reneging on the promise to her nephew, but there may nevertheless be good reasons for contract law to decline to enforce gratuitous promises. Defendants in many failure to rescue cases may have behaved reprehensibly,\footnote{See, e.g., Osterlind v. Hill, 160 N.E. 301, 302 (Mass. 1928) (defendant rented a flimsy canoe to two intoxicated individuals and then ignored their cries for help when the boat capsized).} but the legal process and rule of law considerations suffice to justify a no duty rule exonerating them from legal liability. This is not the exclusion of morality from the law school classroom, as the Carnegie Report fears, but the consideration of the moral norms that regulate the institutional practice of deciding cases according to principles laid down in advance with due regard

for the rights of the litigants and for the capacity of decision makers (judges and juries, as appropriate) to apply the governing standards. The practice of adjudication imposes constraints on the types of questions that can be decided, under what standards, and by whom.\textsuperscript{88} As a conceptual matter, practices have their own internal normative standards, which are given by the nature and end of the practice.\textsuperscript{89} A legal system, by its nature, is a practice of governance that is different from other ways of making decisions and directing the affairs of others.

The classic ideal of the rule of law is that “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered by the courts.”\textsuperscript{90} The ideal of legality emphasizes constraint on the arbitrary exercise of power.\textsuperscript{91} It therefore has a kind of “inner morality,” to cite Lon Fuller’s conception of law as a purposive activity of subjecting human activities to the governance of rules.\textsuperscript{92} A norm can be legal or can be nothing more than the exercise of arbitrary power. As a result, law teachers and law students may care about how a decision is made as much as they do about the substantive moral content of the decision.\textsuperscript{93} Some kinds of decisions are not typically made well by the legal system; just how heroic someone must be to save another from danger is one of those decisions, which is one reason why tort law does not recognize a duty to rescue. Complex “polycentric” engineering and design decisions, involving trade-offs among numerous competing values such as safety, cost, utility, ease of maintenance, aesthetic appeal, etc., are arguably also inherently not decisions the legal system ought to be second-guessing.\textsuperscript{94} Of course, one may disagree with any of these arguments, for example, by offering an administrable standard that could be used to evaluate when a bystander should have

\textsuperscript{88} In this regard I have learned a great deal from my colleague Jim Henderson. See, e.g., James A. Henderson, Jr., Process Constraints in Tort, 67 CORNELL L. REV. 901 (1982); James A. Henderson, Jr., Expanding the Negligence Concept: Retreat from the Rule of Law, 51 IND. L.J. 467 (1976). Henderson in turn was influenced by Lon Fuller, in works such as The Form and Limits of Adjudication, 92 HARV. L. REV. 353 (1978).

\textsuperscript{89} See MACINTYRE, supra note 24.\textsuperscript{88}

\textsuperscript{90} Thomas Bingham (Baron of Cornhill), The Rule of Law, 66 CAMBRIDGE L.J. 67, 69 (2007).


\textsuperscript{92} LON L. FULLER, THE MORALITY OF LAW 106 (rev. ed. 1964). Fuller uses the term “inner morality of law” on page 42, and elsewhere, and refers to the eight criteria that a law or a legal system must satisfy in order for it to express the quality of legality and not be merely a means of governing by fiat.

\textsuperscript{93} Compare the observation in the Carnegie Report that the case-dialogue method of instruction aims at students internalizing “a recognizably legal point of view,” including a conception of facts as something like “facts that are relevant to the disposition of a case” as opposed to “what really happened.” CARNEGIE REPORT, supra note 3, at 52–53.

come to the assistance of a person in peril or by articulating a test for product defect that takes into account the polycentric nature of design decisions. But these are positions taken within the practice of legal reasoning, referring to ordinary moral considerations, to be sure, but also respecting the constraints of a practice of reason giving that emphasizes publicity, prospectivity, and constraint on the arbitrary exercise of power.

As the discussion of the consideration rule and the absence of a duty to rescue show, respect for legality does not guarantee that the law will reach results that are identical with the outcome of moral deliberation in a relevantly similar case. An ordinary person sitting on a dock with access to a long pole would presumably have no difficulty in concluding that she is morally required to use the pole to help rescue a drowning swimmer. The rule of law may not even be instrumentally morally valuable, in the sense that complying with the demands of the law will tend, over the long run, to enable people to do better at complying with the demands of morality. An instrument like a knife or the law may be used for good or bad ends, and conformity with functional or instrumental criteria, such as sharpness for a knife or Fuller's eight standards of legality for the law, does not bear any necessary relationship with morality. If, on the other hand, respect for the law is a way of respecting the inherent dignity and equality of one's fellow citizens, even in the circumstances of deep disagreement about what morality requires, there is something intrinsically good about the rule of law. The ethics in lawyering can therefore be understood, not in terms of underlying moral goods to be pursued through legal means, but in terms of the non-instrumental value of legality as a virtue of societies characterized by tolerance and respect for all citizens.

An interesting version of the rule-of-law argument appears in the Carnegie Report's discussion of professional responsibility courses. Many critics have highlighted the messages tacitly sent by legal educators about professional responsibility. The Carnegie Report focuses on what might be called the interpretive attitude that should be taken toward the law governing lawyers. Its concern is that if legal ethics is taught as a legal doctrinal subject, then students will implicitly be encouraged to apply the same

98. Id. at 609.
99. This is the argument of Chapter 3 in WENDEL, supra note 18, at 86–122, and can be summarized only briefly here.
interpretive methodology to the law regulating their own conduct as they would when advising clients about their legal obligations. What is that interpretive attitude?

When legal ethics courses focus exclusively on the law of lawyering, they can convey a sense that attorneys’ behavior is bounded only by sanctions such as the threat of malpractice charges and give the impression that most practicing lawyers are motivated primarily by self-interest and will refrain from unethical behavior only when it is in their immediate self-interest to do so.¹⁰¹

There are actually two different claims packed into this passage. One is about motivation or character (“most practicing lawyers are motivated primarily by self-interest”) and will be considered in the next section. The other claim is about interpretation and might be called the Holmesian bad man attitude.¹⁰² This is the view that the content of legal obligations is defined by a prediction of when officials will impose sanctions on conduct.

The image of the Holmesian bad man comes from Oliver Wendell Holmes Jr.’s definition of law in terms of a prediction of how relevant legal officials might decide particular cases; significantly, the perspective from which this prediction is made is that of a citizen who is interested only in avoiding legal penalties that might attach to his conduct.¹⁰³ The label “bad” may be misleading. The bad citizen is not necessarily morally bad; rather, she is “disinclined to obey stupid laws just because they are the law.”¹⁰⁴ The Holmesian bad man maintains that the law creates only prudential reasons for action. Prudential reasons appeal to interests an actor already has, such as maximizing her well-being. To the extent paying a penalty is less costly in terms of the actor’s utility than refraining from the conduct, the balance of prudential reasons would direct the actor to violate the conduct rule. However, the Holmesian bad man stance begs an important question about what it means to comply with the law. A hypothetical “bad” citizen may believe that a conduct rule is a nullity unless it is backed by a sanction that the citizen would rather not pay, but this is not the only view that one can take of conduct rules. The bad citizen obeys the law only out of self-interest—i.e., because in some cases the remedial rule has the desired deterrent effect. In this way, the bad citizen’s concern with the law is no different from the reasons that she would have for giving money to a mugger. To put it a bit less bluntly, the costs of noncompliance with law are no different from any other cost that might be weighed against the benefits to be realized by doing something.

A very different attitude toward the law would be manifested in a citizen looking to the law as a source of reasons for action in themselves, not just as a way of predicting when state officials will do unpleasant things, like locking her in jail. H.L.A. Hart argued that jurisprudential theories accepting the bad man definition of law, like Austin’s command-sanction theory or the American legal realism of the 1930s, lacked the conceptual resources to account for the possibility of legal officials accepting the law as a source of obligation. He went further and argued that it is necessarily a feature of a legal system, as opposed to an accidental convergence of behavior by would-be legal officials, that judges regard the rule of recognition of a legal system from the internal point of view, i.e., as creating an obligation to consider only certain sources of norms as part of the law of the society. This does not mean judges may not have other motivations, such as gaining prestige or avoiding embarrassing reversals by appellate courts. Hart emphasizes that “facts about beliefs and motives, are not necessary for the truth of a statement that a person had an obligation to do something.” Whatever specific motivations a judge may have, however, there must be something distinctive about law that provides a different sort of reason for action—otherwise there would be no such thing as a legal system as opposed to a fortuitous convergence of behavior by a bunch of people sitting on high benches wearing black robes. The law must make a practical difference to the way a judge decides a case. Otherwise, there would be no way to account for the distinguishing features of law, such as its generality, certainty, stability, and other virtues associated with the rule of law. One implication of this theory of law is that certain kinds of arguments can be ruled out as not belonging to the domain of law. A client who argues that he should prevail on a motion to compel discovery because he is rich, attractive, or powerful would be making a conceptual mistake. I have argued that, if the internal perspective on the rule of recognition is mandatory for judges because of considerations of objectivity and systematicity, it is equally mandatory for lawyers. A lawyer must treat the law as imposing obligations on the client, and because the lawyer’s own duty is to represent the client faithfully within the law, the law imposes obligations on the lawyer as well. The opposite of the internal point of view manifests itself in legal practice as the attitude that lawyers can, and should, treat the law instrumentally, as merely an impediment to their clients’ goals rather than as a source of obligation. This attitude valorizes “creative and aggressive” structuring of transactions, “zealous” advocacy, and an exces-

106. Id. at 83.
107. Heidi Feldman once offered me an excellent illustration of this kind of conceptual incoherence, which she attributed to Peter Railton: “Shut up, he argued.” Try as I might I cannot find a citation to Railton saying this, so I will just cite my conversation with Heidi.
108. Wendel, supra note 102, at 1492–93.
sively private view of legal obligations that runs only to the client and does not include obligations to courts, third parties, or a general obligation to interpret legal texts in good faith. Moreover, it is inconsistent with the reasons why the law is entitled to respect, namely that it provides a way to justify our actions in terms that reflect the interests of all affected persons—reasons in the first person plural, so to speak. Thus, there is a bridge between the internal standards regulating legal argumentation and broader moral concerns. The law permits the transformation of brute demands into claims of right, and for this reason it is a significant social achievement.

One way to push back on the Holmesian bad man attitude is to take the perspective of ordinary morality. The Carnegie Report approvingly describes a law school course on ethics in health care professions, which requires students to analyze issues "as a human being and as part of the hospital administration." Legal ethics courses often take this perspective, for example, in working through whether there is a conflict between the legal duty of confidentiality and the ordinary moral considerations that tend to favor disclosure in a case like Spaulding. The implication is that the perspective of ordinary morality is the only way to counteract the implicit messages sent to law students elsewhere in the curriculum. As the next section suggests, a critical, objective perspective by itself might be insufficient. Professionals must also possess the requisite character traits. Only a virtuous lawyer, reasoning from the standpoint of being a human being as a part of the legal system, can adequately resolve the sorts of ethical dilemmas that lawyers encounter in practice.

Before considering virtue ethics, however, I would like to briefly fore-shadow the principal thesis of this paper by suggesting a distinction related to internal and external points of view but more familiar to practicing lawyers. This is the distinction between the mindset of litigators and that of lawyers advising clients on the law. On this thesis, the relevant excellence or virtue of lawyers is not related to virtue qua human being but to excellence at interpreting and applying the law—that is, engaging in the sort of legal reasoning and advising that makes up the everyday work of lawyers. To illustrate this distinction in the context of the law governing lawyers, consider a well known case, United States v. Gellene, in which a partner at a large New York City law firm was convicted of bankruptcy fraud for failing to disclose the representation of a related party while representing the debtor-in-possession in a Chapter 11 case. Gellene is a great teaching case because on its face it is baffling that an experienced bankruptcy partner at a major law firm could have so thoroughly misunderstood the applicable law, particularly a bankruptcy rule requiring disclosure of "any connection."

110. See, e.g., Hazard et al., supra note 35, at 3–8 (discussing Spaulding from the standpoint of law and ordinary morality).
111. 182 F.3d 578 (7th Cir. 1999).
the firm had with any other party in interest. Explanations of the partner’s failure generally note the compensation structure at the firm, which placed the lawyer in question, John Gellene, in a subordinate role. Because he represented debtors in corporate restructuring proceedings, Gellene lacked a stable base of repeat-player clients. (If he were doing his job well, at least, his clients would not need his services again.) He was beholden to allies within the firm, including mergers and acquisitions partner Larry Lederman, who referred clients to Gellene. Because of his representation of investment funds, Lederman was a much more successful “rainmaker,” and therefore had considerably more political clout than Gellene in the firm. Lederman was therefore in a position to pressure Gellene, subtly but unmistakably, to leave one of Lederman’s clients off the required disclosure to the bankruptcy court.

On the assumption that Gellene was not an outright crook, however, there must have been some way for him to justify an omission that was subsequently determined to constitute bankruptcy fraud and violation of the federal false-swearing statute. One possibility is that he took a litigator’s mindset with respect to the governing law. The firm did not concurrently have a formal attorney-client relationship with any of the creditors in the Chapter 11 proceeding (with one exception, which the court treats as insignificant); it did, however, concurrently represent constituents and related entities to one of the creditors in the bankruptcy. The creditor in question

114. Lawyers sometimes divide the world of partners into finders, minders, and grinders. Finders bring in clients; minders keep them happy; grinders do the necessary legal work. At Gellene’s law firm, as in others using a so-called “eat what you kill” compensation system, finders were much more powerful than grinders; unfortunately for Gellene, he was a grinder. (In another folksy description, Lederman was the chicken catcher and Gellene the chicken plucker.)
115. See Hazard et al., supra note 35, at 74–75 (discussing the statutes violated by Gellene).
116. See 182 F.3d at 583 n.6. The court cites a bankruptcy matter pending in Colorado, in which the court understood that Gellene’s firm had represented South Street. In his discussion of this representation, Regan cites internal firm conflicts-checking procedures that listed Greycliff Partners as the client in the so-called Busse Broadcasting matter, and also refers to firm lawyers treating Salovaara as the client. Regan, supra note 113, at 146–47. The representation of small, informally governed entities such as partnerships and closely held corporations is fraught with peril for lawyers, who may find themselves inadvertently acquiring implied-in-fact professional obligations to individuals or entities they had not intended to regard as clients. See Hazard et al., supra note 35, at 541–67. Significantly, although it refers to South Street as the firm’s client, the court does not rely on a formal attorney-client relationship existing between the firm and South Street. This is due mostly to the focus on Gellene’s violation of the bankruptcy rule, which requires disclosure of connections with all interested parties, not just clients. But analysis of the representation under generally applicable conflicts-of-interest principles as stated in Model Rules R. 1.7(a)(2) reaches the same result. Gellene’s representation of the debtor is materially limited by the firm’s relationship with Salovaara and Greycliff Partners, regardless of whether South Street is formally a client of the firm.
was South Street Funds, a limited investment fund, which was managed by an entity called Greycliff Partners, in which there were two (human) partners, Salovaara and Eckert. The firm represented Salovaara in a dispute with Eckert over their partnership agreement and also represented Greycliff in other acquisitions. A lawyer might make an argument with a straight face that the firm’s representation of Salovaara and Greycliff was not tantamount to a representation of South Street. For one thing, the rule on entity representation makes clear that a lawyer for an organization, such as South Street, represents the entity itself, not any of its constituents. This means that South Street, not Salovaara, was formally the client of the firm. In addition, the representation of one entity generally does not create a lawyer-client relationship with affiliated entities. Thus, the representation of Greycliff, the manager of South Street, was not equivalent to the representation of South Street. Indeed, as Regan reports, John Gellene believed that he was not required to disclose the representation of Salovaara because he was not a creditor in the bankruptcy proceeding. This is irrelevant to the interpretation of the bankruptcy rule but would be the sort of argument that might occur to a litigator trying to establish, after the fact, that a firm had not violated the generally applicable concurrent conflicts rule.

As it happens, I believe it is also irrelevant to the interpretation of the general concurrent conflicts rule because the firm’s relationship with Salovaara can create a material limitation on its ability to represent the debtor. The reason is that the firm must represent the debtor with due regard to the debtor’s duty of impartiality among the various creditors; the bankruptcy rule requiring disclosure is intended to support that obligation by providing information to creditors so they can monitor the debtor for compliance with its duty. Nevertheless, one could imagine Gellene convincing himself that he was not required to disclose the representation of Salovaara, which happened to be the result that Lederman preferred.

The problem with adopting the litigator’s mindset in this case was that Gellene was not defending conduct that was entirely in the past. Rather, he was involved in directing the firm’s course of conduct. The question he should have been asking was not “is there some argument that passes the threshold of plausibility that I could give to avoid sanctions?” but rather

117. See Regan, supra note 113, at 138, 144–58 (providing the factual background on the firm’s client relationships).
119. See Model Rules R. 1.7 cmt. 34.
120. See Regan, supra note 113, at 148.
121. See Model Rules R. 1.7(a)(2).
122. See Regan, supra note 113, at 139–40, 142–44 (discussing the obligation of counsel for the debtor to act impartially with respect to the interests of all creditors—as a “caretaker for the value of this company for the benefit of all of its creditors,” as Gellene put it, and the objection of a major secured creditor, Jackson National Life (JNL), to the reorganization plan proposed by Gellene, which in the view of JNL would unfairly disadvantage it relative to other secured creditors, particularly South Street).
“what are my firm’s obligations?” Some would respond that the second question collapses back into the first because the question of what one’s obligations are, by definition, is the same as whether some argument can be given for why sanctions should not be imposed. This is the Holmesian bad man stance: On this view the firm’s legal obligations can be restated in the form of a prediction of whether sanctions will be imposed, which takes into account how likely it is that Gellene’s client-identity argument would be accepted by a court.

To be clear, I have no quarrel with lawyers presenting predictive judgments in exactly that form. Suppose the managing partner of the firm asked Gellene whether it was likely that the firm would be disqualified from representing the debtor in the bankruptcy matter because of its concurrent representation of Salovaara. There would be nothing wrong with an answer of the form, “I think we have an argument for why we shouldn’t be disqualified from representing the debtor, but it’s not a sure thing; maybe we have a 25% chance of prevailing on a motion to disqualify.” But that is very different from a statement that the law permits the simultaneous representation of Salovaara and the debtor, and the failure to see this distinction is a serious jurisprudential mistake. It assumes that rights and duties are matters of probabilistic judgments, not an interpretive process that seeks to determine the content of the law. Of course there may be uncertainty, legal indeterminacy, and disagreement about the content of the law. There is seldom one right answer to any question of what the law permits or requires. Lawyers frequently are called upon to exercise judgment, and one reason why professional expertise is not easily modeled or reduced to something else is that judgments are the sort of thing about which experienced practitioners can differ.

The possibility of differences, however, does not mean that there is no such thing as an egregiously inappropriate or inadequately grounded judgment. From the point of view of impartial legal advising, Gellene’s reading of the rules was too tendentious, too much of an advocate’s approach, to satisfy the client’s need to understand what the law really required in this case. As it happens, the “client” here was Gellene and his firm. The law governing lawyers places lawyers in the uncomfortable and unfamiliar position of being the recipient of legal advice. Thus, Gellene ended up misleading his client—i.e., himself—by taking an aggressively adversarial interpretive stance toward the governing law. The result was disaster. Gellene was sentenced to serve two concurrent fifteen-month sentences for bankruptcy fraud.123 A lawyer who had been interested in discerning the content of the law governing disclosure of related-party representations would not have made the same mistake and would still be practicing law today.

D. Virtue-Theoretic Concepts

The question naturally arises, therefore, whether someone like Gellene lacked the requisite traits of character that a good lawyer must possess. The Carnegie Report alludes frequently to the character of lawyers and law students, in part to distinguish it from a more technical body of information that may be acquired in the course of professional education. It is a commonplace that many incoming law students expect to learn a bunch of rules, and certainly there is quite a bit of doctrine to familiarize oneself with in the first year. Students learn the names of different estates in land, the elements of torts and crimes, the rules for calculating damages for breach of contract, and so on. Yet the ability to recall this knowledge is not what best characterizes the practice of law by expert lawyers.

In actual professional practice, it is often not the particular knowledge or special skill of the lawyer or physician that is critical, important as these are. At moments when judgment is at a premium, when the practitioner is called on to intervene or react with integrity for the values of the profession, it is the quality of the individual’s formation that is at issue. The holistic qualities count: the sense of intuitive engagement, of habitual disposition that enable the practitioner to perform reliably and artfully.124

What the Report calls “holistic qualities” are better known in moral philosophy as virtues or traits of character. In places the Report seems concerned primarily with the motivation a lawyer would have to comply with ethical obligations. In other places, however, it seems to have in mind something closer to virtue ethics. In Gellene’s case, a disposition to approach the rules with a more impartial mindset may have prevented the fiasco resulting from his failure to disclose the related-party representations. It is therefore not surprising that critics of legal ethics education point to its failure to address considerations of character.

Some philosophers do insist that knowledge of moral duties and rules alone is not sufficient to ensure compliance with the demands of morality.125 Rather, it is essential that people possess sufficiently stable dispositions to do the right things for the right reasons.126 These dispositions cannot be so general that they are essentially just restatements of the re-

125. See generally Rosalind Hursthouse, On Virtue Ethics (1999); Michael Slote, From Morality to Virtue (1992); Philippa Foot, Virtues and Vices and Other Essays in Moral Philosophy (1978); Edmund Pincoffs, Quandary Ethics, in Revolutions: Changing Perspectives in Moral Philosophy 92 (Stanley Hauerwas & Alasdair MacIntyre eds., 1983); John McDowell, Virtue and Reason, 62 The Monist 331 (1979); G.E.M. Anscombe, Modern Moral Philosophy, 33 Philosophy 1 (1958), In legal ethics, see, for example, Dean Cocking & Justin Oakley, Professional Interpretation and Judgment, and the Integrity of Lawyers, in Professional Ethics and Personal Integrity 68 (Tim Dare & W. Bradley Wendel eds., 2010).
requirements of rules or duties. An honest person refrains from lying or cheating, not because it is wrong to lie or cheat, but because the person is honest. A courageous person might risk her life because “someone had to do it” or “I thought I could save him if I did that” but not because it would win her fame and glory or because she hoped to claim a reward. A virtuous person does the right things for the right reasons.

It is often objected that virtue ethics fails to provide action-guiding standards. Virtue ethicists’ response is that an ethics of rules or principles also may fail to guide action because “a certain amount of . . . practical wisdom (phronesis) might be required both to interpret the rules and to determine which rule was most appropriately to be applied in a particular case.” A different version of the action-guidingness objection, however, would be that virtues and virtue rules (“act honestly,” for example) gain sufficient content to guide action only in relation to some domain of concern and some end to be furthered. One response to this objection, offered by many virtue ethicists who are concerned with general morality, is to follow Aristotle and appeal to what makes a good life qua human being; virtues are then those character traits and dispositions that are conducive to living this kind of life. Within a particular social role or profession, however, one may speak of virtues that benefit a practitioner with respect to that particular context. Those virtues then serve as a regulative ideal—standards of excellence within the particular practice or craft to which a practitioner can aspire. Being a good jazz pianist means having internalized

127. See Hursthouse, supra note 125, at 28–29, 123–31. In her entry on virtue ethics in the Stanford Encyclopedia of Philosophy, Rosalind Hursthouse notes that a range of reactions—some emotional, some practical—distinguish the honest person from someone who merely follows rules. Valuing honesty as she does, she chooses, where possible to work with honest people, to have honest friends, to bring up her children to be honest. She disapproves of, dislikes, deplores dishonesty, is not amused by certain tales of chicanery, despises or pities those who succeed by dishonest means rather than thinking they have been clever, is unsurprised, or pleased (as appropriate) when honesty triumphs, is shocked or distressed when those near and dear to her do what is dishonest and so on.


128. See Hursthouse, supra note 125, at 127–28 (offering the reasons of a courageous person).

129. See, e.g., Christine Swanton, Can Virtue Ethics Provide Legal Ethics, in DARE & WENDEL, in PROFESSIONAL ETHICS AND PERSONAL INTEGRITY 201 (Tim Dare & W. Bradley Wendel eds., 2010) (considering this objection and responses, in the context of legal ethics).

130. Hursthouse, supra note 125, at 40. This is often called the tu quoque argument, see Christine Swanton, Can Virtue Ethics Provide Legal Ethics, in DARE & WENDEL, supra note 129, at 201, which might informally be known as the “oh yeah, can you do any better?” response.


133. See id. at 65–66 (MacIntyre’s examples are of a food that is good for all people to eat, as distinct from a food that would be good for a marathon runner in training to eat).
standards of excellence through a process of apprenticeship including listening to the greats like Thelonious Monk, Oscar Peterson, and Bill Evans, learning something about jazz theory, and, of course, playing the piano for hours and hours.\textsuperscript{134} While it may be difficult to codify standards of excellence, to articulate them in a theoretical way, they are quite real as a property of the craft itself. Playing jazz piano simply is to accept and be guided by the virtues internal to this particular activity. In the context of legal ethics, one might therefore say that being a good lawyer is a matter of being guided by the habits, traits, and dispositions that tend to conduce toward realizing the goals of the profession.\textsuperscript{135} This means that “an appropriately action-guiding profession ethic cannot be generated without specifying what the appropriate orientation and essential guiding concerns of the particular profession ought to be.”\textsuperscript{136}

With respect to virtuous lawyering, one might ask what is the end to be pursued by a virtuous lawyer and over what domain does the activity of lawyering extend. On one conception of legal ethics, the domain of lawyerly virtue is the client’s interests; that is, the lawyer should be understood, first and foremost, as the friend or champion of her client, with the rights of non-clients, and the public interest, subordinated to the client’s rights.\textsuperscript{137} A virtuous lawyer, on this view, would not disclose the confidential information in \textit{Spaulding}, even if she might feel a certain amount of regret about the harm that foreseeably will result. On the other hand, others argue that virtue for lawyers requires balancing the rights of third parties against the rights of clients, not necessarily privileging client interests above the legitimate interests of others. This version of the virtuous lawyer would exercise judgment to determine whether the threatened harm to the plaintiff in \textit{Spaulding} was severe enough to warrant breaching the duty of confidentiality. Perhaps virtue for lawyers includes knowing which of these conceptions should apply in a given case. Some clients may be entitled to full-throated zealous advocacy, while the representation of others should be tempered by a regard for the interests of others. But this move threatens to make virtue ethics for lawyers into a hall of mirrors in which the answer to every question about the content of the virtues refers to even more considerations of virtue. Virtue, or judgment, thus ends up becoming a black box in the theory so that the result depends on something about which we can say little except that it must be what a virtuous agent would have done.\textsuperscript{138} There has to be something that establishes the parameters of the exercise of virtue, and

\textsuperscript{134} Oakley & Cocking, supra note 126, at 25–26 (using the jazz pianist example).
\textsuperscript{135} See id. at 74.
\textsuperscript{136} Id. at 75.
\textsuperscript{138} See Dare, supra note 38, at 111–12 (criticizing virtue-ethics accounts of \textit{To Kill a Mockingbird} in which Atticus’s decision, at the end of the novel, to lie to protect Boo Radley can be explained as a matter of “judgment” rather than as a principled decision).
to avoid circularity, the standard cannot be that which a good person would do.

In other words, before anyone starts talking about virtues in legal ethics and the practice of law, it is essential to have a view about the "essential guiding concerns" of the law, the legal system, and the legal profession. I have argued that they are values associated with the rule of law, including the basic equality of all citizens, the duty to treat one another with respect, and constraints on the exercise of arbitrary power. From these guiding concerns one can then infer specific principles and virtues that characterize good lawyering. Of course, if one has a different understanding of the essential guiding concerns of the law, one will reach different conclusions about the nature of excellence in the practice of law. For present purposes, there is no cause to reargue the underlying normative case. It is important, however, to keep in mind that these issues must be settled before legal educators can think meaningfully about the virtues that belong to an appropriate conception of the ethical practice of law. In the remainder of this paper, I will argue for a particular account of excellence in the practice of law. The guiding principle of this conception of virtuous lawyering is the value of legality, which I believe is the most plausible account of the normative underpinning of the lawyer’s role. John Gellene would have disclosed the related-party representation if he had been suitably motivated by the value of legality, and it is in this sense that we can talk about lawyers as possessing or lacking the requisite traits of character.

1. Legal Judgment and Decision-Making

Donald Schöen, the previously mentioned philosopher of education who studied how professionals implement knowledge in practice, began his study of professional education with a nice metaphor of the topography of professional practice in which the high ground overlooks a swamp. The high ground consists of problems requiring the application of technical rationality—that is, figuring out which means to use to achieve an end that is already defined. These problems turn out to be relatively uninteresting, however, particularly in comparison with those in the swamp, where figuring out how to frame the problem is a question that necessarily precedes the application of technical rationality, and this initial framing question requires the exercise of discretion and judgment. For example, a civil engineer asked to build a road will think in terms of the requirements of technical rationality and consider factors like soil conditions, stability, and drainage. Deciding whether or where to build a road, however, implicates "a complex and

139. See WENDEL, supra note 18.
ill-defined mélange of topographical, financial, economic, environmental, and political factors.” Essentially, the Carnegie Report faults law school ethics courses for staying on the high ground and not getting students down into the swamp: “Such a narrow focus [on the law of lawyering] misses an important dimension of ethical development—the capacity and inclination to notice moral issues when they are embedded in complex and ambiguous situations, as they usually are in legal practice.” The implication is that law school teaches only technical rationality and does nothing to train students to deal with “swampy” questions, including how to recognize and frame ethical issues and how to exercise the faculty of practical reasoning or judgment. To put the point slightly differently, moral decision making in the context of legal practice is less about deliberation and more about action or performance—hence, the language of “capacity and inclination” used in the Carnegie Report.

To some extent this critique is belied by the appreciative attitude toward the case-dialogue (a/k/a “Socratic”) teaching method taken elsewhere in the Report. It refers to the case-dialogue method as a cognitive apprenticeship, aimed not so much at imparting knowledge as training students in “a particular way of thinking, a distinctive stance toward the world.” One aspect of that distinctive stance is awareness of the legal salience of certain features of a situation. As law students quickly discover, “facts” are not just facts. Rather, as the Report rightly observes, they result “from complex processes of interpretation that are shaped by pressures of litigation.”

The case-dialogue method also attempts to convey values and dispositions, along with information. Ordinary human problems are translated into legal terms, and this translation is itself a process, something that requires practice and performance under the guidance of an experienced practitioner. Some law students perceive this as constraining. The Carnegie Report quotes a student at NYU who praised the first-year lawyering course for its rigor, but then added: “[T]hat, too, is a box. The creative process is extremely limited. I’m eager to place legal reasoning into an interdisciplinary context.” To rephrase this objection in Schön’s terms, the student seems to be saying that law schools have deluded themselves into thinking they

142. Id. at 4.
143. See Carnegie Report, supra note 3, at 149.
144. See id. at 149 (noting that an important dimension of ethical development is “the capacity and inclination to notice moral issues when they are embedded in complex and ambiguous situations”).
145. Id. at 51.
146. See Herman, supra note 61, at 77–78 (discussing the importance of “rules of moral salience” that pick out the features of the world that have significance for moral decision-making).
148. See id. at 4.
149. Id. at 41.
are dealing with “swampy” questions but in fact have merely replaced one species of technical rationality with another.

As the next section seeks to demonstrate, however, legal reasoning does not aim to transcend the swamp but to provide a way through it. Legal practice is the direct engagement with non-technical issues—call them moral, social, “policy,” or what have you—using a style of reasoning that seeks to resolve these issues using techniques and procedures that respect the value of legality. Lawyers and judges do not refer back directly to first-order moral concerns but make arguments based on recognized considerations that are internal to law. These can be techniques of common law reasoning, such as analogizing and distinguishing cases, synthesizing a rule from a series of cases, reading holdings broadly or narrowly, appealing to the policy rationale underlying a rule, or arguing for new legal principles or the abrogation of old ones; techniques of statutory interpretation, including ordinary language or “dictionary” analysis, reliance on the syntax and structure of statutes, making use of legislative history, following the post-enactment history of a statute, reading it in conjunction with other similar statutes, using traditional canons of construction like *ejusdem generis*, etc.; and making use of interpretive conventions that regulate the more specific interpretive practices described here. First-order moral reasons figure into this reasoning process only indirectly. To put the point differently, when the NYU student quoted in the Carnegie Report wants to place legal reasoning in an interdisciplinary context, he or she is seeking to stand outside legal reasoning, regarding it as an observer rather than a participant. Legal reasoning is not sealed off from first-order morality, but the connections are indirect. Doing legal reasoning properly means, in many cases, not resorting to the methods of economics, philosophy, or some other discipline. There is a difference between arguing that some tort rule (negligence or strict liability, for example) would be more efficient in a given context and arguing that the law does, or should, reflect negligence or strict liability. Legal reasoning is not just the application of theory to practice but the application of theory *through* practice and *in* practice.

The Carnegie Report defines the practice of law as “engaged expertise,” the mediation between theory and practice, or the faculty of judgment or practical reasoning. It observes: “Like the experienced physician, the legal professional must move between the detached stance of theoretical reasoning and a highly contextual understanding of client, case, and situation.”150 There is no algorithm to model the application of law to facts, because facts take on significance only in light of the law, the client’s goals, and the interests of other parties. Moreover, understanding how to do legal reasoning correctly requires immersion in the practice and a period of apprenticeship before the internal standards regulating the practice become

perspicuous to the practitioner. Along these lines, theological ethicist Stanley Hauerwas frequently refers to his childhood apprenticeship working with his bricklayer father.\textsuperscript{151} In order to learn to lay brick, Hauerwas writes, it is not sufficient to be told how to do it. Not only are there many sub-skills that must be learned (how to mix the mortar and build a scaffold, for example), and not only is there a specialized language (such as understanding what it means to “frog” the mortar), but there is a necessary element of simply performing the relevant tasks, maybe failing in the attempt, and being corrected by more experienced bricklayers. Some tasks require having a feel for conditions—say, the density of the bricks (“clinkers,” the bricks from the bottom of the kiln, being particularly tricky to work with) or the consistency of the mortar—and while this feel may be difficult to articulate, it is the sort of tacit knowledge that experienced bricklayers possess, which is one of the reasons why their jobs turn out looking better than jobs performed by novices. Therefore, there is no substitute for doing when trying to learn how to lay bricks. “God knows how many four-foot-high walls I built, tore down, only to build again,”\textsuperscript{152} Hauerwas writes. “That is the way you learned how to lay brick.”\textsuperscript{153} From these childhood lessons Hauerwas concludes that professions, as well as ethics generally, are practices that must be learned by immersion and by subordinating one’s own judgment to that of an expert. “Through such an apprenticeship we seek to acquire the intelligence and virtues necessary to become skilled practitioners.”\textsuperscript{154}

Appeals to professional virtue and the insistence that professional expertise cannot be theorized completely in terms of non-craft-specific considerations may strike some readers as an attempt to mystify non-professionals and therefore entrench the illegitimate monopoly enjoyed by some occupational group over the provision of services. If robots could lay brick as well as Stanley Hauerwas’s father, bricklayers would be out of business. Thus, if an online legal document preparation service like LegalZoom can create wills, trust documents, and articles of incorporation as good as those prepared by a local lawyer, then lawyers may try to find some way to argue that the activities of LegalZoom should be restricted.\textsuperscript{155}

Of course, lawyers would not come out and argue that they are trying to


\textsuperscript{152}Hauerwas, Hannah’s Child, supra note 151, at 30.

\textsuperscript{153}Id.; see also \textit{Dart, supra note 39}, at 103–04 (using Hubert and Stuart Dreyfus’s example of learning to drive).

\textsuperscript{154}Hauerwas, After Christendom?, supra note 151, at 103.

\textsuperscript{155}See Debra Cassens Weiss, LegalZoom Can Continue to Offer Documents in Missouri Under Proposed Settlement, \textit{ABA Journal} (Aug. 23, 2011, 6:32 a.m.), http://www.abajournal.com/news/article/legalzoom_can_continue_to_offer_documents_in_missouri_under_proposed_settlement. In August 2011, LegalZoom settled a class-action lawsuit in Missouri charging it with the unauthorized practice of law. See id. Previously it entered into a consent decree with the Washington-
protect their monopoly rents. Sociologists of the professions have frequently pointed out how claims of distinctive professional expertise could be used to justify the enhanced status of professionals or the freedom of professions from the regulations to which other industries might be subjected. The “guild power” of professions must be defended by appeal to considerations such as consumer protection, which have wider normative significance. Thus, professions and society enter into an implicit quid pro quo, under which professions obtain insulation from market or regulatory pressures in exchange for an agreement to practice their craft in the public interest.

Moreover, the specialized nature of professional knowledge means that clients, affected non-clients, and society as a whole are not in a good position to monitor professionals to see whether they are, in fact, practicing their profession in the interests of society. In the lawyer-client relationship the asymmetry of knowledge and expertise creates what economists would call agency costs, arising from the difficulty clients have in monitoring the competence and loyalty of lawyers they retain. In the broader context, society as a whole must take on faith, to some extent, the representation by the legal profession that there is some value in what lawyers do and that lawyers (at least most lawyers, most of the time) are in fact acting in accordance with the constitutive norms of the profession that are in the public interest.

The burden of justification in this paper is somewhat different because I am writing for lawyers and legal educators, not members of the public who are not legally trained. What I hope to establish in the concluding section of this paper is that someone who has acquired the expertise of legal analysis can tell the difference between a good legal argument and one that is inadequately supported. If this is a tenable distinction, then the “good” in lawyering can be understood not directly in moral terms but as a function of how well a lawyer expresses respect for the law and the legal system while representing her clients. This conception of legal ethics is not meant to drive a wedge between law and morality but to emphasize the political and institutional aspects of moral reasoning. There is a difference between reasoning about what one ought to do in isolation and what one ought to do.
while also taking account of considerations such as whether the reasons for one’s action can apply to other relevantly similar actors; whether the standard governing one’s action can be expressed in a general way that can be understood and applied by other decision makers; and whether other decision makers ought to have relatively wide latitude to make discretionary judgments or whether instead they should be constrained in their decision-making authority as a way of safeguarding against arbitrary decisions or the abuse of power. These considerations, which are familiar features of first-year law courses, can be understood as a distinctive morality of the legal system, emphasizing as it does the values of impartiality, stability, and constraints on the exercise of power. Thus, the following example, written in the form of an interactive dialogue with the reader, is intended to show how lawyers can do better or worse, as measured by the internal evaluative standards of an appropriately legal and institutional normative system.

II. AN EXTENDED EXAMPLE

The release of George Bush’s memoirs in November 2010 rekindled a long-running debate, in the United States and internationally, on the morality, efficacy, and legality of torture. In an interview broadcast on NBC News after the publication of his book, Bush was asked specifically about the practice of waterboarding. Central Intelligence Agency director Michael Hayden had previously confirmed, in Congressional testimony on February 5, 2008, that the CIA used waterboarding on Khalid Sheikh Mohammed, Abu Zubaida, and other al-Qaeda detainees at secret locations under CIA control, known as “black sites,” throughout the world with the cooperation of foreign intelligence services. (It was subsequently revealed that Khalid Sheikh Mohammed was subjected to waterboarding an astonishing 183 times.)

A few days after Hayden’s testimony, on February 9, 2008, Attorney General Michael Mukasey testified that lawyers in the Department of Justice had concluded that waterboarding was legal and that the CIA had acted according to this advice. Bush took the same line in his NBC News interview. To interviewer Matt Lauer’s question, “Why is waterboarding legal?” Bush responded, “Because the lawyer said it’s legal.”

Note that the questioners here seem to make two related assumptions about the relationship between law and morality. First, if something is legal, then there is

160. Exhaustively documenting all aspects of this history would unnecessarily waste space here. The reader is referred to several sources of support, including Goldsmith, supra note 25; Jane Mayer, The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals 148 (2008); Philippe Sands, Torture Team: Rumsfeld’s Memo and the Betrayal of American Values (2008).

161. See Mayer, supra note 160, at 148 (discussing “black sites” maintained by the CIA).


at least a prima facie reason to believe that it should be permissible. One might ask the follow-up question—“Even if it is legal, is it the sort of thing the United States should be doing?”—but the legal permissibility of some interrogation technique shifts the normative burden of proof to some extent. The second assumption is that if government officials did something the lawyers did not say was legal, they acted wrongfully. Perhaps not wrongfully, all things considered—that is, it may have been justified in some case to violate the law—but again there is a subtle rhetorical allocation of the burden here so that the legality of interrogation techniques assumed paramount importance.

In his attempt at justifying his administration’s policies, Bush was referring to legal analysis provided by an elite group of lawyers within the Department of Justice, called the Office of Legal Counsel (OLC). The OLC exercises power delegated from the Attorney General of the United States to advise the President and to issue legal opinions that are binding on the entire executive branch unless overruled by the Attorney General. The most difficult, serious legal questions involving the legality of government action are referred to the OLC, which traditionally has employed some of the very best available lawyers in the United States. Numerous OLC lawyers indeed had provided legal advice, in the form of several lengthy memoranda, on the legality of various “enhanced interrogation techniques,” including waterboarding. The memos do purport to provide a legal justification for harsh interrogation tactics, including what most lawyers, as well as laypeople, would regard as torture. The quality of this advice was soundly criticized by legal scholars, in the United States and internationally.164 As an ostensive demonstration of the craft of legal reasoning, and the judgment that (in my view) constitutes ethical professional practice, I would like to consider one piece of the question of the legality of subjecting detainees to a simulated drowning experience known as waterboarding. To keep the analysis manageable, the following discussion will bracket numerous other legal regulations, including international humanitarian law and the Uniform Code of Military Justice, and consider only the U.S. domestic statutory prohibition on torture.

A. Waterboarding

The debate about the legality of waterboarding sometimes begins with mistaken assumptions about what is actually involved in this interrogation technique. U.S. Supreme Court Justice Antonin Scalia gave an interview with BBC Radio in which he ridiculed the moral objections raised by critics of the Bush Administration’s torture program:

Is it really so easy to determine that smacking someone in the face to determine where he has hidden the bomb that is about to

164. See infra notes 173–79 and accompanying text.
blow up Los Angeles is prohibited in the Constitution? It would be absurd to say you couldn’t do that. And once you acknowledge that, we’re into a different game.\textsuperscript{165}

Similarly, public debate over waterboarding was frequently characterized by references to “dunking someone in the water” or some other innocuous-sounding treatment.\textsuperscript{166} In fact, however, waterboarding is a truly horrifying process, well described by a former instructor at the U.S. Navy’s Survival, Evasion, Resistance and Escape (SERE) School:

Waterboarding is controlled drowning that, in the American model, occurs under the watch of a doctor, a psychologist, and an interrogator, and a trained strap-in/strap-out team. It does not simulate drowning, as the lungs are actually filling with water. There is no way to simulate that. The victim is drowning. How much the victim is to drown depends on the desired result . . . and the obstinacy of the subject. A team doctor watches the quantity of water that is ingested and for the physiological signs which show when the drowning effect goes from painful psychological experience, to horrific suffocating punishment to the final death spiral. Waterboarding is slow motion suffocation with enough time to contemplate the inevitability of black out and expiration—usually the person goes into hysterics on the board. . . . When it is done right it is controlled death. Its lack of physical scarring allows the victim to recover and be threatened with its use again and again.\textsuperscript{167}

This description will be important in light of the federal criminal statute proscribing torture, which differentiates between physical and mental pain and suffering.

\textsuperscript{165} Law in Action, BBC News (Feb. 12, 2008), http://bbc.co.uk/programmes/b006tgy1/broadcasts/2008/02.


\textsuperscript{167} Malcolm Nance, Waterboarding is Torture . . . Period, SMALL WARS J. (Oct. 31, 2007, 1:30 p.m.), http://smallwarsjournal.com/blog/2007/10/waterboarding-is-torture-period. Among other things, the SERE program trains American special forces, military pilots, and some other uniformed service personnel to deal with torture that they might face in the hands of the enemy if captured. The full article by former SERE instructor Malcolm Nance can be found in an online magazine called Small Wars Journal, and excerpts appeared in various newspapers, including the Independent (U.K.) and the New York Daily News. Id. For a similar description, by a former Navy flight crew member who attended SERE training, see Richard E. Mezo, Why It Was Called “Water Torture “, WASH. POST, Feb. 10, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/02/08/AR2008020803156.html. It should go without saying that the psychological stress of undergoing waterboarding as part of a training program, where it is always possible to ask members of one’s own country’s military to discontinue the treatment, is different from the hopelessness induced by the same interrogation technique being employed by one’s captors.
B. The Torture Statute

Again, for the purpose of simplifying this example, the legal analysis will consider only the domestic criminal law in the United States prohibiting torture.\textsuperscript{168} The relevant portion of the statute provides as follows:

As used in this chapter—

(1) “torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from –

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality[.]

The statute specifically applies to conduct outside the United States\textsuperscript{169}, so it has extraterritorial effect at Bagram Air Base, secret “black sites” maintained by the CIA, and any other location where detainees were subjected to interrogation.

C. Statutory Analysis

Looking at the torture statute, and keeping in mind the nature of the waterboarding process, is waterboarding legally permissible? The OLC lawyers concluded that it is, so the question is whether this conclusion is adequately supported by the governing law. The lawyers’ argument concentrated on the term “severe physical or mental pain or suffering” in the statute. There were two principal lines of argument as to why waterboarding did not cause “severe physical or mental pain or suffering” and thus did not constitute prohibited torture.


1. The Emergency Health Care Benefits Statute

The first argument has been widely ridiculed, in the United States and abroad. It is that the term “severe pain” is ambiguous and thus should be understood with reference to other statutes that also use the term “severe pain.” Using other statutes as a point of reference, the lawyers created an implausibly restrictive definition of torture: “The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body functions will likely result.” The lawyers drew support for this narrow definition from an unlikely source, namely a federal statute defining an “emergency condition” for the purpose of obtaining health care benefits. That statute defines an emergency condition as one “manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent lay person . . . could reasonably expect the absence of immediate medical attention to result in . . . (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part.” What do you think? Is it a legitimate legal argument to infer the definition of severe pain from the emergency health care benefits statute to the torture statute? In particular, are the OLC lawyers correct in concluding that severe pain is limited to that accompanying organ failure or death?

Most commentators have thought that the OLC lawyers’ interpretation argument relying on the health care benefits statute misses the mark completely. They contend that the emergency health care benefits statute is not setting out a definition of severe pain in terms of organ failure or dysfunction but using severe pain as one symptom among many—including organ failure or dysfunction—which might justify a prudent lay person in concluding that a person is in need of immediate medical attention. In terms of the syntax of the statute, the term “emergency” is defined with reference to several different criteria that characterize an emergency. One of those criteria is severe pain; another is the risk of organ failure or death. By analogy, one might define “winter” as a season involving cold weather and snow. But this does not mean snow is cold weather. Apart from the syntax of the statute, there is the problem of context. The emergency health care benefits statute has nothing whatsoever to do with the question the OLC lawyers set out to answer, namely when the infliction of pain is severe enough to constitute torture. Statutory language may indeed be illuminated by the usage of the same word in similar contexts, but it is highly implausible to consider these two statutes as having anything in common beyond the

172. See, e.g., Bruff, supra note 26, at 243–47; Goldsmith, supra note 25, at 144–50.
words themselves. The lawyers’ argument feels like someone went fishing around on a computer database looking to match up the search terms without using their judgment to decide whether the match was on point.

2. The Duration Requirement and the Mental/Physical Distinction

After the initial set of torture memos was leaked to the media and roundly criticized in public, the OLC prepared a new memo on interrogation, which superseded the prior analysis. This memorandum did not rely on the emergency health care benefits statute but nevertheless concluded that waterboarding is permissible. It did so by creating some distinctions and blurring others. The question for readers is, at what point does the following legal analysis become strained, abusive, or manipulative and therefore improper?

Remember that the operative language of the statute defines as torture, and therefore prohibits, “an act . . . specifically intended to inflict severe physical or mental pain or suffering.” The OLC lawyers began by distinguishing between severe “pain” and severe “suffering” in Section (1) of the statute: “[T]he question remains whether Congress intended to prohibit a category of ‘severe physical suffering’ distinct from ‘severe physical pain.’ We conclude that under some circumstances ‘severe physical suffering’ may constitute torture even if it does not involve ‘severe physical pain.’”

This sounds like a concession, as if the lawyers are going to interpret the category of “severe physical suffering” more broadly than the category of “severe physical pain.” In fact, however, the lawyers make this move because they want to play off the related category of “severe mental pain or suffering”: “We interpret the phrase in a statutory context where Congress expressly distinguished ‘physical pain or suffering’ from ‘mental pain or suffering.’ Consequently, a separate category of ‘physical suffering’ must include something other than any type of ‘mental pain or suffering.’” It certainly is true that the statute distinguishes physical and mental pain and suffering. The term “physical pain or suffering” is undefined, but the term “mental pain or suffering” is defined in Section (2), as limited to the results of four types of infliction of harm—essentially the administration of mind-altering drugs, threats of death, torture, the administration of drugs to another, or the mental suffering incidental to the infliction of severe physical pain or suffering. So far, so good. It sounds like severe physical pain and suffering may be a broader category than severe mental pain or suffering because it is not limited to the suffering that results from certain enumerated acts.

174. Id. at 10.
Here is where the crucial analytic move happens. After drawing these distinctions—physical pain vs. suffering and physical vs. mental pain or suffering—the OLC lawyers blur a crucial distinction: “We conclude that under some circumstances ‘physical suffering’ may be of sufficient intensity and duration to meet the statutory definition of torture even if it does not involve ‘severe physical pain.’”\textsuperscript{5} Again, this sounds like a concession. Maybe there is some physical suffering that is of sufficient intensity and duration that it counts as torture, even though it may not involve the infliction of severe physical pain. Notice, however, that a crucial term has been smuggled into this analysis. Look at the statute again. The definition of “severe physical pain or suffering” in Section (1) has no duration requirement. Even the brief infliction of pain may constitute torture. The definition in Section (2) of severe mental pain or suffering, by contrast, has a duration element—it means “the prolonged mental harm” caused by one of the four enumerated acts. Now, by lawyerly sleight of hand, the duration term is moved into Section (1) and used to modify “physical pain or suffering”: “To constitute such torture, ‘severe physical suffering’ would have to be a condition of some extended duration or persistence as well as intensity.”\textsuperscript{6} What justifies this move? As far as one can tell, nothing. The lawyers seem to be playing a shell game, moving around statutory terms and distinctions like physical and mental, pain and suffering, and duration, hoping that the reader will get lost in the analysis and think it only reasonable that short-term physical suffering cannot constitute torture. This matters because waterboarding, because it is so agonizing, is over very quickly.\textsuperscript{7} Most subjects do not last more than a minute before begging for the treatment to end. If the OLC lawyers are correct in their statutory analysis, this would not be torture.

If there were any doubt of the importance of this analysis, consider the testimony of the head of OLC, Stephen Bradbury, before Congress in February of 2008. In response to a question about waterboarding, Bradbury responded that an interrogation technique is not torture if it is

\begin{quote}
[S]ubject to strict safeguards, limitations and conditions [it] does not involve severe physical pain or severe physical suffering—
and severe physical suffering, we said on our December 2004 Opinion, has to take account of both the intensity of the discomfort or distress involved and the duration. Something can be quite distressing or uncomfortable, even frightening, but if it doesn’t
\end{quote}

\footnote{175. \textit{Id.} at 12.}
\footnote{176. \textit{Id.}}
\footnote{177. In an ironic illustration of the duration and intensity of waterboarding, a conservative talk radio host in Chicago who subjected himself to the technique lasted six or seven seconds before insisting that it be discontinued. He subsequently reported, “[i]t is way worse than I thought it would be . . . and I don’t want to say this: absolutely torture.” Ryan Pollyea, \textit{Mancow Waterboarded, Admits It’s Torture}, NBC CHICAGO (May 22, 2009, 12:11 PM), www.nbcchicago.com/news/local/Mancow-Takes-on-Waterboarding-and-Loses.html.}
involve severe physical pain and it doesn’t last very long, it may not constitute severe physical suffering.\footnote{Testimony of Steven G. Bradbury: Hearing Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary, 110th Cong. 129 (2008) (statement of Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, U.S. Department of Justice).}

In addition to the euphemizing (people who have been subjected to waterboarding would describe it as involving something much worse than “discomfort or distress”), the analysis depends on the duration term. Bradbury also assumed that most citizens, and even lawyers, who had been following the debate over waterboarding would not go back and read the statute carefully. On a cursory reading, the argument seems plausible. The duration requirement does appear in the statute. The problem is, it appears only to modify “mental pain or suffering.” Because waterboarding involves physical pain or suffering, of very short duration, it was essential that the lawyers incorporate the duration requirement into the definition of physical suffering. If they could establish that short-term physical suffering is not torture, they could provide a green light to American officials to engage in waterboarding. This is just what they did, and the result is that several detainees were repeatedly subjected to this treatment.

The question for readers is whether this legal analysis is plausible. I have argued that it is not, but some may disagree. The point of this demonstration is not to reargue the case against the OLC lawyers but to use this example to show what it would mean to unpack the ethics of lawyers in terms of the craft of legal reasoning. The arguments raised here depend on the sorts of considerations that lawyers take into account when evaluating legal arguments. For example, relying on the syntax of a statute to determine the meaning of a term is a perfectly ordinary technique of legal interpretation. It is also part of the everyday process of evaluating legal arguments to note that a statute chosen to illuminate the meaning of a term is relevantly different in context and, thus, that it does not shed light on the meaning of the statutory language. In other words, there is nothing mysterious about this analysis. It is what all lawyers do when they conclude, “that’s a lousy argument,” when they think a court’s statement of reasons is inadequate to support its judgment or when they respond to an opponent’s brief. The craft of making and evaluating legal arguments is what lawyers do; it is not a separate skill that belongs to a separate mode of inquiry called “legal ethics.” As law teachers, we teach the craft of ethical lawyering whenever we subject to critical scrutiny the arguments of a judicial opinion or a student’s response to a hypothetical.

The trouble is, references to craft standards have a way of sounding like a theoretical black box to one outside the craft. Donald Schön presents two case studies from professional education, one from architecture and another from psychotherapy, to illustrate how experienced professionals ap-
ply their knowledge to specific problems. These teachers make use of "a repertoire of examples, images, understandings, and actions" to solve the problems on which their students are stuck, and they see something in the situation that is already present. Quoting Thomas Kuhn, Schön emphasizes that the perception of similarities between a problem situation and past experience is "both logically and psychologically prior to any of the numerous criteria by which that same identification might have been made." It may be difficult to articulate criteria of similarities and differences in professional judgment, but that difficulty does not mean judgment is arbitrary. Rather, it is sufficiently complex to resist description in terms of something else but nevertheless governed by recognized, objective standards. A different teacher of architecture or psychotherapy would presumably react to these case studies with an understanding of what the teacher was trying to get the student to see. But the point about priority is important: "It would be a mistake to attribute to the inquirer at the beginning of such a process the articulated description which he achieves later on."

An articulated description is possible, but that articulation does not determine the exercise of professional judgment. It is a retrospective explanation of a judgment that, at the time, was made intuitively and based on experience and training. The torture example is offered in the spirit of Schön's case studies. Just as an experienced architect would presumably find the student's initial design inadequate, an experienced lawyer should have an intuitive reaction that the OLC arguments are inadequate. Pressed to explain, the lawyer should be able to articulate something like the analysis given above. Craft standards do exist, even if experienced lawyers largely make tacit reliance upon them.

**CONCLUSION**

The Carnegie Report is exactly right in its criticism of a stance of detached objectivity that legal education sometimes engenders toward law. There is nothing wrong with evaluating legal rules for their efficiency or in terms of the incentives they create, but understanding law from this external point of view is not primarily what lawyers do in practice. Practitioners do not study law, they do law, and like many complex activities (playing a musical instrument, designing buildings, laying bricks, etc.), lawyering can be done well or badly. This evaluation implicitly makes reference to the end for which the practice is constituted. I have argued that the law grounds a distinction between the rightful exercise of power and raw power and thus enables citizens to arrange their affairs with reference to an agreed upon social framework of cooperation. If this goal, or something like it, indeed

---

179. See SCHÖN, THE REFLECTIVE PRACTITIONER, supra note 9, at 76–127.
180. Id. at 138.
181. Id. at 139 (quoting Thomas Kuhn, Second Thoughts on Paradigms, in THE ESSENTIAL TENSION 307 (1977)).
182. Id. at 140.
identifies the end for which the legal system is constituted, then it follows that there is a reasoning process by which one may differentiate between valid conclusions of law and faux legal justifications, such as the one offered by the OLC lawyers in support of the permission to engage in waterboarding. Teaching legal ethics is therefore inextricably bound up with teaching legal reasoning. The law of lawyering may be its own subject, with all of the technical complexity one would expect from any well-developed body of law, but legal ethics is nothing more than doing what lawyers do, and doing it well.