Shared Norms, Bad Lawyers, and the Virtues of Casuistry

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Shared Norms, Bad Lawyers, and the Virtues of Casuistry

By Paul R. Tremblay*

Each Sunday, The New York Times Magazine features a column entitled The Ethicist, written by Randy Cohen. In this interesting and witty column, Cohen answers questions, “Dear Abby”-style, from readers seeking his advice about whether some action or behavior is ethical or not. The most intriguing quality of the column is this: week after week, answer after answer, Cohen is right in each of his responses. He seldom, if ever, waivers about his advice, or makes excuses about moral ambiguities or relativist preferences. Instead, he parses each case before him carefully, assesses the ethical implications, and tells his readers whether the conduct in question is OK or not. I have yet to see him come out wrong.

Lawyers, of course, encounter ethical questions and morally uncertain choice opportunities on a regular basis. Many observers—and by many I mean many—believe that the legal profession is riddled with ethically troublesome practices, implying that lawyers not infrequently choose the wrong answer to their ethical questions, or resolve

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* Clinical Professor of Law, Boston College Law School. I offer deep thanks to those kind souls who read and commented on an earlier, briefer version of these ideas: Dan Coquillette, Russell Engler, Dick Huber, Mary Helen McNeal, Alex Scherr, Avi Soifer, and Mark Spiegel. I also am grateful for the rich assistance provided by Rocky LeAnn Pilgrim and Amy Leonard, my research assistants. This work was supported by the generosity of Hale & Dorr, LLP, and Boston College Law School Dean John Garvey.


2. Apparently, though, others have. See Randy Cohen, On Second Thought, N.Y. Times Mag., Mar. 31, 2002, at 20 (responding to letters criticizing his advice). In response to the criticisms, Cohen changed two of his opinions. His doing so only underscores the point for which I cite Cohen’s work—that ethics can be a reasoned, analytical process in which argument and dialogue might lead to acceptable and coherent answers.

their moral uncertainties ineptly. The widespread criticism assumes, quite naturally, that the critics possess a reliable sense of what is good and what is not, much like Randy Cohen's talent. Notwithstanding this critical trend, the literature on moral decisionmaking by lawyers reflects a sustained appreciation for, and sometimes deference to, a conception of moral pluralism and "personal values." The assertion that the legal profession lacks a shared account of normative ethics is as widespread as the claim that the profession is experiencing a moral crisis.

These companion observations are not easily reconcilable. In this Article I attempt to puzzle through the seemingly incompatible worries that lawyers are morally at risk and that values are personal and non-negotiable. I do so as, to borrow Alasdair MacIntyre's phrase, a "plain person"—that is, I am neither a philosopher nor do I possess the training, the discipline, or the time to understand deeper, metaphysical questions of value as thoroughly as full time philosophers and

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5. The two claims are often made by the same commentator. See, e.g., Heidi Li Feldman, Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?, 69 S. Cal. L. Rev. 885, 929 (1996) (lawyers "lack a shared, complete account of normative ethics by which to judge [a criticized law firm's] particular actions"); id. at 932 ("[E]thical error is serious error: Our aim is its avoidance."); Hazard, Personal Values, supra note 4, at 139 (values are "subjective"); Hazard, Future of Legal Ethics, supra note 3, at 1239 (profession is in crisis).

ethicists are likely to do. I am also a clinical law teacher, so in my puzzling I tend to look for pragmatic, workable ways to talk about value, worth, norms, and virtues.

I suggest here that there may be ways, at least pragmatic ways, to talk and teach about values and virtues with lawyers and law students. My basic thesis is as follows: There is much to be gained by a search for common, shared norms, and for “paradigm cases” representing agreed-upon sentiments about how moral issues ought to be resolved, as a basis for reasoned conversation about more complex moral dilemmas and conflicts. The process I will describe is known as “casuistry.” It has roots in early Jesuit thinking and has experienced significant popularity in modern bioethics thinking since the 1990s. Casuistry is a form of ethical reasoning that involves the close analysis of particular cases, seeking ethical guidance in an inductive manner rather than deductively through the application of moral theory. Casuists find meaning through paradigm cases and maxims. A case presenting moral ambiguity may be compared to a series of paradigm cases and analyzed by reference to accepted maxims, in order to arrive at a reasonably satisfactory solution to the conflict at hand.

The fact that individuals argue about moral questions, using reasoning and logic, combined with the weakness of any claims about relativism or subjectivism, shows us that the possibilities for identifying consensus exist. Disagreements will continue to thrive, of course, but they tend, at bottom, not to be about “values” at all. Most seeming moral disagreement represents, instead, disputes about facts, predictions, biases, history, perceptions, and the like. Not all disagreement fits this description, of course, but most will. Recognizing a founda-


9. See id. at 199-51.


tion of shared norms permits in moral disputes the same kind of ana­
lytic process law professors use to teach students about substantive law.
If lawyers and law students are open to learning about how best to
make challenging moral choices (a significant qualification, this), a
casuistic process offers some hope for nonrelativistic, reasoned
discourse.

My inquiry proceeds through the following steps. I begin, well, at
the beginning. I start by making explicit the differing reasons why law
schools teach about ethics and values. I suggest three possible reasons:
(1) for the same reasons they teach torts, that is, because the “ethics”
of the legal profession can be useful to practitioners as basic substan­
tive law; (2) for the same reasons bioethicists develop methods of ethi­
cal analysis, that is, to aid good faith, conflicted professionals to find
ways to choose amongst similarly attractive (or similarly offensive) eth­
ical alternatives; and (3) for the same reasons therapists and jailers do
do their work, that is, to provide incentives for bad or misguided people
to do good things. I point out that the first of these has little, but still
some, relevance to an inquiry about the role of values teaching. The
second and third goals are more directly relevant, but they tend to get
conflated. It helps, I suggest, to distinguish between teaching good
people how to be better and teaching bad people how to be good.

In Parts II and III we consider the challenges of working with the
“good people.” Part II reviews some objections to consideration of
moral deliberation as a reasoned, substantive topic, including the
common worry about relativism, questions about the role of faith, and
concerns that values are simply too personal and incommensurable to
permit either teaching about them or reliance upon them in profes­
sional ethical contexts. I conclude in Part II that while some impor­tant subset of moral conflicts involves inherently incommensurable
value choices, a more significant portion of that world does not. Most
values, we see, are not idiosyncratic or subjective, but instead are con­
nected to deeply shared ideas about what is good.

Part III begins to work with the conception of shared norms. I
start this Part with a critique of the use of moral theory as a basis for
either working from, or obtaining, consensus about value. I then de­
scribe a more friendly and practicable approach to moral deliberation—that of casuistry. I follow the introduction to casuistry with an
extended review of, and critique of, recent work by Alan Wolfe,12 who

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12. ALAN WOLFE, MORAL FREEDOM: THE IMPOSSIBLE IDEA THAT DEFINES THE WAY WE
LIVE NOW (2001) [hereinafter A. WOLFE, MORAL FREEDOM]; ALAN WOLFE, ONE NATION,
AFTER ALL: WHAT MIDDLE-CLASS AMERICANS REALLY THINK ABOUT: GOD, COUNTRY, FAMILY,
has performed elaborate and extensive surveys of and interviews with
typical Americans about their moral beliefs. I use the Wolfe oeuvre to
develop and sustain my argument that most moral disagreement, in­
cluding the all too familiar culture wars, does not represent a funda­
mental disconnect about what is worthy and what is not, but
represents instead competing versions of how the world operates. We
may not, of course, be any more confident that we will resolve that
disagreement than we will resolve disagreement about questions of
value, but, it seems fair to say, disputes about fact and about history
have a more firm analytic grounding than true disputes about value
(which I claim are rarer than we might suppose).

Finally, Part IV changes focus, and turns to consideration of the
motivation to care about doing good. In puzzling about what I will call
the “felons, whores, and jerks” in the legal profession, I suggest several
possible perspectives. First, it may be that the critics are wrong in judg­
ing the bad lawyers’ behaviors as bad. Second, if (as is likely) the crit­
cics are not wrong, it might be that the bad lawyers are simply
sociopaths, in which case the academy cannot be too sanguine that it
might make any difference to those lawyers at all. This “sociopath”
thesis is also unlikely, it seems. Third, if the behavior is indeed bad,
perhaps the lawyers intended to do the right thing but just got it
wrong, in which case the “bad” lawyers end up not as corrupt or soci­
opathic, but instead as deliberatively inept. If this supposition is true,
these lawyers join the “good” lawyers in the audience for teaching
about ethical deliberation. Finally, and perhaps of most interest,
maybe the bad lawyers do such unscrupulous things because of the
demands and pressures, institutional or otherwise, they feel within
their work lives. I explore the possibility that the most promising solu­
tion to the bad lawyering phenomenon ought to come from institu­
tional changes, rather than changes in the character or the
decisionmaking prowess of the lawyers.

I. Why Ethics?

There are important reasons why a professional school might
choose to focus its attention on questions of ethics and value, but
those reasons cover several distinct goals. Any discussion of the role of
values education in a law school ought to distinguish among the sev­

RACISM, WELFARE, IMMIGRATION, HOMOSEXUALITY, WORK, THE RIGHT, THE LEFT, AND EACH
OTHER (1998) [hereinafter A. WOLFE, ONE NATION].
eral possible purposes for ethics teaching. Here I offer three such possibilities.

A. "It's Like Asking Why We Teach Torts": Ethics As Doctrine

Most of ethics instruction in law school is in fact instruction in the "law of lawyering"—that is, that body of doctrine developed by courts, bar associations, and disciplinary authorities which lawyers must understand in order to practice law effectively for their clients. This complicated legal material plays a critical role in client representation, and law students should know about it before they leave school. In answer to the question "why teach legal ethics?", the teachers' response might be simple: "It's like asking 'why teach torts?' You just cannot practice law without knowing this stuff."

Law schools teach torts primarily for externally-focused, instrumental purposes. A graduate of law school will be a bad lawyer, and will offer poor service, if she doesn't understand torts when she starts to practice. She will lose her cases, or commit malpractice, or fail to ob-

13. Bar associations often issue advisory ethics opinions, which form an important part of the doctrine affecting lawyer behavior. See Peter Joy, Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct (forthcoming 2002) (unpublished manuscript, on file with the author) (arguing that advisory ethics opinions by bar associations need to be regulated and limited in their influence).


The profound development of the substantive law of lawyering, and its eclipsing the role of "softer" questions of moral issues, has been noted by many observers. See, e.g., Tanina Rostain, Ethics Lost: Limitations of Current Approaches to Lawyer Regulation, 71 S. Cal. L. Rev. 1273, 1274 (1998) [hereinafter Rostain, Ethics Lost] ("a regulatory approach is inadequate to ensure that lawyer-made law serves broader societal purposes. Regulation is a poor substitute for legal ethics."); Michael I. Swygert, Striving to Make Great Lawyers—Citizenship and Moral Responsibility: A Jurisprudence for Law Teaching, 30 B.C. L. Rev. 803, 816-17 (1990). It may best be reflected in the inaugural publication of a Restatement of the Law Governing Lawyers. See American Law Institute, Restatement (Third) of the Law Governing Lawyers (2001). The editors have entitled the Restatement as the "Third," despite its being only the first such publication, apparently to keep it in lock-step with the other Restatement projects. It is not a little ironic that a treatise intended to reflect the highest standards of professionalism should resort to a fib for its own organizational uniformity purposes.
tain clients, if she doesn’t know what the basic legal principles are and how they work. In some (but not all) ways, legal ethics is just like torts—a graduate should know about, say, the instrumental uses of Rule 11 motions or motions to disqualify an opposing lawyer for alleged conflicts of interest, if only to defeat those Rambo lawyers who resort to exploiting these “ethics” rules for tactical gains. If she doesn’t know these tactical ploys, a lawyer will be at a serious disadvantage.

In two critical ways, though, legal ethics is different from torts, and those differences affect conversations and teaching in this area. First, a significant part of the law of lawyering instruction is instrumental but internally-focused. The purpose of the teaching is not to affect others’ behavior, through strategy or argument, but to enable the student to understand for herself what a proper response is, and to assess risks to the lawyer’s career rather than to her client’s case. This aspect of ethics instruction is, perhaps counter intuitively, less interest-

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15. See, e.g., American Bar Association Section of Legal Education and Admissions to the Bar, Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap 124–25 (1992) [hereinafter, MacCrAte Report]. This topic is of course far more complicated, but the basic point is sound. This student may never see a torts case, so for her the arguments just developed are specious. Obviously law schools make judgments about the odds that a practicing lawyer will encounter a torts case, or a torts doctrine-like issue, and conclude that a well-rounded lawyer ought to know the basics of this doctrine. The other apparent flaw in the argument in the text is that many topics are never covered in law school at all, and other topics (say, Internet law) come into existence after many students have finished their law school instruction. When pressed, law schools will admit that they are teaching less “substance” and more “process”—the ability to think like a lawyer and to learn how to understand legal issues as they are encountered. For an administrator’s view of these choices, see John Garvey, The Business of Running a Law School, 33 TOL. L. REV. 37 (2001).


18. See D. Rhode, In the Interests of Justice, supra note 3.

19. This is a perspective which I have frequently observed practitioners share with law students: “Legal ethics and professional responsibility are the most important topics you will study in law school, because they affect you directly, and not just your clients’ interests.” Several commentators have made a similar argument. See Kathleen Clark, The Legacy of Watergate for Legal Ethics Instruction, 51 HAST. L.J. 673, 675 (2000); Russell Pearce, Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School, 29 LOY. U. CHI. L. REV. 719, 722 (1998) [hereinafter Pearce, Teaching Ethics Seriously]. In my experience, this argument has remarkably little persuasive appeal to students.
ing to law students than the former externally-focused topics, and may account in part for the poor track record of legal ethics courses. I suspect two reasons for the lack of interest. To the extent that the message is: “You need this to keep the bar off your back, so you’re the client here,” students correctly perceive that bar discipline is a pretty rare phenomenon, particularly in the context of the topics that legal ethics courses tend to emphasize. On the other hand, to the extent that the message is: “You need this because you will be the only arbiter about what is right, so essentially you’re the judge here,” students, I suspect, worry less about the risk of error under those circumstances, at least in the classroom setting. By contrast, when students face challenging, if private, professional responsibility choices in a true representational setting, such as a law school clinic, their engagement in the topic is profound.

20. As commentators note repeatedly, legal ethics and professional responsibility courses are not well respected in the academy. See, e.g., Roger C. Cramton & Susan P. Koniak, Rule, Story and Commitment in the Teaching of Legal Ethics, 38 Wm. & MARY L. REV. 145, 146 (1996) (stating that “legal ethics remains an unloved orphan of legal education,” and that many law teachers “remain convinced that the subject is unteachable”); Bruce Green, Less Is More: Teaching Legal Ethics in Context, 39 Wm. & MARY L. REV. 957, 957 (1998); David Luban & Michael Millemann, Good Judgment: Ethics Teaching in Dark Times, 9 GEO. J. LEGAL ETHICS 31, 37-38 (1995) (stating that “the legal ethics course is—not to put too fine a point on it—the dog of the curriculum, despised by students, taught by overworked deans or underpaid adjuncts and generally disregarded by the faculty at large”); Pearce, Teaching Ethics Seriously, supra note 19, at 723; William H. Simon, The Trouble with Legal Ethics, 41 J. LEGAL EDUC. 65, 65 (1991) [hereinafter Simon, The Trouble with Legal Ethics].

21. Bar discipline tends to follow from stealing client money and from unthinkable sloppiness or conflicts of interest. The bar disciplinary authorities are far too understaffed and overworked to attend to more ordinary, but clearly unlawful, confidentiality, conflicts, or deception breaches. See, e.g., RESTATEMENT OF THE LAW: THE LAW GOVERNING LAWYERS, at § 110 cmt. b (2000) (observing that “disciplinary enforcement against frivolous litigation is rare”); Elizabeth Chambliss, Professional Responsibility: Lawyers, A Case Study, 69 FORDHAM L. REV. 817, 819 (2000); Amy Mashburn, Professionalism As Class Ideology: Civility Codes and Bar Hierarchy, 28 VAL. U. L. REV. 657, 704 n.255 (1994).

22. Much of the doctrine of professional responsibility trains the lawyer to make decisions in a role where she will be the judge. Her audience, as it were, is herself. The risk of being wrong is not a public one, as it would be in torts (where her mistake in judgment would be known to an opposing lawyer and perhaps to a judge), but a private one. I suspect that, rather than transforming this topic into a more compelling learning experience for a law student, this fact renders the topic less interesting, at least in a classroom setting.

23. Many commentators have noted the benefits of teaching ethics in a clinical setting. See, e.g., Anthony E. Alfieri, Ethical Commitments, 38 Wm. & MARY L. REV. 199 (1996); Amy Gutmann, Can Virtue Be Taught to Lawyers?, 45 STAN. L. REV. 1759, 1770 (1993); Luban & Millemann, supra note 20, at 40; Joan L. O’Sullivan et al., Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice, 3 CLINICAL L. REV. 109, 142-44 (1996).

I have taught for many years in a civil clinic where students represent poor clients in actual disputes. Our course assigns students the classic interviewing and counseling text by Binder, Bergman and Price. See D. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CEN-
There is a second way in which legal ethics is not just like torts, and it involves the role of one’s "personal" values in a law school curriculum. As a substantive doctrine, torts, it is fair to say, implicates deep questions of value and moral judgment. Courts which favor more liberal compensation of victims reflect different moral judgments compared to courts which shift the costs of accidents to the injured parties. Questions of personal responsibility, of fairness, of justice, and of efficiency abound in this substantive area. One can easily imagine a student enrolled in a torts class who has arrived at law school with strongly held beliefs about each of these moral topics, and who sees important issues to debate in the class. The student's value judgments will play a critical role in the analysis of the doctrine, but when the rubber hits the road, when the instrumental goals of the course kick in, those value judgments are far less important. To represent his clients effectively, this student needs to know how those value judgments have been made (that is, what are the common law or statutory trends) and how he can use the resulting doctrine.

Let's now move next door to the ethics class. Like in torts, the doctrine of professional responsibility is imbued with rich moral questions, the suggested resolutions of which may or may not jibe with the sentiments the students assimilated before enrolling in school. The

24. See infra notes 93–110 and accompanying text for a modest challenge to the notion that values ought to be described as "personal."

25. See, e.g., Tom Baker, Blood Money, New Money, and the Moral Economy of Tort Law in Action, 35 LAW & SOC'Y REV. 275 (2001). While I have been using the example of torts to make my comparisons, there is no magic to that randomly-chosen example. Any law school doctrinal course—property, contracts, criminal law or procedure, constitutional law, and so on—would fit just as well as an example for comparison.


27. I do not teach torts, so I may be assuming too much here.

28. It is also likely (although this is in fact a pure guess) that a student's preordained value judgments about, say, the role of personal responsibility in allocating the costs of accidents within the tort system will be relatively open to reexamination as the novice legal trainee learns about the complicated tort doctrine for the first time. My guess in contrasting this process to the experience in an ethics course is that the student's openness to reexamination is less likely in the latter setting, because the activities seem more "personal." See infra notes 111–13 and accompanying text.
courses look similar in that respect, but in one respect they may be critically different. Unlike the torts experience, when the rubber hits the road in the professional responsibility course, it may be much more difficult to ask the student to forget, for now, his existing moral sentiments as he acts in the lawyer's role. For this reason, it seems more likely that objections about imposed values and relativist conceptions will surface more frequently in legal ethics discussions than in tort doctrine discussions. In other words, it is one thing to conclude a torts dialogue with the advice, "I can understand your arguments about efficiency and fairness in this strict liability context. You do see, though, that the Restatement and the common law trends go in the opposite direction, right?" It is entirely different to conclude a classroom legal ethics discussion with something like this: "I hear and understand quite clearly your arguments that by carefully saying only literally true statements you have not 'lied,' even if you may have misled your audience, and therefore you cannot be criticized for getting a rather generous settlement from your opponent in the negotiation. In fact, what you did was indeed 'lying,' and it was wrong." It is entirely different to conclude a classroom legal ethics discussion with something like this: "I hear and understand quite clearly your arguments that by carefully saying only literally true statements you have not 'lied,' even if you may have misled your audience, and therefore you cannot be criticized for getting a rather generous settlement from your opponent in the negotiation. In fact, what you did was indeed 'lying,' and it was wrong." I do not mean to imply that the latter statement by the professor is inappropriate; in fact, I believe it is quite right. My point is that the latter conversation is much more likely to induce objections or worries about "indoctrination," "imposing values," and relativism. We reach those objections below.

Before proceeding to the more central purposes of ethics instruction and conversation, we ought to highlight one other goal achieved by such a focus on the law of lawyering. Teaching substantive Restatement-like law to students, in addition to offering instrumental tools for representation, conveys messages about value orientations adopted by, or inherent within the organization of, the legal profes-

29. I draw this example from the rich critique of misleading in negotiation offered by Gerald Wetlaufer. See Gerald Wetlaufer, The Ethics of Lying in Negotiation, 75 IOWA L. REV. 1219 (1990). See also Reed Elizabeth Loder, Moral Truthseeking and the Virtuous Negotiator, 8 GEO J. LEGAL ETHICS 45 (1994).

30. Of course, the dialogue cannot be as stark as I have left it in my example. Simply defining a moral conclusion as wrong is pure dogmatism and has no justification. But carefully reasoning through with a student the arguments, justifications, and precedents about the use of deception to gain benefits that could not be gained without deception is an entirely proper role of ethics education. Just as a law professor would not hesitate to conclude that a student's reading of Supreme Court doctrine is flawed, and tell the student so, the professor may similarly offer judgments about the analysis of ethics questions. See Paul R. Tremblay, The New Casuistry, 12 GEO J. LEGAL ETHICS 489 (1999) [hereinafter Tremblay, The New Casuistry]. See infra notes 152-55 and accompanying text.

31. See infra notes 78-125 and accompanying text.
Those orientations likely will play an important role in the moral deliberation of lawyers, who frequently adjust sentiments drawn from ordinary citizenry activity to conform to professional contexts and demands.

B. "It's Like What the Bioethicists Do": Training for Moral Deliberation

A commonly offered ambition for legal ethics instruction is "to channel lawyers' behavior in socially desirable ways." The argument proceeds roughly as follows: Observers of the legal profession report substantial evidence that the standards of practice are far less honorable than they should be. Something needs to be done by the profession and by those who train the professionals to improve the ethical quality of its practitioners. One important remedy is to rethink and strengthen ethics instruction within law schools.

In considering the relationship between ethics instruction and lawyer behavior, however, we encounter an intriguing phenomenon. The professionalism movement and its accompanying fears about the "crisis" within the profession tend to describe lawyers acting badly. The stories are well known and all too common. A Houston law firm enabled the Enron Corporation to craft its plausibly legal...
reporting and incorporation plans which enriched management while costing ordinary shareholders and employees a lifetime of investments and pensions, much like lawyers worked with OPM to bilk its lenders and with Lincoln Savings & Loan to mislead investors and federal regulators. So-called "Rambo" lawyers act like "jerks" by aggressively and deceptively exploiting well-intended discovery or procedural devices to thwart principled inquiry and fair hearing on the merits. Aggressive and insensitive lawyers representing the manufacturer of a flawed, potentially deadly birth control device cross examine women users of the device about their sexual and bathroom habits. A lawyer in a deposition sneers at his opposing counsel with the words, "Don't 'Joe' me, asshole. You can ask some questions, but get off that. I'm tired of you. You could gag a maggot off a meat wagon." And so on.

The prevailing theme of the criticism of this kind of lawyering behavior is one of greedy or insensitive lawyers paying insufficient at-
tention to the interests of harmed third parties, the standards of common morality, and their own sense of moral integrity.

What should intrigue us about these stories is that in medical ethics circles, where professionals encounter an equally rich mix of ethical challenges, the stories one hears are seldom about bad doctors, psychiatrists, or nurses. Instead, the rich literature and thoughtful debates within bioethics tend to assume good faith, well-meaning actors trying their very best, amid much moral uncertainty, to come to the right or best decision, all things considered. The doctors or nurses who make wrong decisions are not "jerks" or "whores"; they simply didn't think things through well enough.

This comparison to the bioethicists suggests an important distinction that is seldom explicit in legal ethics literature. The oft-heard stories about bad lawyers may dominate the discourse, but those bad lawyers are not the only, or even the primary, audience for legal ethics and moral deliberation conversations. Indeed, it might be that the most significant goal for ethics education is not to rehabilitate the unscrupulous lawyers, but to aid the good faith lawyers. The stories in this area may be less provocative, but they are likely far more common in day to day practice.


50. One footnote can hardly do justice to the wealth of scholarship addressing applied ethics in medicine and health care. For a sampling of some of the most common bioethics resources, see, for example, Tom L. Beauchamp & James F. Childress, Principles of Biomedical Ethics 17 (4th ed. 1994); Glenn C. Graber & David C. Thomasma, Theory and Practice in Medical Ethics 97 (1989); Albert R. Jonsen et al., Clinical Ethics: A Practical Approach To Ethical Decisions In Clinical Medicine (4th ed. 1998); Kuczewski, supra note 10; Clinical Ethics: Theory and Practice (B. Hoffmaster et al. eds., 1989); Four Principles of Health Care Ethics 319, 326 (Raanan Gillon ed., 1994).

51. See Jonsen et al., supra note 50, at 8–10.

52. One possible exception to the generalizations I develop in the text is the increasing concern about potential conflicts of interest within the medical research institutions, particularly regarding the influence of funding sources on research agendas and reporting of results. See, e.g., Michael J. Malinowski, Institutional Conflicts and Responsibilities in an Age of Academic-Industry Alliances, 8 Widener L. Symp. J. 47, 56 (2001).

C. "It's Perhaps a Little Like Therapy or Prison or Salvation": The Sociopath Thesis

The third goal of legal ethics discourse and teaching is arguably different from the one just described. Like bioethicists, legal ethicists ought to develop methods and practices to aid good faith lawyers to deliberate better about moral choices. But unlike the bioethicists, the legal ethicists claim an additional agenda—to minimize the population of, or the harm caused by, what we might refer to as the "felons," "whores," and "jerks" within the profession. Getting the bad people to be not so bad, then, seems an explicit purpose of legal ethics instruction. In this way the educators' role is not unlike that of therapists, or jailers, or clerics—they aspire to rehabilitate the bad folks, or (more sympathetically) the folks who do bad things.

Noting this apparent purpose of ethics pedagogy invites the obvious inquiry: Is there some reason to believe that the troublesome behavior of the felons, whores, and jerks might be improved if their

54. See Feldman, supra note 5, at 941.
55. I do not intend to underestimate the institutional and role-driven bases for the differences between the professions. The ethical predicaments encountered by physicians tend to involve competing visions of good—between, say, a goal of beneficence and one of autonomy. See, e.g., Beauchamp & Childress, supra note 50, at 38. The professional's personal interests (financial or performance-driven) are not apparently in play. Lawyering predicaments more often pose a caring posture against a hurtful one, with the lawyer's interests usually aligned with the hurtful alternative (for that is the option which benefits the lawyer's client). In this respect legal ethics resembles more closely business ethics, with stark antagonism between owners' and employees' or consumers' interests, than bioethics. Even recognizing the role-driven explanations for the differences between legal ethics and bioethics, the questions about the role of deliberative skill in improving lawyers' behaviors remain important ones.

56. See infra note 62. See also Jennings, supra note 39, at 1223 (noticing that "we lawyers were engaging in the type of behavior that often runs deep into felony behavior"); Lisa Lerman, Blue Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers, 12 GEO. J. LEGAL ETHICS 205, 209-10, 211-14 (1999) [hereinafter Lerman, Blue Chip Bilking] (describing lawyers convicted of billing fraud and listing their prison sentences where appropriate).

57. See Wendel, Morality and Motivation, supra note 53, at 601. See also infra note 70. I use the word "whore" in this Article with some trepidation. I intend it as a term of condemnation, describing a professional who would sell out his principles and his integrity for money and power. I do not, however, intend to cast aspersions on true prostitutes, those men or women who engage in sex for money. Their behaviors are, at least arguably, less flately condemnable. See, e.g., Beverly Balos, Teaching Prostitution Seriously, 4 BUFF. CRIM. L. REV. 709 (2001); Beverly Balos & Mary Louise Fellows, A Matter of Prostitution: Becoming Respectable, 74 N.Y.U. L. REV. 1220 (1999). I suppose what I am saying here is that by calling some lawyers whores I do not intend to insult prostitutes by association.

58. See supra note 43.
59. See Feldman, supra note 5, at 940-41; Pearce, Teaching Ethics Seriously, supra note 19, at 723; Wendel, Morality and Motivation, supra note 53, at 558.
understanding of moral deliberation were better? There is no doubt that the legal profession and graduate educational institutions frequently assume an affirmative answer to that question. Consider a prominent manifestation of this proposition. In 1987, with the insider trading and junk bond scandals involving colorful figures like Ivan Boesky and Michael Milken firmly in mind, then-Securities and Exchange Commission Chair John Shad donated $20 million to Harvard Business School for business ethics education. “I’ve been very disturbed by the great number of leading business and law school graduates becoming felons,” Shad said at the time of his gift. Harvard Business School, which we probably should assume did not take the money from Shad while convinced that such training was a waste of time and resources, either led, or was carried along by, a trend in that era on the part of business schools to emphasize social responsibility concerns amid its more conventional profit maximization training.

Similar sentiments have driven ethics education in law school. The 1970s Watergate scandals apparently prompted law schools to require professional responsibility in their curriculum. The fact that institutions respond to reports of troublesome behavior with recommendations to teach about ethics does not mean, obviously, that the suggested cure has any connection to the purported disease. There is an open invitation to skepticism here, heard from time to time in the literature.

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60. See Clark, supra note 19, at 677 (asking this question and suggesting a qualified affirmative answer); Pearce, Teaching Ethics Seriously, supra note 19, at 739 (the same).
62. Id.
63. See Business Schools’ Assignment: Think About Ethical Questions, Associated Press, BOSTON GLOBE, Sept. 6, 1988 (reporting on efforts at Harvard Business School, University of Pennsylvania’s Wharton School, Columbia University, and University of Virginia to enhance ethics instruction). This agenda has its advocates in law school business education. See, e.g., Kent Greenfield, There’s a Forest in Those Trees: Teaching about the Role of Corporations in Society, 34 GA. L. Rev. 1011, 1013 (2000) (advocating an increased emphasis on stakeholder interests and corporate social responsibility in law school business courses).
64. See, e.g., Clark, supra note 19, at 673; Pearce, Teaching Ethics Seriously, supra note 19, at 722; Richard Wasserstrom, Lawyers as Professionals: Some Moral Issues, 5 HUMAN RIGHTS 1, 2 (1975).
activities\textsuperscript{66} were the result of inadequate instruction in business school classes\textsuperscript{67} It does seem fair to draw a distinction between brazenly illegal behavior and worrisome but borderline unethical behavior,\textsuperscript{68} and it then seems not a little naïve to suggest that felons and law breakers just need a good dose of compulsory chapel.\textsuperscript{69}

But this pot shot may be misplaced. Briefly stated, the response goes something like this: It must be that the cretins we so dislike either mean to do well but just screw up (in which case better training just might help), or they really don’t mean to do well in the first place, which is to say they are sociopathic (in which case better training is less likely to have any effect, unless ethics training can motivate the sociopaths).

But here’s the difficulty. It \textit{may} be true that the felons, the whores, and the jerks are at bottom uninterested in considerations of fairness, justice, or what might be “the good.” It \textit{may} be true that, if a critic were to buttonhole one of these folks, the lawyer would answer the critic’s complaints with something to the effect of “Sorry, bub. I agree with you about the injustice, the unfairness, and the cruelty of what I do, but I simply don’t give a flying fig. I just do not care.” But I’ll bet, and you’ll likely agree, that the critics are not going to hear such words from those lawyers.\textsuperscript{70} When buttonholed, those lawyers will de-


\textsuperscript{67} Actually, the fact that Shad worried about too many Harvard Business School graduates becoming “felons” might imply some belief in that proposition—that somehow criminal (as opposed to unethical) behaviors might be deterred by better ethics instruction. \textit{See Lenzner, supra note 61.}

\textsuperscript{68} John Dean is reported to have made that distinction after Watergate: “I knew that the things I was doing were wrong, and one learns the difference between right and wrong long before one enters law school. A course in legal ethics wouldn’t have changed anything.” D. Goldman, “Exclusive Interview with John Dean,” \textit{Comment}, Boston University School of Law 1 (1979), quoted in Wendel, \textit{Morality and Motivation, supra note 53, at 602 n.243.}


\textsuperscript{70} \textit{See Wendel, Morality and Motivation, supra note 53, at 601 (lawyers asked about questionable conduct “did not say, ‘Yeah, I’m a whore. I’m only in it for the money.’ The justifications they offered related to considerations of justice, fairness, political legitimacy, and loyalty to clients . . . .'”). See also Dan M. Kahan, \textit{Trust, Collective Action, and Law}, 81 B.U. L. Rev. 333, 338 (2001) (“Most individuals want to perceive themselves and be perceived by
fend what they did with arguments, whether persuasive or not, that connect to shared norms within the profession.

The obvious response by the skeptics at this point is: "Of course! But can't you see that these felons, whores, and jerks are lying? They're sociopaths, after all, so they'd hardly worry about lying." We have to accept that explanation as entirely possible. It is easy for sociopaths to pretend that they are not sociopaths, and given some of the strained arguments the critics might hear, the suspicions about dissembling might be rather high. But this need to dissemble is telling for two reasons. First, and perhaps less interesting, this reality means that the critics, and the teachers, will never be able confidently to identify the sociopaths. They will look very much like the good faith but stumbling lawyer who just gets it wrong, and offers weak arguments because his skill at this deliberative reasoning stuff is not so great. Second, and more interesting it seems, the very need of the felons, whores, and jerks to dissemble with arguments communicates something about the nature of community norms and their effect on behavior. Rambo doesn't need to lie, so why would he do so? He may be willing to act like a sociopath, but it's very hard for him to admit being a sociopath, because his community of peers will not accept that level of immorality.

We return to this question in Part IV of this Article. In that Part we explore further the various guises under which the felons, whores, and jerks might appear, in an effort to discern whether professional schools, or professional trade associations, might play some role in influencing their behaviors. For the next two Parts we return to the realm of moral deliberation, assuming here that the audience cares about doing this ethics stuff right.

II. Deliberation About Values

Let us assume, for the next two Parts, that law students and lawyers are likely motivated to be as good as they can be, all things consid-

others as being motivated by moral values like generosity, honor and honesty and not just by the prospect of material gain."). Rob Atkinson may disagree. He argues that "unscrupulous Type 1 [hired gun, or 'Rambo'] lawyers ... do not justify their Type 1 behavior by even a self-serving reference to dubious theories; they do not try to justify it at all." Atkinson, Dissenter's Commentary, supra note 4, at 306. His reference for this statement, however, offers only "an exception that proves the rule." Id. at n.202 (recounting a Skadden Arps lawyer's claim that "I'm at Skadden now. We pride ourselves on being assholes. It's part of the firm culture," quoting LINCOLN CAPLAN, SKADDEN: POWER, MONEY, AND THE RISE OF A LEGAL EMPIRE 241 (1993)).

71. See text accompanying infra notes 217–37.
It is possible, I suppose, that simply by wanting to be as good as she can be, an individual can be trusted to make reliable, centered, and correct moral choices—but that supposition is unlikely. We would suppose, instead, that good faith persons can learn how to deliberate better, in order to make superior moral choices, and that they ought to study how to do so. At this juncture, though, some difficulties appear. There seems to be consensus among writers in this area that students and lawyers ought to learn an art often described as "deliberative (or reflective) judgment"—that is, how to recognize moral questions, how to parse their components, and how to weigh important moral considerations in context. Seldom, though, is the suggestion made that students and lawyers can learn some right answers, or how to balance appropriately competing claims about what might be right. Teaching a sense of reflective judgment is viewed as an altogether good thing; teaching specific values, by contrast, is worrisome. Certain nagging doubts about personal values, about moral pluralism, and about one's ethical identity seem to predominate. "There are no right or wrong answers," one frequently hears, "but there are better or worse answers." The critique continues, if values are to be taught, "whose values" will those be?

In this Part we examine some of the underlying sources for the doubts about identifying, and working from, shared values. I conclude

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72. See Simon Blackburn, Being Good: An Introduction to Ethics 7 (2000) (noting the difference between "moralists" and ordinary persons who may not always be perfectly good).

73. See, e.g., Clark, supra note 19, at 676; Feldman, supra note 5, at 941.


75. Ian Johnstone & Mary Patricia Treuthart, Doing the Right Thing: An Overview of Teaching Professional Responsibility, 41 J. Legal Educ. 75, 76 (1991) ("[I]t seems inappropriate for law schools to promote particular values. To do so would be to assume that values are universal or that those embodied in the professional role are uncontroversial."); Lee Modjeska, On Teaching Morality to Law Students, 41 J. Legal Educ. 71, 71, 73 (1991) (teaching morality "raises the specter of moral pontification . . . . Law teaching . . . is not a bully pulpit.").

76. See, e.g., Deborah Rhode, Professional Responsibility: Ethics By the Pervasive Method 15 (2d ed. 1998) [hereinafter Rhode, Ethics By the Pervasive Method]; Clark, supra note 19, at 675–76.

that, unless one accepts a relativist or subjectivist perspective about values—a position with few real world defenders—the prevailing conception of non-comparable, personal values is an unwarranted one.

A. The Relativism Worry

The first, and perhaps the least troublesome, objection comes from the relativists. When the topic turns to questions of value a student might object: "I'm sorry, but how can we talk about values here? My values may be very different from your values, and nothing we can say here can persuade me that you are right and I am wrong. Let's talk about law, which we can study, but not values, which are only in our heads."78

This is hardly the place for an in-depth exploration of the relativism controversy, which has engaged scholars for centuries.79 For our purposes, it suffices to note that the crude relativism argument just presented, which Bernard Williams calls "vulgar relativism,"80 is either incoherent, or irrelevant. Its incoherence stems from its implicit expression of reasons (I will act this way because my individual values support such action) while denying, at the same moment, that those reasons have any intersubjective validity. If the relativist's values serve as a basis for acting (and what else would they do?), the values imply some form of shared norms which give the reasons some substance.81 If, on the other hand, the relativist denies this apparent truth, then her position is irrelevant. It is irrelevant both because no conversation with her will have any purpose, and because, frankly, she doesn't exist.82 Even the most passionate defender of the "it's my opinion" argument will have reasons for her opinion, and once there are reasons, there are arguments, and efforts to make others understand why the

78. This argument is not one presented by relativist scholars, but it is one sometimes heard among plain persons, including law students and lawyers. See Jeremy Waldron, On the Objectivity of Morals: Thoughts on Gilbert's Democratic Individuality, 80 CAL. L. REV. 1361, 1373–74 (1992) [hereinafter Waldron, Objectivity of Morals] ("Although relativism appears to be a very popular position among nonphilosophers, it is notoriously difficult to formulate in philosophically rigorous terms.").


81. See Blackburn, supra note 79, at 27–29.

82. Cf. Blumenson, supra note 79, at 541 n.58 (arguing the incoherence of a relativist reasoning process).
reasons make sense, and then something other than relativism is going on. 83

There is a more credible version of relativism which I should note in passing but which need not concern us here. A much more serious debate grapples with the prospect of cultural relativism and “universalizability” of moral judgments. Richard Posner, for instance, has argued that “[i]nfanticide is abhorred in our culture, but routine in societies that lack the resources to feed all the children that are born.” 84 He thus concludes that infanticide is not necessarily “wrong” in any absolute sense. Many writers, like Posner, wonder whether all deeply held notions of the good are culturally driven, and question whether one can justifiably critique a different culture for practices accepted as immoral here. 85 Those arguments, even if persuasive, have little place in the debates within the legal profession about how lawyers may act honorably. The cultural relativism arguments seem to assume strong norms within one culture, and question the applicability of those norms elsewhere. Those arguments in this way tend to support the positions developed here, which look for common, shared norms among those who worry about lawyers’ ethics.

Another reason to minimize relativism as a serious worry for professional ethics conversations is that even avowed relativists tend to join in common discourse when the topic comes around to the most glaring cruelties or injustices. For instance, even the envelope-pushing Judge Posner, a prominent defender of a deep version of relativism, seems unable to sustain his relativist thesis when confronted with compelling, real tragedy. 86

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83. See Blackburn, supra note 72, at 28.
84. Posner, Problematics, supra note 7, at 1650. Posner would “hesitate to call . . . immoral . . . a person who sincerely claimed, with or without supporting arguments, that it is right to kill infants . . . .” Id. at 1644.
85. See, e.g., Michael Walzer, Thick and Thin: Moral Argument at Home and Abroad (1996). For responses to those arguments, see Williams, supra note 80; Blumen­son, supra note 79.
86. A few years after his Holmes Lectures in which he defended infanticide and slavery as not necessarily morally wrong given the right local community norms, see supra note 7, Posner demonstrated the real challenge in adhering to a relativist (or subjectivist) stance. In a recent column in The Atlantic Monthly, Posner quotes an American historian and offers his response to the historian’s views:

[The historian writes:] “I’m not sure which is more frightening: the horror that engulfed New York City [on September 11, 2001] or the apocalyptic rhetoric emanating daily from the White House.” Come again? Can this really be a difficult choice? One is reminded of Martin Heidigger’s saying that although the extermination of the Jews was bad, so is mechanized agriculture.
B. The Role of Faith

If relativism falls short as an intellectual objection to values talk within professional education, arguments grounded in religious faith are equally beside the point. This is not to assert, of course, that the role of faith is not considerable in its influence on many lawyers' and students' views of morality. Any such claim would be just silly. But arguments based on faith can never be persuasive to those who do not share the proponent's religious beliefs; faith based arguments are persuasive when they reach a shared core of sentiment about what is to be valued. Those who argue that, for instance, Jesuit education offers a more sustained moral vision than secular education may well be right, but the moral values taught by Jesuit or Catholic institutions are profound and meaningful not because they are Jesuit or Catholic, but because they are profound and meaningful.

A religious ethicist does not make the argument that her beliefs are good simply because they are her beliefs as propounded from on high. A purely scriptural argument is one we simply will not hear:

I don’t care what you say to me about, and indeed I accept your arguments about, cruelty, unfairness, disrespect, inequality, and the like—I value “X,” notwithstanding its cruelty and injustice, because my God tells me I must value “X,” and what my God tells me is absolute truth to me and binding on me.

As Simon Blackburn writes, “The point is that God, or the gods, are not to be thought of as arbitrary. They have to be regarded as selecting

Richard A. Posner, The Professors Profess, ATLANTIC MONTHLY, February 2002, at 28 (quoting Eric Foner). There is no question that Posner's disagreement with Foner (and his use of the Heidigger story) is a normative one, and Posner uses arguments in an effort to persuade his readers that on the normative question he is assuredly right—that it is worse, morally, to kill 3000 innocent civilians by crashing airplanes into two skyscrapers than to engage in apocalyptic rhetoric about evil and war. This is moral argument, pure and simple, by a self-proclaimed relativist. See Nussbaum, supra note 7, at 1787 ("[I]s Posner really a relativist at all?").


88. See Blackburn, supra note 72, at 10.


90. Simon Blackburn offers an example from Plato's Dialogues to make this point. Socrates develops the circularity of Euthyphro's argument that "piety" is loved because it is holy, not holy because it is loved.
the right things to allow and to forbid." The important question, for religious as well as non-religious professionals, is discerning what those "right" things are.

C. The Role of "Personal" Values

Few respected applied ethics writers defend a deeply relativist stance, as we have seen. A purely subjectivist stance has even less currency. So it does not surprise us that we seldom, if ever, hear arguments like this:

I happen to believe deeply that it is entirely right for a lawyer to bribe a judge, forge documents, and offer perjured testimony on behalf of a wealthy corporate client in order to win an entirely trumped-up foreclosure case against a working class family with sick children and nowhere else to live. Just my opinion.

By contrast, many respected applied ethics writers treat moral values as somehow "personal," and suggest limits on their role within professional education. William Simon, for instance, disparages the role that "private or personal moralities of individual lawyers" ought to play in ethical decisionmaking. Bruce Green cautions lawyers not to allow their personal values to influence their professional deci-

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91. Id. at 16.
92. For an example of this point, see Monroe H. Freedman, Legal Ethics from a Jewish Perspective, 27 Tex. Tech. L. Rev. 1131 (1994). Freedman writes that his legal ethics are influenced by his Jewish traditions and their commitment to "the dignity and sanctity of the individual, compassion for fellow human beings, individual autonomy, and equal protection of the laws." Id. at 1134. Freedman's list is evocative and compelling, and there is little doubt that these sentiments are central in his Jewish tradition, but the goods he lists are hardly idiosyncratic. Indeed, it is hard to imagine any community, of faith or otherwise, not committed to those values.
93. See supra note 78 and accompanying text.
94. See Posner, Problematics, supra note 7, at 1642–43 (defending a version of relativism but denying that his arguments are subjectivist).
95. Note that we may hear arguments from a lawyer who represents a wealthy corporation foreclosing on a working class family with sick children and nowhere else to live, defending that representation. Those arguments, though, will rely on some reasons, some principles, and some shared concepts and norms, however contestable in the circumstances of the particular case. See Charles Fried, Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 Yale L.J. 573 (1977) (offering a reasoned, principled defense of zealous advocacy).
A similar recognition of the personal nature of moral commitment is reflected in the frequent observation about the "moral diversity" of the legal profession and the absence of shared values among lawyers. Rob Atkinson criticizes as "demonstrably erroneous . . . [the] premise that conscientious lawyers agree on the way to be a good person and a good lawyer, or that a single kind of lawyering is right and all others wrong," a thesis that Atkinson labels "the fallacy of the one true way."

The notion of "personal" values, either as a basis for lawyering commitments or as an impermissible distortion of those commitments, engenders the same incoherence that surrounded the relativist arguments. A claim that values are personal implies that they are somehow non-negotiable, that they are not based upon reasons or arguments, but just "are." That kind of offering is justly rejected when proffered by a relativist. Why does it have such currency and validity here? There is some good reason for the difference, but to understand that reason we must distinguish among three versions of "personal" values. With an appreciation of these distinctions, we see that some values are "personal" in the non-negotiable way, but others are not.

1. Values As Reasoning About What Is Right

A common understanding of one's personal values treats those concepts as beliefs about what might be correct from a moral standpoint. Such beliefs cannot be idiosyncratic without our relying on

98. See Green, supra note 4, at 19. See also Rostain, Ethics Lost, supra note 14, at 1298 (criticizing a suggestion by some ethicists, including Geoffrey Hazard, that "[a] lawyer can resort to her own idiosyncratic values to draw the line at which partisanship leaves off and exogenous norms take hold"). Rostain argues that "Hazard ends up in a 'lonely subjective world' of inchoate personal value," citing Hazard, Personal Values, supra note 4, at 141.


100. Atkinson, Dissenter's Commentary, supra note 4, at 303.

101. Id.

102. See Swygert, supra note 14, at 807-08, 813-14.

103. See Green, supra note 4.

104. See Jane B. Baron & Richard K. Greenstein, Constructing the Field of Professional Responsibility, 15 NOTRE DAME J.L. ETHICS & PUB. POL'y 87, 49-50 (2001); Scherr, supra note 74, at 194.
subjectivist or religious arguments, and hence do not warrant the protective label of "personal." Imagine: I claim that my "personal" values forbid me from lying to gain an advantage in a particular context, the details of which you and I understand equally well. You respond that your "personal" values permit you to lie in that identical circumstance. Assuming that you and I reject dogmatic relativism or subjectivism ("it's my opinion because, well, because it's my opinion") as well as purely religious foundations for our stances ("it's my opinion because my dogma says so, and I can't offer any other reasons"), our values are negotiable. I offer my nuanced reasons why lying is wrong in this case (not always wrong, perhaps, but wrong here); you respond with your nuanced arguments in support of the lie here. We might call our values personal, but we gain very little in doing so. They certainly gain no protection from critique or debate by that label, nor am I out of bounds by concluding (and teaching, if I am your teacher) that your value is ill-reasoned and, well, wrong, at least in this context.

Bruce Green has articulated the most robust defense of a distinction between personal values and professional values, arguing that the former ought to be cabined in professional decisionmaking. His arguments, though, are not persuasive. His thesis is most provocative when he imagines professionals holding idiosyncratic personal values and applying those values in an unacceptable way. For instance, he asks us to imagine a judge, assigned to hear a visitation dispute involving an abusive father, calling upon his "personal belief that divorce is immoral, as well as a religious conviction that children should respect and revere their parents" to decide that the son should visit the father, even though "two independent psychiatrists believe that the children would be harmed" by the visitation.

Green's point is that the judge should not rely on these beliefs because they are personal and religious. He is correct that the judge should not rely on these beliefs, but not because of their source. In-

105. The qualification that we understand the context of the value choice at hand is critical. See text accompanying infra note 171.

106. My argument addresses the moral assessment of your conduct, and not the legal assessment. William Simon may be right that the latter is often more workable, and exhibits clearer shared norms, than the former, and my example here is one such instance. See Simon, The Practice of Justice, supra note 47, at 18. It is plainly unlawful for you as a lawyer to lie, and my argument on that score will employ a truly shared authority, like Model Rules Prof'L Conduct, R. 3.3, 4.1 and 8.4(c) (2002), if they happen to have been adopted in our jurisdiction. My larger point is that, the facility of the legal arguments notwithstanding, the same reasoning often applies to moral questions.

107. See Green, supra note 4.

108. Id. at 51–52.
The judge should be faulted because his moral reasoning is simply wrong. Green's analysis is subtly, but insistently, relativist or subjectivist. He affords the judge autonomy in his choice of values, without offering a reasoned challenge to the acceptability of the values expressed by the judge. His thesis implies that we cannot evaluate the acceptability of personal values, and, therefore, the safe route is to adhere to collective professional values. The opposing thesis developed here is that we can reason through questions of value and conclude, like we will in his example, that certain decisions are simply wrong.

2. Values As Reasons for Acting, Apart from Considerations About What Is Right

The notion of personal values might mean something rather different, however, from an opinion about what is right morally. The literature about autonomy and individual choice relies often on the accepted understanding that individuals differ in their personal values. In this context the term "values" refers to deep preferences, or, as David Luban has written, "reasons for acting . . . that form the core...

109. Green credits personal and religious norms as critical to a person's identity, see id at 34, but understands those norms as idiosyncratic and, hence, not subject to reasoned analysis. See id. at 23 ("unique individual moral codes"); id. at 24 ("subjective religious and personal moral dispositions," quoting Geoffrey C. Hazard, Equal Opportunity in the Practice of Law, 27 San Diego L. Rev. 127, 128 (1990)).

110. Green offers several examples to establish his claim that the indiscriminate application of private, idiosyncratic norms is unwise. In the most provocative examples, not surprisingly, the personal value choices conflict with the disposition offered by the profession's guidelines. (If there were no clash, we would not know that the actor had acted on personal norms; and if the professional guidelines did not require a particular resolution or limited set of options, the choice made would be essentially unfettered.) In each case where the exercise of a supposed personal value led to an injustice, see id., Examples 3, at 31–32; 4, at 36; and 7, at 41, the critique in the text would apply—the injustice ought to be avoided because it is unjust, not because of its connection to personal values. In the cases where adherence to the professional guidelines might seem unjust, see id., Examples 2, at 30–31; and 10, at 54–55, Green's argument is even more difficult to sustain. Perhaps it is best to allow certain injustices to occur in the interests of developing fidelity to rules, but that conclusion would follow from a careful analysis of the rule and the circumstances, and should not be decided because one value is deemed professional and another personal. Cf. Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962) (child's life endangered when lawyers adhered to confidentiality rules and did not disclose aneurysm to child).

of [one's] personality."\textsuperscript{112} Using this view of the term "values," we have little difficulty agreeing that they are idiosyncratic, non-negotiable (for the most part), and "personal." But it is equally apparent that this conception of values is different from the conception of values as sentiments about what is right. You might declare that your deep preference is to lie to gain an advantage in the case we are discussing. I am powerless to persuade you that your preference is wrong \textit{as a statement of your reasons for acting}. I am not powerless or unjustified, by contrast, in trying to persuade you that your choice is wrong \textit{as a question of ethics.}\textsuperscript{113}

\section*{3. Values As Patterns of Response to Incommensurability}

The third conception of "personal" values offers an understanding of personal normative commitments which does not presuppose relativism or subjectivism but which may demand respect for idiosyncrasy and non-negotiable stances. This conception thus combines elements of the first two, and might support, in some settings, the commentators' recognition of a strong diversity of moral opinions within the legal profession.

We saw above, in discussing the first conception of personal values, that questions of right and wrong invite reason-giving, and hence build upon a shared language and shared beliefs about normative value. Bradley Wendel has recently explored the nature of normative disagreement in light of the weakness of relativist arguments, and he offers the ideas of \textit{incommensurability} and \textit{incomparability} as central components of moral uncertainty and conflict.\textsuperscript{114} Two nonrelativists ought to agree generally about common core values, at least in the abstract.\textsuperscript{115} If multiple shared norms conflict (as they will in any instance

\textsuperscript{112} Luban, \textit{Paternalism and the Legal Profession}, supra note 111, at 470.

\textsuperscript{113} This understanding of "personal values" seems to mesh with the use of that phrase to represent private behaviors which may or may not affect one's professional duties. See Menkel-Meadow, \textit{supra} note 96, at 369-70, 389-91 (comparing President Clinton's less than admirable private moral conduct with his professional obligations).

\textsuperscript{114} See Wendel, \textit{Value Pluralism}, supra note 34, at 143. See also Kronman, \textit{supra} note 74, at 114-15 (the incommensurability of norms is a conception taught to law students, contrary to their pre-law school understanding).

\textsuperscript{115} See Walzer, \textit{supra} note 85, at 1-19 (arguing that agreement in the abstract is of very little use in moral and political disputes; "thin" descriptions might offer seeming agreement about principles, but more complex "thick" descriptions, where several valued principles clash, undercut any earlier agreement).
of moral uncertainty\textsuperscript{116}, the two conversants might still agree about how the conflicting norms ought to be weighed or ranked,\textsuperscript{117} but only if they first concur about some "covering value" which might serve as the basis for the comparison.\textsuperscript{118} In many instances of moral uncertainty, Wendel asserts, no such covering values can be found. Indeed, the disagreement may well be itself about two plausible covering values.\textsuperscript{119}

Wendel offers a "thick" example involving a dispute over whether to develop a copper mine within the Glacier Peak Wilderness in Washington's Cascade range.\textsuperscript{120} He argues that the choice between developing the mine and leaving the Wilderness pristine implicates serious moral concerns about which observers will disagree. The disagreements will not be ones of mere "opinion," for the arguments about which side is right will rely on reason, on facts, and on common norms which both sides accept. The difficulty, Wendel shows, is that when the debate is exhausted the "better" answer depends on how one ranks the two goods (economic values and jobs versus breathtaking beauty), and on that score no "reason" will suffice to persuade another.\textsuperscript{121}

In the "tragic" instances of incomparability and an inability to define an adequate covering value, Wendel argues, the actor cannot rely on reasoning alone, and must instead rely on his personal commitments, his character, and his life story to make the best choice he can, all things considered.\textsuperscript{122} Having done so, he will not (Wendel implies) be criticized by us, or ought not be, for we cannot say that he is wrong

\textsuperscript{116} See Jonsen & Toulmin, supra note 8, at 330.
\textsuperscript{117} Most moral philosophers reject the idea of an \textit{ex ante} lexical ordering of principles or norms. W. D. Ross proposed a ranked order of duties, arguing that the principle of nonmalevolence (avoiding harm) ought to take precedence over the principle of beneficence (the production of good consequences). See Ross, supra note 6, at 21–22. Few philosophers believe that the lexical ordering endeavor is a fruitful one. See Wendel, \textit{Value Pluralism}, supra note 34, at 139–41; Kai Nelson, \textit{On Being Skeptical About Applied Ethics}, in \textit{Clinical Medical Ethics: Exploration and Assessment} 95 (Terrance F. Ackerman et al. eds., 1987); Alasdair MacIntyre, \textit{Moral Philosophy: What's Next?}, in \textit{Revisions: Changing Perspectives in Moral Philosophy} 1, 5 (Alasdair MacIntyre & Stanley Hauerwas eds., 1983) ("there are no scales" for the weighing of competing values).
\textsuperscript{118} See Wendel, \textit{Value Pluralism}, supra note 34, at 152 ("The possibility or impossibility of making comparisons is intelligible only if there is some \textit{covering value} in respect to which the intrinsic merit of two items may be evaluated.").
\textsuperscript{119} See id. at 153.
\textsuperscript{120} See id. at 154–57.
\textsuperscript{121} See id. at 159 ("The point of the example is that it seems impossible to specify a covering value that takes into account the full range of moral and prudential considerations at play in the policy dispute and tells us how they should be ranked.").
\textsuperscript{122} See id. at 160–61.
(or that we know that he is wrong). That limit on criticism, if we accept it, might leave the observers of the present state of affairs of the legal profession a bit more humble in their censure. We reach that question at the end of this Article.\textsuperscript{123}

The recognition of incommensurable or incomparable norms offers support for the commentators who cabin the "personal" values from the arena of reasoned argument. At the same time, it is important not to overstate the significance of this phenomenon. Some of the more skeptical observers imply that all moral reasoning falls into this incomparability camp,\textsuperscript{124} and that conclusion is seemingly mistaken. Further, in cases of true incomparability, and perhaps Wendel's National Wilderness mining story meets that definition, important reasoning and argument may proceed on the legal values at stake, so that the lawyer need not see the choice as one which he must make entirely on his own.\textsuperscript{125} As we shall see in the next Part, some techniques of moral reasoning, particularly casuistry, can minimize the frequency that moral conflicts end up with true conversation-stopping incomparability.

\section*{III. Working with, and from, Shared Norms}

An important aim of this Article is to question the common understanding that values are idiosyncratic and non-negotiable. Disagreements which appear to arise from irresolvable conflicts between different individuals' personal values can often be reframed as disagreements about facts.\textsuperscript{126} The deep seated disputes reported as evidence of "culture wars"\textsuperscript{127} are genuine controversies, but not always,
or even often, about values. The reasons given in defense of positions on the death penalty, or divorce, or gun control, or gay marriage, or even abortion tend to assert factual premises, or predictions about future harms or benefits.128 (Faith-based arguments are also prevalent, but those arguments are not persuasive as a justification for a moral position, as we saw earlier.129) The differences of opinion seldom, by contrast, hinge on definitions about what is “good.”

In this Part, I address one attractive possibility for working with agreement, one that builds upon the classical and traditional moral theories. I suggest that using theory as a way to work from common sentiments is problematic at a practical level. I then describe a more promising method of ethical reasoning, casuistry,130 which employs agreement as a starting point and a focus for moral assessment. I end this Part with a review of sociological work which offers evidence of the shared norms upon which casuists rely.

A. Moral Theory and Its Limits

A seemingly promising way to advance conversations about ethics from the realm of personal opinion and preferences to a more substantive reasoned plane is through the use of moral theory. Imagine again a common ethical disagreement in a law school or law practice setting: You defend deceiving your opponent in a negotiation about a material fact, and I disapprove of your choice. Our disagreement is rather fruitless if we remain at an *ad hominem* level, so perhaps we ought to move to a careful consideration of moral theory. If we apply the more prominent moral theories to our disagreement, we may reach some common understanding of the moral principles involved, and perhaps we may even agree about a resolution to our debate. At a minimum, moral theory *grounds* our conversation in a way that our expressing our strong personal opinions does not.

Many observers make this kind of suggestion.131 Not surprisingly, the most common advice urges the study of the two historically most

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128. This thesis is explored in the context of a review of Alan Wolfe’s sociological studies on American values. *See infra* notes 174–207 and accompanying text.
129. *See supra* notes 87–92 and accompanying text.
130. One of the leading casuist writers denies that this process should be seen as a “methodology,” fearing that such a word implies too formal an idea. *See* Albert R. Jonsen, *Casuistry: An Alternative or Complement to Principles?,* 5 KENNEDY INST. OF ETHICS J. 237, 241 (1995) [hereinafter Jonsen, *Alternative or Complement.*]
131. Many standard professional responsibility textbooks introduce moral theory in an early chapter, implicitly or explicitly in order to aid students to understand better the moral issues they will confront in the course and in their practices. *See, e.g.,* Rhode, *Ethics*
prominent theories, utilitarianism and deontology, although other kinds of moral theories, including the conception of virtue ethics, find their way into texts about professional ethics deliberation. The more one understands about moral philosophy, the better prepared one will be to confront "the intractability of moral dilemma: moments of crisis when, viewed honestly, the paths of right and wrong conduct do not clearly stretch out from one's feet." Some scholars explicitly urge greater study by law students of "metaethics, or the study of value systems."

These moral theory proposals make much good sense, but they are blemished by some deep problems. I do not pretend to discount the value of exploring the rich philosophical traditions that underpin modern moral discourse. Far be it from me to minimize the brilliance of the elaborate theories of moral reasoning offered by Kant, or the intricate efforts of the consequentialists to respond to the admittedly dogmatic elements of Kantian theory. My several concerns run in the opposite direction, and actually grow out of the sophistication needed to join these philosophical debates.

My worries are three. First, those who introduce competing moral theories to young professionals in training do so in order to offer a choice among several orientations. The implication is that one "opts in" at some stage of her professional development and makes moral choices based on the resulting decisional path. (This suggestion in-

BY THE PERSUADE METHOD, supra note 76, at 11-32; MORTIMER D. SCHWARTZ ET AL., PROBLEMS IN LEGAL ETHICS 4-27 (5th ed. 2001).

132. See SCHWARTZ ET AL., supra note 131, at 6-17, 20-27. The same advice appears in applied ethics sources in medicine, again not surprisingly. See, e.g., BEAUCHAMP & CHIL­DRESS, supra note 50, at 47-62.

133. See RHODE, ETHICS BY THE PERSUADE METHOD, supra note 76, at 19; BEAUCHAMP & CHIL­DRESS, supra note 50, at 62-69.

134. CHARLES WOLFRAM, MODERN LEGAL ETHICS 71 (1986).


138. See, e.g., RHODE, ETHICS BY THE PERSUADE METHOD, supra note 76, at 13, 27-32; Terrell, supra note 135, at 113 ("distinguish[ing] between two subtle approaches to choosing one's values").

139. See Tremblay, The New Casuistry, supra note 30, at 501-02 (developing this argument).
cludes the accompanying implication that one would make different choices depending on where one lands. There exists a serious question whether law students and lawyers have the skill and sophistication necessary to understand the theories well enough to make such a commitment. Kant in his original texts is extraordinarily difficult to understand, and those who offer to make his teachings clearer are seldom that much more comprehensible. Perhaps students are expected to make an ad hoc path choice after reading a page or two summary (or even a chapter or two), but even stating that possibility shows its absurdity.

The second worry follows from the first. Even if a lawyer learned a great deal about the intricacies of the two (or more) competing theories, she still may not want to “opt in” to one camp in exclusion of the other. Sometimes, she might find the Kantian idea of dignity and autonomy far more attractive than an opposing choice grounded in consequentialist notions of efficiency or best interests. At other times, she might find herself relying on the utilitarian idea of using scarce resources efficiently, even if doing so fails to afford sufficient respect

140. See, e.g., SAMUEL GOROWITZ ET AL., MORAL PROBLEMS IN MEDICINE 543 (1976) (describing a medical school examination with the following instructions: “Describe a medical situation in which different decisions might be made by a Kantian (or Rawlsian) on the one hand and a utilitarian on the other. Explain what the difference would be and how it would arise.”); RHODE, ETHICS BY THE PERVERSIVE METHOD, supra note 76, at 25–27.

141. While his Holmes Lectures arguments may be quite flawed in many respects, Judge Posner’s assertion there about the inaccessibility of modern philosophical literature is hard to quarrel with. See Posner, Problematics, supra note 7, at 1670–71. At least one of his critical commentators agrees with him on that score. See Nussbaum, supra note 7, at 1794–95.

142. An anecdote: I recently read John Rawls’s Harvard University undergraduate lectures on the history of moral philosophy, most of which covers Kant’s writings. See Rawls, supra note 136. At the risk of exposing my intellectual frailties (which, I suppose, have been readily apparent to readers thus far), I found this careful exposition of Kant’s ideas still extremely difficult to assimilate and to understand in any comprehensive way. Even if I were to follow the very exquisite and careful logic of Kant, I confess that I would have some trouble relying on that analysis to guide my decisions in the hurly-burly of my law practice (or, for that matter, my everyday life).

One notable exception to my criticism of modern writers about Kant would be Simon Blackburn’s short work on moral philosophy, but that book offers the briefest and most cursory coverage of the body of Kantian thinking. See Blackburn, supra note 72, at 116–24.


144. Bradley Wendel reminds us of Derrick Bell’s Space Traders story as a powerful argument against the pleasure maximization principle that one might understand to follow from consequentialist reasoning. See Wendel, Value Pluralism, supra note 34, at 213 (quoting DERRICK A. BELL, FACES AT THE BOTTOM OF THE WELL: THE PERSISTENCE OF RACISM 158 (1992)).
She rightfully objects to any efforts to induce a commitment on her part to a defined moral theory.

The third worry then follows directly from the first two. The reason why the lawyer resists commitment to a theory which could then determine her future actions is that her moral choices are not made in a deductive fashion, by applying a theory to a set of facts and deducing the right response from that syllogistic reasoning. The explanation why the lawyer might find a deontological approach attractive in one setting and a utilitarian approach attractive in another is that the context determines her sentiments, and not a theory. Moral theories, and the mid-level principles that applied ethicists craft from the grander theories, reflect and organize sentiments drawn from work with actual cases. As many commentators have noted, when a carefully crafted theory clashes with deeply held moral sentiments, the theory gets jettisoned, not the sentiments.

Assignment of classic philosophical treatises, then, can have considerable worth as they inform conversations about moral value, but not the worth that its proponents imply. Besides its inaccurate assumption of deductive reasoning among deliberators, the theory conception fails to offer a method of assigning priorities or of ranking when

145. I might use my own work as an example of this kind of “switch hitting.” I have defended a fairly consequentialist approach to triage decisions within legal services practice. See Paul R. Tremblay, “Acting a Very Moral Type of God”: Triage and Poor Clients, 67 FORDHAM L. REV. 2475 (1999). Elsewhere, I have defended a decidedly Kantian conception of individual autonomy and dignity in commenting on the proper role for lawyers working with possibly disabled clients. See Paul R. Tremblay, On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client, 1987 UTAH L. REV. 515. Maybe I’m wrong on one of these stances, but it seems unlikely that I’m wrong because I have incorporated strands of different moral theory in my analyses.


148. This is the lesson of Derrick Bell’s story about the Space Traders. See Bell, supra note 144, at 158. The observation in the text may be found in Principles and Particularity, supra note 143, at 988–91.
theories or principles conflict.\textsuperscript{149} The next Part addresses a technique of moral deliberation that builds upon this quality of moral theory and ethical principles.

B. Casuistry As a Deliberative Technique

As I have described at some length elsewhere,\textsuperscript{150} the art of casuistry has garnered considerable attention among ethicists in recent years, particularly within bioethics.\textsuperscript{151} Casuistry offers a method of moral reasoning and deliberation which resists theorizing and which builds upon common sentiments about normative value. “Unlike Kantianism, utilitarianism, coherency, and contractarianism, [casuistry] does not claim to be an ethical theory.”\textsuperscript{152} Casuistry’s elements have been described cogently by the ethicist Carson Strong:

[Casuistry] is a case-based approach in which an argument is developed by comparing the case at hand with paradigm cases in which it is reasonably clear what course of action should be taken. In addition, the comparisons of cases are made in terms of certain morally relevant factors, which I refer to as “casuistic factors” and which can vary from case to case. The decision which is best will depend on the extent to which these factors are present in the given case. Moreover, casuistry does not generally claim to reach certainty in its conclusions. The strength of the conclusions depends on the plausibility of the comparison with the paradigm cases. . . . Furthermore, casuistry does not claim to be able to resolve all cases. When disagreements . . . cannot be resolved, it might sometimes be appropriate to conclude that several alternative courses of action are permissible . . . .\textsuperscript{153}

The paradigm cases represent the source of shared sentiments.\textsuperscript{154} Most ethical dilemmas or quandaries consist of stories or circumstances where multiple, competing ethical principles or moral theories seem to apply, and how to rank or prioritize the conflicting norms is not readily apparent. In some of those stories or circumstances, the dilemma or conflict will be insoluble, for incomparability reasons described by Bradley Wendel.\textsuperscript{155} In those cases, despite the angst experienced by the agent who must proceed amidst the uncertainty, there is

\begin{itemize}
\item \textsuperscript{150} See Tremblay, The New Casuistry, supra note 30.
\item \textsuperscript{151} The revival of casuistry has been attributed to the pathbreaking book by Stephen Toulmin and Albert Jonsen. See Jonsen & Toulmin, supra note 8.
\item \textsuperscript{152} Strong, supra note 149, at 330.
\item \textsuperscript{153} Id. at 331.
\item \textsuperscript{154} See Braunack-Mayer, supra note 10, at 73; Kuczewski, supra note 10, at 72.
\item \textsuperscript{155} See supra notes 114–23 and accompanying text.
\end{itemize}
no available right answer and her actions cannot be criticized. Of course, not all dilemmas or conflicts are so insoluble—if they were, ethical conversation would have no purpose. Ethical conversation and debate assumes that some issues are subject to reasoned analysis. Casuistry offers a coherent, practical method for that analysis. It permits the same kind of inductive, analogy-driven scrutiny that legal scholars employ when using common law precedent to decide on a right answer in a difficult legal dispute. Casuistry offers a coherent, practical method for that analysis. It permits the same kind of inductive, analogy-driven scrutiny that legal scholars employ when using common law precedent to decide on a right answer in a difficult legal dispute. Law students perform that process regularly in substantive law courses; they might then be shown a similar process in ethics contexts.

Casuistry, thus described, invites reasoned, principled argument about ethics questions in a fashion which evades reliance upon personal opinions. It also allows, but does not require, sustained study of classic moral theories, and it need not ask participants to opt in as an adherent of one theorist’s conception over another’s. It works from the ground up, and in that way is anti-theoretical. Different cases will call for different answers and different analysis. The details of the cases will be critically important, and, in classrooms unconnected to practice, “thick” descriptions will fare better than “thin.” Casuistry offers comfort and workability, of course, only if shared sentiments do predominate, or at least exist in some not-insubstantial way. Without agreement about paradigm cases, casuistry is no method at all. The remainder of this Part and the next Part develop further support for the thesis of shared, and non-idiosyncratic, value systems.

Consider the following example where casuistry might refute a suggestion that value choices are idiosyncratic and personal, and that...
their conflicts are incomparable. In his brilliant exposition about the professionalism “crusade,” Rob Atkinson describes three archetypes of lawyering stances, each of which has ethical support for its moral vision.\textsuperscript{158} His Type 1 is the “hired gun,” or the “Rambo” litigator—an aggressive, no holds barred advocate with zeal in his heart.\textsuperscript{159} Type 2 is the purposivist lawyer, the counselor who will respect the interests of third parties and attend to the underlying purposes of procedural and/or substantive law, rather than exploit the law or procedure instrumentally.\textsuperscript{160} Type 3 represents the “cause” lawyer, as aggressive as the Type 1 lawyer but only for worthy clients (in contrast to Type 1, who will sell his services to the highest bidder).\textsuperscript{161}

Atkinson offers an environmental litigation example to show how each of these lawyers would act differently in his or her representation of a client, but (and this is his prime point) “conscientious people” will disagree on principled grounds about the ethics of each one.\textsuperscript{162} Stressing what he terms the “fallacy of the one true way,”\textsuperscript{163} Atkinson argues that many versions of good practice may coexist, and the critics have no right to treat as wrong any one of the versions. Such criticism implies dogmatism and intolerance of each lawyer’s personal ethics.\textsuperscript{164}

\begin{flushleft}
\textsuperscript{158} See Atkinson, \textit{Dissenter’s Commentary}, supra note 4, at 303–12.
\textsuperscript{159} Id. at 304–08. The hired gun lawyer has many defenders within the legal ethics world, including Charles Fried, Ted Schneyer, and Stephen Pepper. See Fried, supra note 95; Schneyer, \textit{Hired Gun}, supra note 99; Stephen Pepper, \textit{The Lawyer’s Amoral Ethical Role: A Defense, A Problem, and Some Possibilities}, 1986 AM. B. FOUND. RES. J. 613 [hereinafter Pepper, \textit{Amoral Role}].
\textsuperscript{161} Atkinson, \textit{Dissenter’s Commentary}, supra note 4, at 3. Atkinson’s evidence of ethical support for this Type is a bit more scant, but he includes himself, see Rob Atkinson, \textit{Beyond the New Role Morality for Lawyers}, 51 Md. L. Rev. 853 (1992), as one such defender. For a thorough exploration of the “cause lawyering” practice, see \textit{Cause Lawyering: Political Commitments and Professional Responsibilities} (Austin Sarat & Stuart Scheingold eds., 1998).
\textsuperscript{162} Atkinson, \textit{Dissenter’s Commentary}, supra note 4, at 305.
\textsuperscript{163} Id. at 303.
\textsuperscript{164} In his defense of the liberal neutrality thesis, Atkinson argues himself into a corner, it seems. His neutrality position appears clearest when he comments about the role of law professors teaching students. He writes,

\begin{quote}
[Professor] should, in fidelity to the tradition of liberal education, eschew insisting that the values of the current professionalism crusade or any particular vision of how to be a good person or a good lawyer is right or true, beyond dissection and critical examination. Conversely, they should insist that no conscientiously presented vision of lawyering, or, for that matter, of law itself, is beneath contempt . . . . \textit{Without pronouncing what right and good ultimately are}, [some] scholars
\end{quote}
\end{flushleft}
One might read the Atkinson taxonomy and conclude that here we have a vivid example of what we identified above as "incomparability."\(^{165}\) Good moral arguments abound in this debate, and without any covering values each lawyer is left to her or his own sensibility, character, and life story to choose her appropriate legal identity.

The casuist is not satisfied, though. First, what could it mean to say that "conscientious people" might disagree about the propriety of the three advocacy types? Atkinson argues that the fact of this conscientious disagreement precludes teachers and bar leaders from taking sides.\(^{166}\) That conclusion simply doesn't follow from its premise. The debates between, say, Luban\(^{167}\) and Simon\(^{168}\) on the one hand and Pepper\(^{169}\) and Schneyer\(^{170}\) on the other might be insoluble, but we needn't automatically assume so. Atkinson implies that once some writers support a version of lawyering with reasoned arguments the debate is over. He rejects the possibility that those arguments might be flawed. To the extent that the debates about moral activism rest on historical analysis, factual assumptions, predictions about future behaviors, sociological data, and strands of logical reasoning, they can be assessed and evaluated for coherence and persuasiveness. Law professors assign B minus grades to students who perform legal analysis but get the answers wrong. They do not assume that the students' having presented an argument precludes the professors from judging its cogency. So it ought to be with flawed moral arguments.\(^{171}\) On the other hand, if the moral activism debate ends with true incomparability, because there are no covering values that permit the comparison to proceed, then Atkinson's proposal is defensible. That conclusion is

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\(^{165}\) See supra notes 114–23 and accompanying text. See also Wendel, Value Pluralism, supra note 34, at 141.

\(^{166}\) See id. at 338.

\(^{167}\) See Luban, Lawyers and Justice, supra note 48.

\(^{168}\) See Simon, The Practice of Justice, supra note 47.

\(^{169}\) See Pepper, Amoral Role, supra note 159.

\(^{170}\) See Schneyer, Hired Gun, supra note 99.

\(^{171}\) See supra notes 105–10 and accompanying text (discussing Bruce Green's judge with idiosyncratic personal values).
a last resort, though, and not one to be drawn merely because the participants disagree.

The casuist has a second objection to the neutrality thesis, though, which is stronger, and with which Atkinson might agree. Let us assume, for the moment, that the debate about the moral justification of the various lawyering types is an insoluble one. Perhaps there are no covering values, or perhaps (a more likely scenario) there is no way to resolve the factual, sociological, and political disputes that underpin the debate. We agree for now that we cannot conclude, \textit{ex ante}, that acting as a Type 1 Rambo lawyer (the one we would most often criticize) is wrong. That concession does not disallow criticisms of Type 1 lawyering \textit{in a particular context}. This is the deep casuistry suggestion. Some Type 1 lawyering might be bad in some concrete circumstances, and a careful assessment of the facts of the case where the Type 1 lawyering occurs can permit that kind of moral judgment.

As I noted, Atkinson seems to agree on this point. He refines his worry about the "one true way" approach of the professionalism crusade by noting that a professional ideal that condemns incivility and aggressiveness across the board fails to accommodate those cases where justice requires tricks, rudeness, and aggression.\textsuperscript{172} One might read his "fallacy of the one true way" complaint as casuistic—any hard and fast visions of a lawyer's role is problematic because it does not allow for individual context and circumstance.\textsuperscript{173} If that is his thesis, we are in substantial agreement.

C. Sociological Evidence of Shared Norms

In this Part, I review recent empirical research on the divisions among middle class Americans on questions of value. The casuistry thesis presupposes many common and shared sentiments, represented in that methodology by paradigm cases. If most of us disagree about basic, fundamental values, as is frequently asserted, then not only is the casuist's project in some jeopardy, but also at risk is any effort to find reasoned grounding for conversations about ethics generally.

The empirical work I review shows significant disagreement among Americans about morally-relevant topics, but not always, inter-

\textsuperscript{172} Atkinson, \textit{Dissenter's Commentary}, \textit{supra} note 4, at 319. As he writes, "we are reminded of a classic ... formula for civility: never hurt another person's feelings—without meaning to. And, most of us would add, except for a good cause." \textit{Id.} (citation omitted).

\textsuperscript{173} This reading of Atkinson does clash with his insistence of liberal neutrality in teaching about good lawyering. \textit{See supra} note 164.
Interestingly, at the level of value. The disagreements that surface far more often than not reflect different and conflicting perceptions about the world’s operations, about human psychology and dynamics, and about factual propositions. People tend to agree about what they hold dear and important, and what constitutes bad acts or bad results. They argue instead about what causes or will encourage the good, and what might minimize the bad.

The work that I review is that of Alan Wolfe, the prominent sociologist and civic republican commentator who has surveyed middle class Americans about their moral, political, and religious beliefs.174 His research consisted of elaborate surveys inquiring into beliefs, value preferences, and attitudes, and extensive follow-up interviews with carefully selected respondents, in order to understand more deeply and accurately the nature of their moral commitments. He dissected the results of his work in two separate books.175

Wolfe’s studies demonstrate broad agreement among typical Americans about the obligation to act in morally defensible ways, as well as about the bases by which actions might be defended and justified. While his work shows substantial consensus about what “counts,” it shows at the same time significant disparity in how his respondents balance conflicting commitments. Wolfe might beg to differ with the assertion that his respondents evince much consensus about right and wrong (his commentary is rather inconsistent on this score176), but a careful reading of their reports and narratives shows very little disagreement about the commitments that ought to matter. Their disagreements in practice, in the application of the shared norms to individual circumstances, show them to be practicing casuists.177 In a rather unpersuasive argument, Wolfe criticizes repeatedly ordinary Americans’ practice of justifying individual choices by complex bal-

175. See id.
176. See, e.g., Wolfe, Moral Freedom, supra note 12, at 168 (the respondents have “roughly the same views” about “fundamental questions about human nature, the formation of character, qualities of good and evil, and the sources of moral authority”) compared with id. at 199 (“[t]he respondents . . . take for granted something revolutionary: never have so many people been so free of moral restraint as contemporary Americans”).
177. I noted in my earlier work on casuistry the similar observation by the ethicist John Arras: “it turns out that, like the bourgeois gentilhomme, we’ve all been ‘practicing casuistry’ all along . . . .” John D. Arras, Common Law Morality, 20 HASTINGS CTR. REP. 35 (July/Aug. 1990), referring to MOLIÈRE, THE WOULD-BE GENTLEMAN (1670). See Tremblay, The New Casuistry, supra note 30, at 526.
ancing of conflicting duties in a contextual, situational manner. I address that argument at the end of this Part.

Wolfe's report on the first set of investigations described his 200 respondents' opinions about a number of the hot button "culture war" topics, including immigration, treatment of gays and lesbians, affirmative action, patriotism, welfare, and religion. He concludes, "on moral matters, there is no unanimity in America," but notes at the same time that his research has "found little support for the notion that middle-class Americans are engaged in bitter cultural conflict over the proper way to live." Even as they argue about and disagree about each of the topics he explores, his respondents evidence broad agreement about what counts as good, but deep uncertainty about whether certain policies or programs contribute to that goodness. The respondents persistently reflect conflict between competing values, and uncertainty about how to resolve those conflicts.

Wolfe follows his Middle Class Morality Project report with further empirical study. In 2000 Wolfe conducted, in cooperation with The New York Times, a public opinion poll which asked Americans about "their views on sex, money, morality, work, children, identity, and God." Like with his earlier project, Wolfe followed the poll with in-depth interviews of 205 respondents from eight carefully chosen communities. In reporting the results of the more recent survey and interviews, Wolfe developed a hypothesis he labels the "moral freedom" claim. His theory interests us here.

178. See, e.g., A. Wolfe, Moral Freedom, supra note 12, at 202 (referring to moral freedom as a "do-as-you-please affair").
179. See infra notes 208–16 and accompanying text.
180. See Wolfe, One Nation, supra note 12. Wolfe, supported by the Russell Sage Foundation, conducted what he called the Middle Class Morality Project, consisting of interviews with and a survey of 200 middle-class persons living in eight carefully chosen suburban communities. See id. at 18–31.
181. Id. at 276.
182. Id. at 278.
183. For instance, Wolfe's respondents express some remarkably dated opinions about whether mothers should work, but those who are worried about that behavior express their worries by reference to harm to children. See id. at 94–111. On questions of welfare and immigration, the middle-class Americans express a variety of opinions, but the disagreements rest on perceptions about the worthiness of the individuals who seek to immigrate or who apply for welfare. Those worthiness judgments, in turn, reflect factual assumptions (deeply held ones, we might presume) about why the individuals are in the position they find themselves in. See id. at 134–63 (immigration); 195–209 (welfare).
185. See id. at 4–5.
Wolfe's thesis is that Americans have lost connection with, and lost an unyielding adherence to, core, unquestioned traditional values, including “[w]ork, thrift, temperance, fidelity, self-reliance, self-discipline, cleanliness, [and] godliness. . . .” 186 He calls the practice of choosing one's values and making moral judgment calls on a case by case basis “moral freedom,” and he considers acceptance of that kind of reasoning a dangerous and troubling one. 187 The claim of lost virtue is, of course, a common one. 188 If that claim is true, Wolfe's respondents seem not to suffer from this amoral (or immoral) bent, if their conversations with Wolfe and his researchers are to be credited. None of Wolfe's respondents defends a personal morality which holds that work, or self-reliance, or self-discipline, or fidelity, or thrift, and so on, is not something to be valued. That would be an unusual and pretty unpersuasive position to adopt. 189

What Wolfe does observe, however, is a resistance to an unwavering commitment to any one virtue; like those in his earlier study, his respondents continually weigh certain core values against others as they search for meaning and coherence in their lives. Wolfe describes this casuistry in unflattering terms usually, 190 but it is readily apparent that the citizens with whom he spoke care a great deal about doing what is right. A brief review of two virtues he examines will make this point clear.

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186. Id. at 66, quoting Gertrude Himmelfarb, One Nation, Two Cultures 5 (1999).
187. See id. at 198–292.
189. There is evidence of some respondents rejecting the “godliness” virtue, but it is hard to imagine that Wolfe could seriously be troubled by the occasional incidence of atheism within American culture. See A. Wolfe, One Nation, supra note 12, at 39–87.
190. See, e.g., A. Wolfe, Moral Freedom, supra note 12, at 223 (stating:
Listening to the way our respondents talk gives a certain amount of credence to those who argue that contemporary Americans have too much freedom for their own good. When they decide whether to tell or shade the truth, to stay with their job or family or leave, to discipline their instincts for the sake of long term reward, and to forgive but not forget, our respondents are guided by subjective feelings more than they are by appeals to rational, intellectual, and objective conceptions of right and wrong. It is not standards of excellence to which they turn, but what seems best capable of avoiding hurt to others . . . . Without firm moral instruction, Americans approach the virtues gingerly. They recognize their importance, but since they are wary of treating moral principles as absolute, they reinvent their meaning to make sense of the situations in which they find themselves.)
One of the virtues which critics, including Wolfe, see as lost today is that of honesty. In older, and better, times, it seems, people told the truth most of the time; nowadays people fib or lie and don't see it as a problem when they do so. Recalling the Kantian position that all lies violate the categorical imperative, Wolfe worries that "Americans think about honesty as a conditional, not absolute, value . . . . This is a way of thinking that, because it encourages relativism, would not sit well with classical theories of the virtues, but it is widespread nonetheless." There may or may not be less honesty than in past eras, but people recognize honesty as an important virtue. Among Wolfe's respondents, no other virtue "was brought up as spontaneously, and as frequently, as honesty." The citizens interviewed believed that honesty was an obligation presumptively, but not invariably. Story after story from the respondents evidenced a commitment to truthfulness unless some overriding harm or trumping consideration made honesty unwise. That position is hardly an immoral one; indeed, Kant's dogmatic opinion to the contrary, the negotiability of honesty is among the most widely held moral positions among ethicists today.

Wolfe's claim that "[n]either St. Augustine nor Immanuel Kant would find much to admire in the way modern Americans think about honesty [because] whether they live in local communities or big cities, Americans do not believe that telling the truth constitutes a moral command they ought always to obey" is a hollow and unfair criticism. That description shows not that the people he met had impoverished values, but rather, one might argue, that their values were enriched, for they recognized, or tried to recognize, when adherence to an absolute standard would cause greater moral harm than deviating from it. It may be that the respondents have made those casuistic choices poorly, but Wolfe's stories do not show that to be the case. And even if it were the case that the citizens were unskilled casuists,

191. See id. at 97–130.
192. See id. at 97 (citing IMMANUEL KANT, On a Supposed Right to Lie Because of Philanthropic Concerns, in GROUNDINGS FOR THE METAPHYSICS OF MORALS 65 (1981 ed.)).
193. Id. at 125.
194. Id. at 101.
195. See id. at 102–09.
198. There is some evidence that the moral choices about honesty made by the respondents were perhaps a bit difficult to square with a principled casuistry. For instance, one person, after claiming that "I consider myself to be really honest," volunteered that "I will
and made the wrong call often, that fact does not render them lacking in a commitment to values. As they repeatedly told the researchers, they believed in honesty unless being honest caused some greater harm.

Wolfe’s reports and commentary about the virtue of loyalty reflect a similar pattern. “Of all the virtues presumed to have been lost in America, loyalty generally takes pride of place,” he writes. Critics of the declining moral state of contemporary America lament the rise of self-interested, individualistic thinking and the accompanying decline in commitment to family, employer, and local community. One might conclude from such reports that ordinary people hold differing views about the value of loyalty, with some holding it dear and others not considering it to be an important norm.

Wolfe’s interviews belie that conclusion. It may well be, as Wolfe insists, that his respondents are less loyal than traditional Americans used to be, in the sense that they tend to divorce more often, change employers with more frequency, and relocate communities with less apparent regret than previous generations. Their actions, though, do not represent a betrayal of loyalty or a rejection of that virtue. Instead, his respondents repeatedly report a commitment to loyalty and a respect for it as a value. The difficulty for most people is balancing the loyalty commitment with other, conflicting commitments. Loyalty is an accepted and valued character trait, but it is not a trump, particularly when adherence to that value causes considerable harm or betrayal of other commitments.

The best example of the moral casuistry evidenced by Wolfe’s stories is that of divorce. Wolfe quotes conservative commentators who interpret rising divorce rates as unambiguous proof of the loss of loyalty as a real virtue in contemporary American culture. The stories he relates, however, show a significantly more complicated phenomenon. Americans demonstrate a very strong commitment to marriage and to the loyalty promise that the marriage vows represent. They cheat the IRS if I have a chance. And insurance companies, I would cheat them too.” Id. at 108.

199. Id. at 23.
201. See, e.g., A. Wolfe, Moral Freedom, supra note 12, at 29, 34, 35, 52, 53 (quoting or paraphrasing respondents who value loyalty and struggle to balance differing loyalties).
202. See id. at 45 (quoting Barbara Defoe Whitehead, The Divorce Culture (1997)).
203. See id. at 49–50 ("Many of those with whom we talked made it clear that they were anything but frivolous in the way they thought about divorce. . . . Americans think hard about the conditions under which divorce is or is not justified.").
are unwilling, however, to accept the virtue of loyalty as blanket justifica-
tion for perpetuating abuse, harm to children, or deep unhappiness
of the marriage partners. No participant in the Wolfe study rejected
loyalty as a good or viewed marriage as a trifle which one might ignore
if something more interesting happened by. Perhaps some in America
subscribe to that view, but few of us have met them, and fewer would
take them seriously if we did. Instead, the respondents struggle hard
and deeply as they balance the agreed-upon value of loyalty with the
similarly-shared goals of avoiding harm, escaping physical and emo-
tional abuse, raising well-adjusted children, and leading more produc-
tive lives. Perhaps the critics charging that loyalty ought to serve
essential as a trump would argue that these latter goals should be
sacrificed in the interests of the virtue of loyalty. It’s not hard to con-
clude that such an argument would be, at a minimum, unsettling.

If Wolfe’s respondents are to be taken seriously—and they cer-
tainly sound familiar to us in their stories and in their struggles with
moral conflict—the critics who charge that Americans have lost their
commitment to loyalty, and that the loss is an altogether regretful
thing, are mistaken. The argument that Americans have idiosyncratic
value systems and personal preferences that have little in common
with one another simply does not find support in Wolfe’s stories and
surveys. What might be true, however (and this may be a better inter-
pretation of the critics’ lament), is that the respondents are making
poor choices in their casuistry, in their balancing of the several values
which they share. Barbara Defoe Whitehead may be arguing that
those who divorce today are overestimating the benefits of divorce
and underestimating its harms. That contest, though, is not one
about values. It is instead about facts, supported by research and inves-
tigation into plausibly empirical data. It may not be easily resolved,
but it lends itself to some conceivable resolution separate from the
debate about a ranking or trumping of virtues. It is the kind of inquiry
that casuistry contemplates.

\[204.\] See id. at 52 (“Remaining in an abusive marriage can be taken as an expression of
loyalty, but it can also be viewed as a violation of the principle never to condone cruelty.”).

\[205.\] See, e.g., id. at 60 (“The decline of a conception of loyalty in which people pledge
to remain together until death do them part can be keenly felt, but it is not clear whether it
can or should survive the onset of new ways in which loyalty is redefined to accommodate
itself to how we actually live.”) (emphasis added).

\[206.\] I suspect that she would indeed make those arguments. See Whitehead, supra note
202, at 7–8.

stressing importance of the “set of particulars” in the working of casuistry).
I end this exploration of Alan Wolfe’s investigation into American values with some brief comments on his critique of “moral freedom,” for his criticisms bear directly on the struggles in professional schools surrounding teaching about professional and personal values. Wolfe’s ultimate thesis in his most recent book is that moral freedom is a tragic thing. Moral freedom, in his eyes, permits Americans to decide for themselves what is right, and that permission invites dangerous self-interested choices. The result of the emergence of moral freedom is worrisome moral decline, because the traditional virtues of honesty, integrity, self-discipline, loyalty, and hard work are no longer accorded the almost non-negotiable respect that they used to receive, before moral freedom arrived. As Wolfe writes:

Moral freedom means that individuals should determine for themselves what it means to lead a good and virtuous life. Contemporary Americans find answers to the perennial questions asked by theologians and moral philosophers, not by conforming to strictures handed down by God or nature, but by considering who they are, what others require, and what consequences follow from acting one way rather than another.

... [N]ever have so many people been so free of moral constraint as contemporary Americans... For if there are no binding moral rules—if individuals are as free to drop or add their moral beliefs with the same alacrity with which they buy or sell stocks—then all social relationships, including those of free exchange, will be threatened.

It is difficult to understand Wolfe’s point here. Perhaps he offers a lament, a longing, or a dirge: “In earlier times, people did not think about right or wrong. Instead, they obeyed higher powers and respected higher principles reflexively. They respected the virtues, and life was better as a result.” If that is his point, we can hear him, even if we may disagree about either the description about whether people were so reflexive or whether the result of the blind adherence was altogether a good thing. But his point seems also a prescriptive one, a call to return to those better days. As such, it is essentially tautological.

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209. See id. at 199.
210. Id. at 195, 199, 201. This argument has been made by another virtue adherent in her description of modern judges. See Mary Ann Glendon, A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society 152 (1994) (modern liberal judges are free “from the constraints of statute, precedent, Constitution, or tradition”).
211. The quote is mine. Wolfe seems to be describing the halcyon classical times in America. See, e.g., id. at 209–11.
Wolfe cannot plausibly urge Americans to become unthinking again, to reject reasoning about right and wrong in favor of blind, non-cognitive acceptance of traditional virtues. He apparently fails to appreciate that he himself exercises his “moral freedom” when he develops, in the year 2001, reasoned arguments in favor of returning to earlier times when none of us thought about what might be a better way to live, or believed we had the right to think about it. He undoubtedly concludes that moral and civic life would be better if we adhered to higher authorities without our deciding for ourselves how to answer questions about moral value. He might be right about that conclusion (although there is good reason to doubt him), but by the very submission of his argument he refutes it, for he is choosing, and not blindly and not in a non-cognitive fashion, a better way to live a moral life. In doing so, he is exercising his moral freedom.

Aside from its tautological essence, Wolfe’s argument confuses moral freedom with moral irresponsibility, and reflects a deep worry about the latter despite very little, if any, evidence of it from his surveys and interviews. He worries that “in the absence of binding moral rules, what prevents me from deciding, after you had given me possession of the car I agreed to buy from you, that I ought to keep my money after all?” This question disrespects, in a profound way, his respondents and misunderstands their commitment to shared norms and to collective values. It is from his surveys and interviews that he seems to have discerned the pattern of moral freedom, yet not one of his respondents has asserted that stealing a car is a good thing, or expressed any similar opinion from which Wolfe could draw such an inference. They may well reject a universally binding rule condemning stealing in every instance, so that a husband might be justified to steal drugs from a pharmacist to save his dying wife. However, in doing so they will not conclude, as Wolfe implies, that because no binding rule exists, any stealing that helps them at the moment is morally acceptable. Indeed, Wolfe himself seemingly cannot identify any such binding rules which he would defend as non-negotiable.

212. Wolfe explicitly suggests that the antidote to moral freedom is non-cognitive moral assessment. “Our capacity to act rationally is dependent upon a morality that evolves outside our cognitive control.” Id. at 201.

213. Id.


215. Wolfe is obviously deeply suspicious of allowing ordinary persons to make their own moral choices, but in each moral topic he explores, Wolfe reports sympathetically that
This review of Wolfe’s work offers insights into the virtues of casuistry. Wolfe’s rich and detailed stories and reports show that plain persons accept, by and large, the basic elements of a good and virtuous life, including the supposed “lost” virtues. Plain people do disagree, though, at the level of application, and the product of that disagreement might initially appear as a dangerous form of relativism or lack of “moral backbone.” The temptation in response to such disagreement may be to call for a commitment to firmer principles or stricter rules, but that proposal is doomed, for no body of rules or principles or virtues can avoid the call for individual choice when the rules or virtues or principles conflict. Wolfe’s respondents demonstrate a persistent casuistry, but we cannot tell from his reports whether it is a very good or skillful casuistry. These plain persons may be making self-interested choices rather than well-reasoned ones, as Wolfe implies. The remedy for that problem, assuming of course that they wish to arrive at more defensible or better decisions, is to teach the skill of casuistry more widely. This same lesson will apply, of course, to lawyers and law students.

IV. What About the Felons, the Whores, and the Jerks?

The previous two Parts explored moral deliberation ideas, and assumed for the sake of discussion that the lawyers and law students in question desired to be better moral deliberators. In this Part we meet up with the rest of the profession. What about those lawyers who, from all indications, just don’t care about doing what’s right? Do we have anything to say about them?

Whether we have anything to say about, or to, them depends on who these folks are, and, indeed, whether they exist at all. Consider four possibilities:

1. Maybe They Don’t Exist at All

It is at least conceivable that what we observers witness as evidence of unscrupulous behavior by unscrupulous lawyers is, in fact, good faith moral choice amidst complex circumstances, which we critics cannot understand or evaluate from our distant perspective. Admittedly, it is unlikely that all of the seemingly bad behavior within the profession is explainable in this fashion, but the arguments developed here, and the arguments of most ethicists describing the nature of moral inquiry, suggest
that our ability to evaluate moral choice from a distance is a frail one. 217 By this assumption, the behaviors suspected to be antisocial and/or criminal are in fact correct and justified. The mistake is ours, not the lawyers’.

2. Maybe They’re Felons, Whores, and Jerks, and That’s the End of the Story

The next possibility is the one that many assume to be the case: Some lawyers are simply without moral fiber, will cheat and lie and steal for their own personal gain, and (most important for this categorization) don’t care to act any differently. While we have all met some lawyers who we suspect fit this bill, our general sense is that this sociopath description is quite rare. For present purposes, we can assume that if such persons exist, it is unlikely that our teaching, example, or professing will make a whit of difference. Maybe therapy or drugs or jail time will improve these lawyers’ behavior, but that’s for another commentator to explore. 218

3. Maybe They Do Bad Things but They Tried to Get It Right

This possibility is different from the first two. By this assumption, the lawyers we observe and worry about look like felons, whores, and jerks, but did not intend to end up there. Unlike the second category, these lawyers want to get it right. Unlike the first category, they didn’t—so here, the critics are right. For these lawyers, perhaps, teaching about ethical deliberation might make a difference. For them, all we have explored in the previous two Parts will apply.

4. Maybe They’re Overwhelmed and Out of Control

We now reach an entirely different set of assumptions about who these bad lawyers might be, or why they look like bad lawyers to us. In this category, the lawyers do bad things; no arguments there. They know their actions are bad, so their reasoning isn’t flawed or unsophisticated, but they care and worry about having done the bad stuff. And finally, they did the bad stuff because of powerful pressures and fears over which they, at that moment, experienced little (or, at least, insufficient) ability to control. These are our most interesting bad lawyers and, I suspect, the most common ones.

It is hard to know with much certainty which of the above explanations accounts for the bad behavior of the felons, the whores, and the jerks, but one might make some educated guesses. For much of the unscrupulous or criminal conduct the critics worry about, it seems reasonably unlikely that the lawyers in question just deliberated in-

217. See Wendel, Value Pluralism, supra note 34, at 195.
218. See supra note 68 and accompanying text (reporting the comments of John Dean).
eptly, thinking they were doing right but guessing wrong. It also seems equally implausible that the bad lawyers were simply sociopaths, without any shred of a conscience. I’ve met few lawyers who appear that soulless (although I’ve encountered many nasty characters in my years as a clinical supervisor), and none of my students have ever fit that bill. On balance, it seems far more likely that the wretched actions that embarrass the profession result from a more complicated mix of institutional forces, undeveloped character, and psychological frailty.

Lisa Lerman’s elaborate investigation into the stories of lawyer overbilling offers some helpful insights on this point. Lerman researched a number of high profile, large-sum billing and accounting fraud cases emanating from prestigious law firms across the country. The lawyers whose misdeeds she reports stole, in some cases, millions of dollars from clients and partners. In addition to conveying the extent of this kind of behavior, Lerman asks “Why did they do it?” Her hypotheses support the proposition described above. She inquires into the possibility that these unscrupulous lawyers were “bad apples,” which seems to equate with my “sociopath” thesis, and she finds no evidence to support that theory. She also rules out mental illness as a likely culprit.

Lerman’s most plausible explanations point to the culture of the law firms, the culture of modern corporate America, and the absence of the kind of stable bonds and supportive community that might offer strength and courage in the face of enormous pressures to succeed, and to make a lot of money. Her ideas are consistent with

219. See Lerman, Blue Chip Bilking, supra note 56.
220. See id. at 233–45.
221. Id. at 252.
222. Id. at 255–57.
223. See supra note 216 and accompanying text.
224. See Lerman, Blue Chip Bilking, supra note 56, at 257–58. From her research about the lawyers’ reputation, background, and other activities, Lerman concludes that the lawyers were “the least likely suspects” to have demonstrated a lack of moral restraint. Most of the lawyers rationalized their actions and, when caught, expressed seemingly sincere remorse. See supra note 56 and accompanying text (predicting that the felons, whores, and jerks would offer some arguments defending their bad behavior).
225. Id. at 257. Some of the lawyers alleged forms of mental illness in their defense to the charges, but Lerman concludes that serious mental illness was not sufficiently evident to serve as a broad reason for the overbilling and cheating.
226. Lerman suspects a powerful “fear of falling” among the high-powered, very successful lawyers who fell victim to the urge to pad their accounts. See id. at 254. She also notes the growing importance of money as the benchmark of success within the profession, and the accompanying pressures on practicing lawyers to measure their worth by that standard. See id. at 219.
those of many other thoughtful critics.227 The felons, whores, and jerks may be less "bad" as people and more stuck in a maelstrom from which they have neither the wherewithal nor the courage to extract themselves.

If that suggestion is correct, at least for some of the felons, whores, and jerks, the implications for ethics instruction are significant. As Eleanor Myers argues:

While there is surely a role for education in influencing moral or ethical behavior, that role should be properly understood. Even the finest moral education—one that teaches the rules of the profession, attempts to cultivate the capacity for reflective moral judgment, and actively engages students in values clarification and moral choice—is likely to be undermined if the workplaces in which our students practice systematically undercut expressions of personal values or constrain the exercise of judgment.228

It seems plain that the law schools will not effect significant change within law firm culture in the short term.229 In fact, some see the prime purpose of law schools as to enculturate students to the law firm world.230 The prospects of altering and improving the ethos of law firms by participation in "professionalism" and "civility" activities of the Bar seem equally futile.231 Perhaps the modeling of virtuous behavior by law professors, especially in clinical programs where students can experience pressures and tensions in a direct way, will help students begin to develop moral insights and character traits necessary


228. Myers, supra note 49, at 829. Myers’s quote implies a conception of “personal” values that I have sought to undermine earlier in this article. See supra notes 93–102 and accompanying text. That possible disagreement with this thesis of this article does not undermine the importance of her point about the professional culture.


231. For sustained criticism of the bar’s professionalism “crusades,” see Atkinson, Dissenter’s Commentary, supra note 4, at 263; Pearce, Professionalism Paradigm Shift, supra note 3, at 1230–33.
to maintain integrity within the competitive world of high-priced lawyering.\textsuperscript{232}

It is not easy to be sanguine, of course. The fundamental structural and institutional problems of law practice, as Deborah Rhode reminds us, cannot be separated from the influence of money.\textsuperscript{233} So long as the pursuit of profit, perhaps not of the money itself but for the value that annual income has come to represent in the competitive differentiation of winners and losers within large firm culture,\textsuperscript{234} remains the \textit{raison d'etre} of law firms in the United States, the capacity for law schools to overcome the institutional forces faced by vulnerable lawyers will probably be minimal. But others do offer some hope. Prominent scholars argue that a richer conception of moral responsibility and accountability,\textsuperscript{235} as well as greater efforts to foster the exercise of complex judgments about practice,\textsuperscript{236} might reduce the alienation and dissatisfaction so prevalent among lawyers these days. Less alienation, in turn, may lead to healthier approaches to moral choices, and stronger character to resist the pressures to cheat in order to win. Less alienation might also imply a stronger and more meaningful sense of community among practicing lawyers, and for many scholars the potential for community and a sense of belonging relates strongly to the development of moral character.\textsuperscript{237}

\textbf{Conclusion}

My puzzling about the challenges of talking about, and then teaching about, values and ethics leads to some tentative conclusions. First, it seems to matter a lot whether we intend to teach this subject because we want to add to the students' repertoire as moral deliber-

\begin{thebibliography}{99}
\bibitem{233} \textsc{D. Rhode, In the Interests of Justice, supra note 3, at 31.}
\bibitem{234} \textit{See id. at 33; Schiltz, supra note 227, at 904--06.}
\bibitem{235} \textit{See D. Rhode, In the Interests of Justice, supra note 3, at 17; Baron & Greenstein, supra note 104, at 97.}
\bibitem{236} \textit{See Simon, The Practice of Justice, supra note 47, 109--37.}
\bibitem{237} \textit{See, e.g., Robert F. Cochran, Jr., Honor as a Deficient Aspiration for "The Honorable Profession: The Lawyer as Nostromo, \textit{69 Fordham L. Rev.} 859, 893 (2000) ("it is within communities—within families, religious congregations, and friendships—that we can find moral foundations"); Lerman, \textit{Blue Chip Bilking, supra note 56, at 254--55 (noting a lack of "stable professional bonds" on the part of the lawyers who succumbed to the pressure to cheat); Sammons, supra note 227, at 295--98 (lamenting the "increasing corruption of the larger society as it becomes a community without the civic friendship upon which the liberal tradition depends and without the decency upon which the civic friendship depends").}
tors, or because we want to persuade or encourage them not to act badly in practice. It helps to see that the two goals are different, and that one might be more attainable than the other. Second, it seems, contrary to some thinking, that conceptions of value are neither ephemeral, personal, idiosyncratic, nor non-negotiable. One can locate a rich overlapping consensus about what counts as good. The differences among persons on moral questions that appear so entrenched and so irresolvable may be both of those things, but perhaps not because of differences in values. Instead, those conflicts often will represent differing perceptions about the world, and not about what constitutes a good, or a virtue. Third, having recognized the possibility of consensus, teachers may teach about values in precisely the same way that teachers teach about law. Contrary to what we might suppose, argument about moral positions is no less reasoned, analogical, and structured than argument within legal analysis. Within bioethics, a process of evaluating moral choice using the consensus represented by paradigm cases has gained much credibility and acceptance. That process, known as casuistry, offers opportunities for the same kind of principled discussion about values—not “personal” values, or “idiosyncratic” values, but values as shared notions of the good—among law students and lawyers.

Finally, for the “felons, whores, and jerks” among us, we have less optimism about changing their behavior and fewer insights developed from the puzzling process. A few important observations, though, do seem warranted. If the sophisticated chroniclers of the deliberative method are right, then it is more difficult to be certain that the seemingly nasty professionals are in fact acting nastily. If the critics are right that the nasty professionals are indeed nasty, the question then becomes why they act in this way. It seems unlikely that they are true sociopaths, and unlikely that they intended to act correctly but just missed the mark. The remaining possibility is that the nasty professionals are not nasty, as such, but are weak and overwhelmed, and succumb to enormous institutional pressures to cheat and to win. That likely possibility creates particular challenges to those educators who hope to inspire, instill, or otherwise encourage an ethos of goodness in their students.