



1996

## Codes and Virtues: Can Good Lawyers be Good Ethical Deliberators?

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69 S. Cal. L. Rev. 885

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# ARTICLES

## CODES AND VIRTUES: CAN GOOD LAWYERS BE GOOD ETHICAL DELIBERATORS?

HEIDI LI FELDMAN\*

### INTRODUCTION

Regardless of its specific contents, any black letter statutory codification regulating lawyers' conduct will be flawed as an instrument of ethics for lawyers. This is the central thesis of this Article. It is motivated by the idea that typical statutory prohibitions and permissions are likely to stunt sentimental responsiveness, a key feature of good ethical deliberation. Additionally, a certain technocratic mode of legal analysis heightens this tendency. Although other styles of lawyering might better engender sentimental responsiveness, statutory codes of lawyers' ethics do not invite this style as readily as a well-developed common law of lawyers' ethics would.

If these ideas are correct, they suggest that there is some basis for the popular perception that lawyers are distinctly unethical.<sup>1</sup> On a

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Thanks to Lucy Clark, Jeff Ballard-Brand and Sam Feder, for important research assistance. Thanks also to the participants at the Law and Society Workshop at Boalt Hall, who commented on an early version of this Article, and to participants in the workshop "Legal Professionalism: In Whose Interest? Public, Client or Lawyer?" sponsored by the Westminster Institute for Ethics and Human Values, held on June 2-3, 1995, in Toronto. Finally, special thanks to Steve Bundy, David Chambers, Becky Eisenberg, Don Herzog, Don Loeb, David Luban, Bill Miller, Terry Sandalow, Fred Schauer, Kent Syverud, James Boyd White, Chris Whitman and David Wilkins.

1. There may, of course, be additional explanations for the popular perception. Several scholars have attributed popular dissatisfaction with attorneys' conduct to the lawyer's specialized role and its distinctive moral demands, which can diverge from common sense moral intuition. *See, e.g.*, DAVID LUBAN, *LAWYERS AND JUSTICE* 104-47 (1988) (critically analyzing the idea of role morality and its place in legal ethics); Virginia Held, *The Division of Moral Labor and the*

superficial level, it is possible that differences between some types of legal analysis and ethical deliberation yield different answers about how to act. More fundamentally, if a certain mode of legal analysis is essentially unlike ethical deliberation, then lawyers attacking ethical problems in that mode may seem, and may well be, unethical in a more thoroughgoing sense—just as a totally color-blind person does not merely match colors poorly, but has no sense of color matching whatsoever.

In this Article, I identify one type of legal analysis that is in tension with ethical deliberation, and I demonstrate how modern black letter statutory language and structure tend to invite technocratic lawyering.<sup>2</sup> In particular, I argue that this mode of lawyering discourages, and may even entirely thwart, a certain sentimental responsiveness integral to genuine ethical deliberation.

The technocratic lawyer is a kind of legal minimalist. She aims essentially for instrumental efficacy in accomplishing goals set by her client. A more honorable lawyer seeks, at minimum, to ensure that goals explicitly adopted by the client serve the client's genuine best interests. Beyond this, an honorable attorney working on behalf of a

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*Role of the Lawyer*, in *THE GOOD LAWYER* 60-82 (David Luban ed., 1984) (defending the appeal to role morality, but criticizing the current conception of lawyers' role); Richard Wasserstrom, *Roles and Morality*, in *THE GOOD LAWYER*, *supra*, at 25-37 (describing the nature of and problems with role morality); Susan Wolf, *Ethics, Legal Ethics, and the Ethics of Law*, in *THE GOOD LAWYER*, *supra*, at 38-59 (challenging Wasserstrom's formulation of the problem of role morality and arguing that lawyers' role obligations are compatible with a more universal morality). My own view is that thinking about legal ethics in terms of role morality is ultimately unhelpful. Talk of role morality tends to assume or foster the idea that role morality is distinct from morality proper. I believe we should strive for a unified moral theory that is sensitive to context (and therefore allows for different moral judgments of the same or similar actions performed under relevantly different circumstances) rather than cultivate a variety of discrete role moralities. A focus on role tends, I think, to replace careful analysis of specific circumstances with attention to defining an abstract role that offers little assistance in making moral judgments in concrete situations, where attention to particulars can be crucial.

2. Many lawyers and observers of the legal profession believe there has been a rise in technocratic lawyering, particularly in the area of lawyers' ethics. Various commentators have noted sociological changes in the structure of the legal profession, changes that might play a role in motivating technocratic lawyering. See, e.g., LINCOLN CAPLAN, *SKADDEN* 121-230 (1993) (noting the rise of "mega"-law-firms since the 1970s; increased economic pressures upon attorneys; increased attorney mobility among law firms; racial, ethnic and gender diversification of the bar; increased importance of law firm partners' individual earning power; and the 1980s boom in mergers and acquisitions activity); MICHAEL J. KELLY, *LIVES OF LAWYERS* 1-4 (1994) (noting a large increase between 1960 and 1990 in the number of lawyers; increased legal specialization; increased racial, ethnic and gender diversity; and the "growing power of the practice organization"); SOL M. LINOWITZ WITH MARTIN MAYER, *THE BETRAYED PROFESSION* 37 (1994) (noting increased emphasis on lucrative income among lawyers and the shift from client/firm relationships to client/individual-member-of-the-firm relationships).

client may consider—and may encourage the client to consider—a host of factors other than the client's own narrow self-interest when defining goals and choosing means to attain them. Depending upon the circumstances, both technocratic and honorable legal analysis can be components of good lawyering. In contrast, technocratic and honorable legal analysis are not both components of good ethical deliberation. Thus, in circumstances where good lawyering demands good ethical deliberation, a technocratic style hinders the attorney's performance. If one believes that good lawyering practically always demands good ethical deliberation, then it follows that the honorable mode of legal analysis should practically always dominate the technocratic one.

In this Article, I am not interested in defending the second, stronger claim. I argue simply that to the extent that sound lawyering calls for healthy ethical deliberation, the technocratic style interferes. I also argue that statutory codes of lawyers' ethics elicit the technocratic style rather than the honorable one. Finally, I suggest that a common law approach would at least tend to reverse this effect.

To advance my arguments, I use two well-known examples from the literature of legal ethics. The first illustrates some of the shortcomings of a statutory lawyers' ethics, while at the same time the reflections of the lawyer involved suggest some ethically important traits of character and deliberation discouraged by one current code. The second example tests and confirms the claims I make on the basis of the first and on the basis of virtue ethics, a specific philosophical approach to normative ethics.

I draw upon the virtue ethics tradition to pinpoint and redress some of the disadvantages of a codified lawyers' ethics. Virtue ethics is one of the major philosophical approaches to normative ethics, the field that questions how we should live, what we ought to do, what is morally good and morally right. Aristotle grandfathered the virtue ethics tradition. Current virtue ethicists include Philippa Foot, Alasdair MacIntyre, Michael Slote, Martha Nussbaum and John McDowell. Virtue ethicists tend to focus on the traits of character necessary to live an ethically admirable life. Alternative perspectives on normative ethics, such as the various forms of utilitarianism and Kantianism, concentrate on different elements. Utilitarians generally consider what constitutes good outcomes and how people should act to achieve them. Kantians attempt to cultivate maxims for morally right action.

Both Kantians and utilitarians tend to formulate explicit rules of conduct. Kantianism starts from the Categorical Imperative, itself a specific maxim, from which other maxims can, arguably, be derived. Classic utilitarians adopt the Benthamite precept of utility maximization; in an effort to make utilitarianism a more workable decision procedure, some of its proponents have advanced rule-utilitarianism, an obviously rule-based ethics. To the extent that Kantian maxims or utilitarian precepts lend themselves to black letter formulation, neither Kantianism nor utilitarianism holds the promise for legal ethics that virtue ethics does.

As overall approaches to normative ethics, utilitarianism, Kantianism and virtue ethics each have their weaknesses. Here, I make no effort to defend virtue ethics conclusively. Using it provisionally, I argue that this approach offers insight into the limitations of a legally codified lawyers' ethics and how to compensate for those limitations. Virtue ethics captures some important features of character and deliberation, features apt to be neglected or ignored by lawyers deciding ethical questions solely on the basis of a legal code.

The Model Rules of Professional Conduct, adopted in 1983, represent the American Bar Association's most recent codification of lawyers' ethics.<sup>3</sup> Unlike earlier ABA regulations, the Model Rules self-consciously emulate the style, structure and language of modern civil and criminal statutory codes. The ABA Commission on Evaluation of Professional Standards formulated the Model Rules and specifically recommended a more codified format over other alternatives. The Kutak Commission, as it was known informally, advocated an organization of "blackletter Rules and accompanying Comments."<sup>4</sup> This format organizes Rules by subject matter. Each Rule is titled, listed and then followed by interpretive commentary. The drafters emphasize that only the Rules create obligations.<sup>5</sup> Using the terms

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3. MODEL RULES OF PROFESSIONAL CONDUCT (1995) [hereinafter MODEL RULES]. The ABA has also promulgated the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter MODEL CODE]. For a brief history of the ABA's development of the Code and the Rules, see Geoffrey C. Hazard, *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1249-55 (1991).

4. MODEL RULES, *supra* note 3, Chairperson's Introduction, 1.

5. MODEL RULES, *supra* note 3, Scope, 6-7.

“shall” and “may,” the Rules present imperatives or grant permissions.<sup>6</sup> To date, thirty-six states pattern statutes governing lawyers’ conduct after the Model Rules.<sup>7</sup>

## I. THE LAKE PLEASANT BODIES CASE

The Model Rules strive to be black letter legal rules. Black letter law invites a specific sort of lawyerly response. To see this, consider how a lawyer faced with a famous ethical problem might well analyze the situation according to the Rules. The situation, sometimes called “The Lake Pleasant Bodies Case,”<sup>8</sup> is a chestnut of the academic literature on legal ethics.<sup>9</sup> Most commentators discuss the case to debate

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6. See, e.g., MODEL RULES, *supra* note 3, Rule 1.9(a) (*Conflict of Interest: Former Client*) (commanding that a lawyer “shall not” represent another person in a matter “materially adverse to the interests of the former client”). According to the ABA, this imperative has no exact counterpart in the earlier Model Code. Rather, the Model Code pedagogically suggested that a lawyer “should avoid” the “appearance of professional impropriety” and “should preserve the confidences and secrets of a client.” MODEL CODE, *supra* note 3, Canons 9, 4. The Code’s forerunner, the *Canons of Professional Ethics*, simply provides a recitation of the “duty” to “preserve” client confidences, a duty that “outlasts” the lawyer’s employment. CANONS OF PROFESSIONAL ETHICS, Canon 37 (1963). Concomitantly, the Canons speak aspiringly: A lawyer “should strive at all times to uphold the honor . . . of the profession and to improve not only the law but administration of justice.” CANONS OF PROFESSIONAL ETHICS, Canon 29 (1963).

7. Lawyers are subject to both bar and state regulation. Of course, only the state can impose criminal penalties or civil fines for ethical misconduct, but the bar can also sanction lawyers, including disbarment. In practice, however, lawyers in violation of relevant professional standards and law tend to be relatively insulated from punishment. This is due to a variety of factors, including lawyers’ unwillingness to report one another’s misdeeds and, when serving on bar association adjudicatory panels, their reluctance to censure their fellow attorneys. Gerard E. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491, 535; Deborah L. Rhode, *Professionalism in Perspective*, in DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 946 (1992); Ronald D. Rotunda, *The Lawyer’s Duty to Report Another Lawyer’s Unethical Violations in the Wake of Himmel*, 1988 U. ILL. L. REV. 977, 979.

8. So named by David Luban, LUBAN, *supra* note 1, at 53.

9. See, e.g., Jeffrey Frank Chamberlain, *Legal Ethics: Confidentiality and the Case of Robert Garrow’s Lawyers*, 25 BUFF. L. REV. 211, 216 (1975) (asserting that lawyers Armani and Belge acted properly; lawyer-client privilege must prevail in such cases); Monroe H. Freedman, *Where the Bodies Are Buried: The Adversary System and the Obligation of Confidentiality*, 10 CRM. L. BULL. 979, 986 (1974) (defending Armani and Belge’s nondisclosure); Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. REV. 687, 710 n.129 (1991) (describing Belge as a “rare example of a case in which the reach of a criminal law was found to be circumscribed by a lawyer’s ethical duty”); David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424, 425-28 (1990) (concurring with Monroe Freedman that Armani and Belge acted properly); Kenneth L. Penegar, *The Five Pillars of Professionalism*, 49 U. PITT. L. REV. 307, 358-59 (1988) (summarizing Belge without comment).

the moral value of confidentiality, of the adversary system, or both.<sup>10</sup> That is not my purpose. I present it to contrast the sort of deliberation black letter rules elicit from lawyers with other sorts of deliberation more appropriate for resolving ethical problems. While I use the Model Rules in my discussion, my arguments apply to them not in light of their specific provisions, but because they possess the more general features of a black letter legal codification.

To appreciate the richness of the ethical problem generated by the Lake Pleasant Bodies Case, I present the situation in greater detail. On Sunday, July 29, 1973, Robert Garrow fatally stabbed Phillip Doblewski, an eighteen-year-old student from Schenectady, while Doblewski was on a camping trip in the Adirondacks.<sup>11</sup> About ten days later, after the largest manhunt in the history of the state of New York, police captured Garrow.<sup>12</sup> Police suspected that Garrow had been involved in several crimes beyond the Doblewski murder. They had recently found the body of Daniel Porter, whose death seemed similar to Doblewski's, about fifty miles from the place where Doblewski was killed.<sup>13</sup> In addition, Porter's camping companion, Susan Petz, had disappeared "without a trace."<sup>14</sup> Police later came to suspect that Garrow was also involved in the disappearance of Alicia Hauck, a sixteen-year-old high school student, who had been missing since July 11, 1973.<sup>15</sup>

Shortly after police caught Garrow, the judge appointed Frank Armani to be Garrow's public defender.<sup>16</sup> Not a criminal lawyer, Armani had never tried a murder case, but he had represented Garrow in several other matters.<sup>17</sup> Armani recruited his friend, Francis

10. See, e.g., MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 1-8 (1975); LUBAN, *supra* note 1, at 53-54; DEBORAH RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* 262-64 (1994) [hereinafter RHODE, *PROFESSIONAL RESPONSIBILITY*].

11. *People v. Garrow*, 379 N.Y.S.2d 185, 186 (App. Div. 1976); TOM ALIBRANDI WITH FRANK H. ARMANI, *PRIVILEGED INFORMATION* 14 (1984).

12. *Application of Armani*, 371 N.Y.S.2d 563, 564 (App. Div. 1975); ALIBRANDI & ARMANI, *supra* note 11, at 36.

13. *Armani*, 371 N.Y.S.2d at 566; ALIBRANDI & ARMANI, *supra* note 11, at 21.

14. *Armani*, 371 N.Y.S.2d at 566; ALIBRANDI & ARMANI, *supra* note 11, at 21.

15. *Armani*, 371 N.Y.S.2d at 566; see also ALIBRANDI & ARMANI, *supra* note 11, at 64; *Slayer's 2 Lawyers Kept Secret of 2 More Killings*, N.Y. TIMES, June 20, 1974, at 1, 26 [hereinafter *Slayer's 2 Lawyers*].

16. *Armani*, 371 N.Y.S.2d at 564; ALIBRANDI & ARMANI, *supra* note 11, at 46-47.

17. See *Armani*, 371 N.Y.S.2d at 566. Armani had represented Garrow in two other criminal matters. Garrow had been accused of abducting two Syracuse University students, but the charges were dropped. In June of 1973, Garrow was charged with sexually molesting two young

Belge, a noted trial lawyer from the area, to help him.<sup>18</sup> Armani and Belge began to prepare an insanity defense for Garrow.

At the end of August 1973, Garrow confided to his lawyers that he had killed Daniel Porter and raped and killed Susan Petz and Alicia Hauck.<sup>19</sup> Armani and Belge verified Garrow's claims; shortly after Garrow's confession, the lawyers found the bodies of Hauck and Petz, and photographed them.<sup>20</sup> They found Petz's body in an abandoned mine shaft, and Hauck's body in a cemetery. In order to fit all of Hauck's remains in the photo, Belge had to move her skull.<sup>21</sup> The attorneys did not disclose their find to anyone, even though authorities were still searching for the bodies.

On September 7, 1973, the lawyers met with the District Attorney to discuss plea bargaining. While exactly what the lawyers said is disputed, they at least suggested they could help police find the bodies of Petz and Hauck in exchange for favorable treatment for Garrow.<sup>22</sup> In any case, prosecutors rejected their offer.<sup>23</sup> At around the same time, Armani was approached by Petz's father for information, but Armani refused to tell him anything about his daughter.<sup>24</sup>

Students eventually accidentally discovered the bodies of Petz and Hauck.<sup>25</sup> Petz's corpse was not discovered until four months after Armani and Belge took the photos, and the body of Hauck was not

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girls. Garrow missed his trial date of July 23rd. ALIBRANDI & ARMANI, *supra* note 11, at 18-20, 41.

18. See *Armani*, 371 N.Y.S.2d at 564; ALIBRANDI & ARMANI, *supra* note 11, at 63-65.

19. See *People v. Belge*, 372 N.Y.S.2d 798, 799 (Onondaga County Ct.), *aff'd*, 376 N.Y.S.2d 771 (App. Div. 1975), *aff'd*, 359 N.E.2d 377 (N.Y. 1976); ALIBRANDI & ARMANI, *supra* note 11, at 73-76.

20. See *Belge*, 372 N.Y.S.2d at 799; *Armani*, 371 N.Y.S.2d at 566; ALIBRANDI & ARMANI, *supra* note 11, at 84-89; *Slayer's 2 Lawyers*, *supra* note 15.

21. ALIBRANDI & ARMANI, *supra* note 11, at 88-89. This act would later cause Belge some legal difficulties. In pursuing health and penal law violations by the attorneys, Onondaga County District Attorney Jon K. Holcombe emphasized that the attorneys had reassembled Hauck's remains. See TEACHING PROFESSIONAL RESPONSIBILITY 240-41 (Patrick A. Keenan ed., 1979) (reprinting Bill Jerome, *Garrow Case to Be Probed by Grand Jury*, SYRACUSE HERALD, July 3, 1974); Tom Goldstein, *Garrow's Lawyers Facing a New Inquiry*, N.Y. TIMES, July 4, 1974, at 23.

22. See ALIBRANDI & ARMANI, *supra* note 11, at 109-13; Tom Goldstein, *Lawyer Reports Body-Deal Offer*, N.Y. TIMES, June 22, 1974, at 30.

23. ALIBRANDI & ARMANI, *supra* note 11, at 109-13.

24. See *People v. Garrow*, 379 N.Y.S.2d 185, 186 (App. Div. 1976); ALIBRANDI & ARMANI, *supra* note 11, at 100-03, 113.

25. RHODE, PROFESSIONAL RESPONSIBILITY, *supra* note 10, at 262.



found until December 1973.<sup>26</sup> Even after locating the bodies, law enforcement officials were unable to connect Garrow to their demise until his trial in June 1974.<sup>27</sup> There, as part of his insanity defense, Garrow testified in court to killing Phillip Dombleski, Daniel Porter, Susan Petz and Alicia Hauck, and to committing several rapes.<sup>28</sup> Armani and Belge held a press conference on June 20, during which they admitted they had known of Garrow's other crimes, and of the locations of the bodies, for more than six months.<sup>29</sup>

Garrow was found guilty of Dombleski's murder and sentenced to twenty-five years to life.<sup>30</sup> On September 8, 1978, Garrow escaped from jail. He was shot and killed by authorities on September 11.

Upon learning the location of the women's bodies from Garrow, Frank Armani, Garrow's lawyer, had to decide whether to keep this information secret or disclose it to the authorities, the women's families, or both. Let us examine a partial reconstruction of an analysis of this question under the Model Rules. I am applying the current Model Rules, rather than the then-prevailing ethical code and statutes, because I want to illustrate the sort of technocratic legal analysis invited by a black letter code, and contrast this response with Armani's own actual, more reflective reactions to the situation. My application of the Rules is incomplete because the analysis raises questions of substantive criminal law that I do not want to take the time to unravel fully here. I pursue the discussion far enough to demonstrate the sort of analysis black letter rules can easily elicit, especially from technocratic lawyers. Another objective is to show how skilled technocratic lawyering can produce a perfectly defensible, if not outstanding, legal argument in favor of actions apparently disfavored by black letter rules. Such an argument may suffice to make an attorney or client comfortable taking such actions; it may even convince a court, should the matter come to trial. My central goal in applying the Model Rules to the Lake Pleasant Bodies case is to demonstrate how a good technocratic lawyer can use the Rules as a basis *either* for withholding or for disclosing the location of the

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26. *Slayer's 2 Lawyers*, *supra* note 15.

27. RHODE, PROFESSIONAL RESPONSIBILITY, *supra* note 10, at 262.

28. *Garrow*, 379 N.Y.S.2d at 186; *see also* ALIBRANDI & ARMANI, *supra* note 11, at 144-48; *Slayer's 2 Lawyers*, *supra* note 15.

29. *See Garrow*, 379 N.Y.S.2d at 186; *Slayer's 2 Lawyers*, *supra* note 15.

30. *Garrow*, 379 N.Y.S.2d at 186; *see also* TEACHING PROFESSIONAL RESPONSIBILITY, *supra* note 21, at 241.

corpses, and *either* for using or for not using that information to plea bargain.

Three Model Rules pertain directly to Armani's situation. Rule 1.6 ("Confidentiality of Information") states that "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . ." <sup>31</sup> The Rule includes several exceptions. It allows the revelation of information the lawyer believes reasonably necessary to prevent the client from committing a crime likely to lead to "imminent death or substantial bodily harm"; <sup>32</sup> the disclosure of matters necessary to resolve a controversy between the lawyer and client; and the revelation of information necessary to a lawyer's defense against any criminal charge or civil claim based on the client's conduct or the attorney's defense against any allegations made in a proceeding regarding the legal representation of the client. <sup>33</sup> Rule 8.4 ("Misconduct") deems it professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" <sup>34</sup> or to "engage in conduct that is prejudicial to the administration of justice." <sup>35</sup> The Comment to Rule 8.4 emphasizes that criminal offenses involving dishonesty or serious interference with the administration of justice indicate lack of fitness to practice law. In addition, Rule 3.4 of the Model Rules prohibits a lawyer from "unlawfully . . . conceal[ing] . . . material having potential evidentiary value" or from assisting another in doing so. <sup>36</sup>

Rule 1.6 evidently bears on Armani's situation, and seems to indicate the Rules' presumption in favor of lawyer-client confidentiality. To see how Rule 8.4 relates to his decision, we must consult substantive criminal law. Because the actual Armani-Garrow situation arose in New York, I will refer to the New York penal code, specifically its provision on hindering a prosecution. This section makes it a criminal offense to assist a criminal so as to a) "prevent, hinder, or delay discovery or apprehension of . . . a person who has committed a crime"

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31. MODEL RULES, *supra* note 3, Rule 1.6(a).

32. MODEL RULES, *supra* note 3, Rule 1.6(b)(1).

33. MODEL RULES, *supra* note 3, Rule 1.6(b)(2).

34. MODEL RULES, *supra* note 3, Rule 8.4(b).

35. MODEL RULES, *supra* note 3, Rule 8.4(d).

36. MODEL RULES, *supra* note 3, Rule 3.4(a).

or b) "to assist a person in profiting or benefiting from the commission of a crime."<sup>37</sup> Prohibited forms of assistance include the suppression of any physical evidence "which might aid in the discovery or apprehension" of a criminal "or in the lodging of a criminal charge against him."<sup>38</sup>

On the basis of these Rules, a technocratic lawyer could develop defensible arguments for *or* against disclosure, and for *or* against using information about the corpses' location to plea bargain.

Consider first the issue of disclosure. Depending upon the interpretation of New York's statutory prohibition of hindering prosecution, Garrow's lawyer either need not or must inform the authorities of the whereabouts of the bodies. Assume the lawyer prefers nondisclosure. She could then rely heavily on Rule 1.6 while arguing that the criminal statute does not require disclosure of mere knowledge of the location of physical evidence. Omitting to tell the police or prosecutor of the site of the corpses does not *suppress* physical evidence: The bodies remain in place, ready to be discovered.

Now, suppose Garrow's lawyer would rather disclose. She could rely heavily on Rule 8.4 while arguing that the New York penal code demands disclosure. Because this argument is somewhat more contentious than the previous one, I shall document it in some detail.

The argument for disclosure starts by questioning the significance of the distinction between omission and commission in this context. If the point of the statute is to facilitate apprehension and prosecution of criminals, particularly by ensuring that all relevant physical evidence reaches the police, then the statute should not distinguish between hiding evidence and failing to report its whereabouts. It is settled law that a lawyer who comes into actual possession of physical evidence relating to a crime must submit that evidence to the police.<sup>39</sup> If a lawyer's client hands her a gun, and says, "I used this to murder John

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37. See N.Y. PENAL LAW § 205.50 (McKinney 1994). Case law focuses on whether or not the defendant intended to render assistance in order to hinder prosecution of a crime that the defendant knew or believed to be committed. See *People v. Nieves*, 197 A.D.2d 542 (1993) (denying a motion to dismiss charges where a drug dealer got the license plates of surveillance personnel from a police officer); *People v. Verez*, 191 A.D.2d 378, *rev'd*, 83 N.Y.2d 121 (1994) (evidence strongly suggested that the defendant, the driver of a van that sped off immediately upon arrival of the third party, believed that the third party committed a crime).

38. See N.Y. PENAL LAW § 205.50(5) (McKinney 1994).

39. See, e.g., *Morrell v. State*, 575 P.2d 1200 (Alaska 1978); *People v. Meredith*, 631 P.2d 46 (Cal. 1981); *State v. Olwell*, 394 P.2d 681 (Wash. 1964). Several of the cases suggest that the defense lawyer's duty to turn over evidence is based, at least in part, on the existence of obstruction of justice or concealment of evidence statutes. See *Morrell*, 575 P.2d 1200 (basing the duty

Doe," the attorney must give the gun to the police. Likewise, while it is unlikely that a client would ever physically hand over a corpse to a lawyer, should this happen, the lawyer would have to pass the body along to the proper authorities. What is more likely is what in fact happened in the Lake Pleasant Bodies case: A client told his lawyer the location of his victims' bodies. When the police are having tremendous difficulty locating these bodies, as the police in the Lake Pleasant Bodies case were, withholding this information is a form of helping the client hide the corpses—conduct expressly forbidden by New York's law against hindering apprehension of a criminal.<sup>40</sup>

In the face of Armam's question, the Model Rules seem inconclusive. Rule 1.6 seems to forbid disclosure of the location of the bodies, while Rules 8.4 and 3.4 can be read to require it. Resort to conventional tools of statutory analysis will not remedy the problem. Suppose we consult the preamble and other introductory materials to the Rules, to see if the drafters offer any guidance for resolving the apparent conflict between the demands of Rule 1.6 and those of Rules 8.4 and 3.4. On one hand, much of the prefatory language emphasizes the lawyer's responsibility to serve justice and the legal system. For example, the preamble begins: "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."<sup>41</sup> It continues: "A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. . . . While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process."<sup>42</sup>

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on the state concealment of evidence statute, and on the notion that it is unethical for a lawyer to conceal relevant evidence in a criminal case); *Commonwealth v. Stenhach*, 514 A.2d 114 (Pa. Super. Ct. 1986) (basing the duty on state statutes but finding the statutes unconstitutionally overbroad).

40. The *Morrell* case supports this interpretation of New York's misprision statutes. The court in *Morrell* wrote:

Morrell correctly cites cases which establish that misprision statutes are generally interpreted to require an affirmative act of concealment in addition to a failure to disclose a crime to the authorities. However, the cases disciplining attorneys for failing to turn over evidence or upholding denials of motions to suppress evidence turned over by attorneys do not rest alone on the notion that an attorney who does not turn over such evidence may be guilty of a crime. *The cases cited are also based on the proposition that it would constitute unethical conduct for an attorney—an officer of the court—to knowingly fail to reveal relevant evidence in a criminal case.*

*Morrell*, 575 P.2d. at 1210-11 (emphasis added) (citations omitted).

41. MODEL RULES, *supra* note 3, at 5.

42. *Id.*

On the other hand, the note discussing the scope of the Rules reiterates the importance they assign confidentiality: "The fact that in exceptional situations the lawyer under the rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed . . . ."<sup>43</sup> Ultimately, the drafters' prefatory language reflects, rather than resolves, the inconclusiveness of the Rules applicable to Armani's problem.

One might argue that it would be wrong to apply the law against hindering prosecution to an attorney who keeps quiet about information that could lead to an indictment of his client or that could be used to bargain for a good plea. According to this view, the attorney is simply doing his job, adequately and fully defending the client. To hold him in breach of the law is to say that to defend a criminal is to hinder prosecution. Two replies are relevant here. First, to put limits on what an attorney may do in the course of defending his client is not to say that he may not defend his client; in fact, there are already clear limitations upon the measures a defense attorney may take (for example, prohibitions against tampering with physical evidence, interfering with witnesses and allowing perjured testimony). Precisely what is at issue in the Armani-Garrow situation is whether refraining from disclosure falls within or without the limits of permissible behavior on the part of a defense attorney. Assuming the permissibility of withholding begs the question. Second, Armani need not seek the most permissive interpretation of the penal law. If he wants to disclose, he may rely on defensible interpretations that give him grounds for doing so. To say otherwise is, again, to beg the question against disclosure.

In fact, the state of New York prosecuted Francis Belge, Armani's co-counsel in the Lake Pleasant Bodies case, charging him with violations of several health laws, including one mandating that a dead body receive a "decent burial" and one requiring that "anyone knowing of the death of a person without medical attendance report the [death] to the proper authorities."<sup>44</sup> The court found that the case presented an easy question, requiring the court to balance "the Fifth Amendment right, derived from the constitution, on the one hand . . . against the trivia of a pseudo-criminal statute on the other, which has seldom

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43. *Id.* at 8.

44. *People v. Belge*, 372 N.Y.S.2d 798, 799 (Onondaga County Ct.), *aff'd*, 376 N.Y.S.2d 771 (App. Div. 1975), *aff'd*, 359 N.E.2d 377 (N.Y. 1976).

been brought into play."<sup>45</sup> The court stated, however, that Belge's behavior hindered the prosecution's ability to apprehend Garrow, and that if Belge had been charged with obstruction of justice, the court would have faced a real challenge:

There is no question but Attorney Belge's failure to bring to the attention of the authorities the whereabouts of Alicia Hauck when he first verified it, prevented bringing Garrow to the immediate bar of justice for this particular murder. This was in a sense, obstruction of justice. This duty, I am sure, loomed large in the mind of Attorney Belge. However, against this was the Fifth Amendment right of his client, Garrow, not to incriminate himself. If the Grand Jury had returned an indictment charging Mr. Belge with obstruction of justice under a proper statute, the work of this Court would have been much more difficult than it is.<sup>46</sup>

In affirming the county court's decision, the appellate division also noted the larger legal and ethical issues lurking beneath the narrow issue presented:

We write to emphasize our serious concern regarding the consequences which emanate from a claim of an absolute attorney-client privilege. Because the only question presented, briefed and argued on this appeal was a legal one with respect to the sufficiency of the indictments, we limit our determination to that issue and do not reach the ethical questions underlying this case.<sup>47</sup>

The courts in the actual Lake Pleasant Bodies case recognized that it potentially presented close, troubling questions of law. This indicates the practical inconclusiveness of the relevant statutory codes, in addition to the theoretical inconclusiveness already established.

Turning briefly to New York's statute against assisting a person in benefiting from the commission of a crime, again, a good technocratic lawyer could argue either for or against the permissibility of using the possibility of disclosure to plea bargain on Garrow's behalf. The good technocrat could argue for an extremely literal interpretation of the statute, according to which nondisclosure of the corpses, which provided Garrow's attorneys with a bargaining chip, directly assisted Garrow in benefiting from those murders. Alternatively, the good

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45. *Id.* at 803.

46. *Id.*

47. *People v. Belge*, 376 N.Y.S.2d 771, 772 (App. Div. 1975), *aff'd*, 359 N.E.2d 377 (N.Y. 1976).

technocrat could rely on the traditionally strong commitment to zealous advocacy in the criminal context, and argue that exchanging privileged information for a better deal for one's client is a quintessential part of criminal representation.

I will not explore the legal arguments surrounding the plea bargaining issue as extensively as I pursued those pertaining to disclosure. The point is the same: A skilled technocratic lawyer can create defensible legal arguments for almost any position, not in spite of black letter ethics codes, but with their aid. This owes in large measure to the inevitable inconclusiveness inherent in any statutory code, including a code of ethics.<sup>48</sup>

Legal analysis of codified requirements comes up against inconclusiveness on a fairly frequent basis. Various legal thinkers have discussed the inconclusiveness of legal rules. Legal realists, critical legal studies scholars, pragmatists and liberal theorists take different positions on the extent of inconclusiveness, on whether and why it is troubling and on how to respond to it.<sup>49</sup> All agree that it arises, at least sometimes. The foregoing analysis shows that it emerges when we apply the Model Rules of Professional Conduct to the Armani-Garrow situation. The more frequently a black letter ethics code is inconclusive, the more opportunities there are for technocratic lawyering: for interpreting the rules simply to permit pursuit of the client's ends, without regard to independent ethical concerns.

In cases that do not present ethical questions, clients' ends typically supply lawyers the deciding factor for how to go on in the face of inconclusiveness in codified law. In a case that raises ethical difficulties for the lawyer, this tactic becomes problematic, as the Armani-Garrow situation illustrates: Straightforward pursuit of the client's ends creates the ethical problem. While Armani's nondisclosure of the location of the corpses would clearly serve Garrow's ends, it is

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48. See generally David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 469 (1990).

49. See, e.g., Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 838-42 (1935) (legal realist); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 3-4, 13 (1987) (critical legal studies); Gary Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J.L. REF. 561, 606-17 (1988) (critical legal studies); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 804-24 (1983) (critical legal studies); STANLEY FISH, DOING WHAT COMES NATURALLY 87-119 (1989) (pragmatist); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 295-96 (1989) (liberal); Frank I. Michelman, *Politics as Medicine: On Misdiagnosing Legal Scholarship*, 90 YALE L.J. 1224, 1226-28 (1981) (liberal); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987) (liberal).

precisely nondisclosure that is ethically suspect. An attorney with an ethical question might unreflectively refer to his client's ends to supplement the black letter rules, but when a client's ends raise ethical difficulties, this ignores the problem instead of resolving it.<sup>50</sup>

Alternatively, a lawyer in Frank Armani's position might undertake analysis of the Rules with a preference or intuition either for or against disclosure. This allows him the chance to tailor his legal analysis to vindicate a course of action chosen without regard to ethical concerns. In this situation, the Rules do not select the outcome; they simply provide justification for doing as the lawyer had already decided. For example, suppose Frank Armani simply felt he had to tell Susan Petz's father what had become of his daughter. Starting from this intuition, Armani could develop a plausible argument, under the Model Rules and New York law, justifying disclosure. Or, if Armani's intuitions lay the other way, he could, again under the Rules and the law, justify maintaining secrecy.

One might object to my faulting statutory ethics codes for their inconclusiveness on the grounds that my example suggests a need for clearer, more specific rules rather than a need to look beyond rules altogether.<sup>51</sup> While it might work in some cases, this solution will not always succeed. Instances of inconclusiveness arise in all areas of the law, including those governed by relatively specific fine-grained rules and regulations. The only way to eliminate inconclusiveness entirely would be to devise rules to cover every particular case of ethical difficulty—an impossible task, because the cases are infinite.

Even if we could write codes that eliminated much of the inconclusiveness lawyers tend to elicit from statutory provisions, there is another sort of serious problem with black letter legal ethics. It not only permits, but invites a type of deliberation that lacks features typically associated with ethical analysis.

Consider Frank Armani's own actual reflections—recorded in a television interview—on his deliberations about whether to withhold

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50. Purely the instrument of his client, a technocratic attorney becomes, in essence, an egoist—albeit not on behalf of his own self but on behalf of the client. Such a lawyer identifies completely with his client's position. While some may be tempted to regard this as a kind of altruism, see, for example, Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976), this makes little sense in the case of the wrongdoing client. That client is acting unethically or nonethically, not behaving altruistically. As a pure extension of the client, neither, then, is the wholly technocratic attorney.

51. Although well aware of the lawyers' abilities to manipulate indeterminate rules, David Wilkins suggests something along these lines. Wilkins, *supra* note 48, at 515-19.



the information he had received from Garrow.<sup>52</sup> At first, Armani suggests it was a simple issue: "All we went by at the time was our oath of office to keep inviolate the secrets of our clients." In a later segment of the interview, Armani describes the issue as involving a conflict, a question of "which is the higher moral good." On the one hand, Armani felt that his duty to defend Garrow required him to keep silent. "It's a question of the Constitution, a question of whether a bastard like [Garrow] having a proper defense, having adequate representation, being able to trust his lawyer as to what he says . . . ." On the other hand, Armani knew that the information he held could ease the pain of the grieving family. Armani balanced his duty to defend Garrow "against the breaking hearts of a parent." In the end, Armani judged that the families' suffering did not outweigh his duty to Garrow: "Their suffering was not worth jeopardizing my sworn duty or my oath of office or the Constitution." The extent to which Armani felt a moral conflict is suggested by a later segment of the interview in which Armani discusses his inability to answer a letter from one of Garrow's victims' sister. Armani states, "I caused them pain . . . . What do you say? Nothing I could say would justify it in their minds. You couldn't justify it to me."

While Armani did not see the situation as a close call under the prevailing code of ethics, neither did he think the code solved his ethical problem. In fact, the code *created* ethical conflict by assigning Armani a professional duty that conflicted with other ethical values, particularly the good of alleviating innocent suffering. Armani's remarks reveal his deeply emotional and empathic response to the situation, demonstrated by his awareness of "the breaking hearts of a parent," the pain he caused the victims' families and the evident anger and revulsion he felt toward Garrow. Armani also comprehended the situation's tragedy. He could not fulfill his duty to Garrow and completely justify his behavior.

Armani's recollected deliberations are striking in a number of respects: (1) he considers himself under a legal obligation, based at least in part on the applicable code of ethics, to keep Garrow's confidences, but he did not regard his statutory duty as determinative of his choice; (2) he was aware of the possibility that he confronted a genuine ethical dilemma, in which neither choice could be fully justified in the face of the alternative; and (3) he was engaged emotionally with several of

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52. *Ethics on Trial* (television broadcast, available from WETA-TV, Washington, D.C.). All quotations attributed to Frank Armani in the text are from this source.

the parties affected by his decisions and reacted toward them with a wide range of varied sentiments. Each of these features is distinctive of ethical deliberation (under some circumstances), and each is in some degree of tension with the legal analysis elicited by the black letter statutory code of lawyers' ethics.

Armani's sense that his statutory duty does not settle the question of whether he should disclose the location of the bodies illustrates an intuitive distinction between legal and ethical demands. Intuitively, it seems that ethical requirements can exceed and even contradict legal ones. If it were possible to codify lawyers' ethics completely and correctly, we would not have to worry about possible divergence between legal and ethical demands on lawyers. Given the notorious difficulties of normative and applied ethics, however, we have no reason to expect such great success from any given set of statutory provisions governing lawyers' conduct.<sup>53</sup>

Focusing lawyers' attention on black letter statutory codes of conduct may cause lawyers to consider the commands of these codes exhaustive. For while we have a notion of morally or ethically supererogatory conduct, we do not have an idea of legally supererogatory conduct. It makes sense to talk of behaving in an ethically or morally superlative way, exceeding minimal ethical baselines or moral requirements. If someone "goes beyond" satisfying his legal obligations, however, we do not usually say that he has behaved in a legally superlative way. The sense in which he has "gone beyond" his legal obligations is usually ethical or moral. He has not only fulfilled his legal obligations, he has behaved in an ethically admirable fashion. Even if it does not take itself to exhaust the subject of lawyers' ethics,

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53. To get a sense of the range and types of disagreements regarding the Model Rules, see, for example, MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* (1990) (giving a concise review of the inadequacies and inconsistencies of the different sets of ethical rules); Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985) (criticizing the Model Rules for favoring lawyers over both clients and the administration of justice); R.W. Nahstoll, *The Lawyer's Allegiance: Priorities Regarding Confidentiality*, 41 WASH. & LEE L. REV. 421 (1984) (arguing that the Model Rules are too litigation-oriented and that the Rules addressing confidentiality need amendment); Jan Ellen Rein, *Clients With Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and Beyond the Competency Construct*, 62 FORDHAM L. REV. 1101 (1994) (arguing that Model Rule 1.14 provides no guidance for determining a client's competence, leaving much room for error); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989) (questioning the wisdom of strict rules regarding confidentiality); David Austern, *Ethics*, TRIAL, Aug. 1984, at 15 (asserting that the Model Rules regarding confidences are flawed).

a statutory code equates lawyers' ethical and legal obligations, discouraging lawyers from considering going beyond what is legally required to what would be ethically admirable.

Advocates of strong role morality for lawyers and the current Model Rules and Code of Ethics might claim that the Rules and the Code do not obscure the supererogatory but rather subsume it within the definition of the lawyer's role as codified in those documents. We should reject any claim that these codes render the idea of the supererogatory superfluous to an honorable lawyer's ethical deliberations. For the same reasons that no codification can capture the whole of legal ethics,<sup>54</sup> no code can capture the whole of the supererogatory even if its drafters tried.<sup>55</sup>

Armani's awareness that he may be facing a genuine ethical dilemma indicates another distinctive feature of ethical deliberation. Just as the notion of the supererogatory has a place in ethical thought, so does the notion of tragedy or genuine dilemma. There is no corresponding notion in law. Even when lawyers elicit inconclusiveness from legal materials, they do not regard themselves as facing a legal dilemma, in which neither alternative can be justified in the face of the other. Something slightly different goes on: The lawyer usually regards either course as at least arguably justifiable, rather than both as somewhat unjustifiable. If such a situation leads to litigation, the courts will and must recognize one course or the other as the legally appropriate one, thereby resolving the question, at least for practical purposes.

Black letter legal ethics can create the impression that it rules out the possibility of dilemma or tragedy. If the rules license or require two practically incompatible courses of action, a lawyer will not see herself as facing a dilemma. Instead, she will regard both options as potentially justifiable and will select one or the other on some external

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54. See *supra* notes 48-49 and accompanying text.

55. In any event, the current Model Rules and Model Code do not even aim to cover all ethically required conduct, let alone all ethically exemplary conduct. MODEL RULES, *supra* note 3, Scope note 14, at 7 ("The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules."); MODEL CODE, *supra* note 3, preamble, at 1 ("The Model Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards."). Despite these preambulatory claims, the specific provisions of these codifications do invite lawyers to read them as exhausting the ethical considerations relevant to a lawyer's ethical deliberations.

ground.<sup>56</sup> If the matter goes to litigation, the court will rule out one of the options: Leaving matters (legally) tragic is not a judicially appropriate outcome.

Sometimes people talk of tragedy in the legal setting, but I think they have in mind a dilemma between satisfying a legal obligation, which itself exerts a moral pressure, and fulfilling some other, nonlegal ethical obligation. This type of situation does not present two practically contradictory *legal* obligations. The dilemma really consists of two competing *ethical* claims. If this is the case, then we have a problem of ethical tragedy, not legal inconclusiveness.

I believe that the Lake Pleasant Bodies case does present a genuine ethical dilemma. There are good ethical reasons in favor of Armani keeping Garrow's confidence, and there are good ethical reasons in favor of disclosure. In a case like this, there is no fully satisfactory solution to the question of the lawyer's conduct. What is noteworthy about Armani is not only his appreciation of this sad state, but his realization of the gap between an ethical justification and a technocratic legal one. When Armani explains why he did not reply to the sister who wrote to him asking him to explain his decision to her, he says, "I caused them pain . . . . What do you say? Nothing I could say would justify it in their minds. You couldn't justify it to me." With these words, Armani recognizes that a fully satisfactory ethical justification applies more universally than a narrow technocratic legal one. While a good technocratic legal justification may vindicate a particular client's position (or a course of action taken to serve it), it is not necessarily an adequate ethical justification.

Armani's emotional engagement with the situation he faces is the third striking feature of his deliberations. Not only does Armani engage emotionally with the situation, he responds to its various aspects with specific differentiated sentiments. He expresses a mixture of revulsion, anger and pity toward Robert Garrow, saying that even "a bastard" like Garrow needs adequate representation, needs to be able to trust his lawyer. Toward the families of Susan Petz and Alicia

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56. It might seem that technocratic analysis, which allows a lawyer to generate arguments either way on any given issue, could therefore foster both a recognition of genuine ethical dilemmas and a willingness to wrestle with them. This does not follow naturally from technocratic analysis. The technocratic lawyer does not deploy her skill at generating inconclusiveness in order to explore the possibility that she confronts an ethically tragic situation. Instead, she uses technocratic analysis to develop arguments in favor of an outcome chosen independently of ethical concerns. In other words, technocratic analysis is not usually a method of ethical deliberation; rather it is an instrumentalist alternative to it.

Hauck, Armani reacts with empathy, sympathy, sorrow and—as a result of his own decision against disclosure—shame. Noticing the range of Armani's sentiments and their prominence in his deliberations reminds us that ethical deliberation progresses, at least sometimes, through specific emotional or sentimental responses.

In simple cases, the philosophically complicated connection between sentiment and ethical judgment is relatively clear. Sentiment seems to provide both motive and reason for ethical judgment. For example, a person might decide to donate to charity out of *pity* for the impoverished or she might decide to volunteer for her national army out of *pride* in her country. A person might conclude she ought to take these measures or that they are ethically proper because of the appropriateness of the relevant sentiments. Were she to decide that the feelings were inappropriate—that the impoverished do not merit pity or her country is not worthy of pride—she would reach a different ethical judgment.

In more intricate cases, such as the one faced by Frank Armani, the philosophically complex connections among sentiment, motive, reason and judgment are even harder to draw. I will not tackle these philosophical complexities here, because for now I simply want to emphasize the conspicuous place the sentiments occupy in ethical deliberation.<sup>57</sup>

A long philosophical tradition accords the sentiments a prominent place in moral deliberation, judgment and behavior. Adam Smith, one of the earliest and most insightful members of this tradition, was also one of the first philosophers to associate the sentiments with ethical virtues. In *The Theory of Moral Sentiments*, Smith argued that sympathy—a term of art he used to “denote our fellow-feeling with any passion whatever”<sup>58</sup>—arouses in us specific sentiments in response to situations involving other people.<sup>59</sup> These sentiments range from grief and joy toward another person's poor or good fortune to anger or exasperation directed at a person abusing someone else.<sup>60</sup>

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57. I am *not* claiming that all ethical judgments involve fairly refined sentimental responses; it might be the case that at least sometimes we decide what we ought, ethically, to do without seeking or getting guidance from our sentimental responses. I *am* claiming that sentimental responses play a role in many ethical judgments.

58. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 49 (Liberty Classics ed. 1976) (1759).

59. *Id.* at 49-52.

60. *Id.* at 50.

Smith also maintained that people aim to synchronize their sentimental responses, such that "the spectator [tries] to put himself into the situation of the other" while at the same time the other person attempts "to lower[ ] his passion to that pitch, in which the spectators are capable of going along with him."<sup>61</sup> Correspondingly, we as spectators cultivate the "amiable virtues," which enhance our ability to sympathize with others, while as agents we cultivate the "virtues of self-denial," which increase our ability to check our own self-regarding passions.<sup>62</sup> Finally, Smith held that we rely upon our sentimental responses to judge others' passions and sentiments and the actions they prompt.<sup>63</sup>

Without undertaking a detailed examination of Smith's theory, I want to highlight some of its elements that subsequent ethicists have amplified. First, Smith assigns sentimental engagement with others a primary place in our ethical lives.<sup>64</sup> This engagement enables us to make ethical judgments about both ourselves and others. Second, our shared sentimental capacities enable us to coordinate our ethical judgments and therefore our behavior.<sup>65</sup> Third, not only do we rely upon our sentimental capacities to make ethical judgments, we assess the appropriateness or inappropriateness of our own and others' particular sentimental responses to specific situations; these appraisals themselves are one central kind of ethical judgment.<sup>66</sup> Finally, ethical virtue consists, at least in part, of having appropriate sentimental responses and being able to judge properly the appropriateness of those displaced by other people.<sup>67</sup>

Smith's consistent attention to the intricate relationship between sentiment and judgment emphasizes the cognitive, deliberative dimension and role of the sentiments. They are not merely blunt affect or feel, but sophisticated complexes of emotion, cognition and judgment.

Twentieth century philosophers expand upon the Smithean tradition in a variety of ways. For present purposes, I single out one line of

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61. *Id.* at 66-67.

62. *Id.* at 70.

63. *Id.* at 59.

64. ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS* 126-50 (1990); Justin D'Arms, *Evolution and the Moral Sentiments* (1994) (unpublished Ph.D. dissertation, University of Michigan (Ann Arbor), on file with author).

65. GIBBARD, *supra* note 64, at 132-40, 147-50.

66. *Id.* at 153-250, 274-92; John McDowell, *Virtue and Reason*, 62 *MONIST* 331 (1979); DAVID WIGGINS, *A Sensible Subjectivism?*, in *NEEDS, VALUES, TRUTH* 185 (1987).

67. GIBBARD, *supra* note 64, at 253-73; WIGGINS, *supra* note 66; McDowell, *supra* note 66.

expansion: the investigation of the relationship between specific sentimental responses and corresponding concepts, often tagged with a specific linguistic term. For example, consider the concept *pity*. When we apply this concept, it stimulates a specific sentiment in us (identified, linguistically, with the word "pity"); likewise, experiencing the sentiment can prompt us to apply the concept. Not all concepts like this are labeled with the vocabulary of emotion, however. Consider Armani's use of the term "bastard" to describe Garrow. Used in that context, this term evokes a complicated sentimental response, tied closely to our ethical appraisal of both Garrow and Armani himself. If we accept Armani's judgment that Garrow was a bastard, we assume a particular ethical stance toward Garrow, perhaps one of unmitigated hostility; importantly, we also adopt a certain attitude toward Armani, perhaps admiring his ethical good sense.

Concepts like *pity* and *bastard* belong to a larger category: blend concepts. I have written more extensively about these elsewhere.<sup>68</sup> Such concepts intertwine description and evaluation. When applied, they characterize the world with a blend of description and evaluation, and they therefore tend to supply their users with reasons to act as directed or as encouraged by the concepts.<sup>69</sup> This reason-giving capability is particularly evident in blend concepts that provoke sentimental responses because such concepts tend to motivate, as well as to justify, specific behavior. The precise nature of the relationships among evaluation, motivation, justification and reasons raises philosophically difficult issues, but these are not directly relevant to this Article. For now, what matters are the apparent connections among certain concepts, specific sentiments and ethical judgment and behavior. Also important is the recognition that not all blend concepts relate to the sentiments or to ethics.<sup>70</sup> In fact, many specialized legal blend concepts, such as *negligence*, do not seem to produce sentimental responses in their primary users, attorneys.<sup>71</sup> This is especially significant for the present discussion because it suggests that while lawyers may be especially adept at noticing and employing blend concepts, they may also be prone to minimize or ignore the sentimental responses associated with many ethical blend concepts. Even if black letter legal ethics codes attempted to refer to ethical blend concepts

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68. Heidi Li Feldman, *Objectivity in Legal Judgment*, 92 MICH. L. REV. 1187, 1191-1212 (1994).

69. *See id.* at 1194-1206.

70. *See id.* at 1191-94.

71. *Id.* at 1194.

(by, for example, using words like "pity" or "sorrow"), the structure and connotations of a black letter statutory code might well incline lawyers to treat these terms as specialized legal blend concepts, lacking the sentimental component normally present in their nonlegal usage.

In any event, statutory language is distinctly unsentimental, particularly in the black letter format. Black letter statutes are written in terms of imperatives—and, sometimes, permissions—combined with descriptive language depicting what is required or forbidden. The Model Rules of Professional Conduct say things like: "A lawyer shall not reveal information relating to representation of a client, unless the client consents after consultation . . ." <sup>72</sup> and "It is professional misconduct for a lawyer to . . . commit a criminal act." <sup>73</sup> The terms in such rules are either drawn from legal vocabulary or are presented as such. When applying such terms, a lawyer does not rely on distinctive sentimental responses to guide her. Rather, she consults relevant textual materials or looks to the purpose of the codification.

Compare my earlier reconstruction of a technocratic analysis of the Lake Pleasant Bodies case according to the Model Rules with Armani's passionate deliberations. The lawyer consulting the Rules starts by reviewing them to decide which ones bear on her situation based on the fit between the facts of her circumstances and the scope of the various rules. She checks for the applicability of any of the exceptions to the confidentiality Rule; she parses the terms of the Rules pertaining to misconduct and concealing evidence; she analyzes the penal code prohibitions on hindering a prosecution. None of this activity calls upon her to consult her sentimental responses to the situation of Garrow, the missing corpses, the mourning families and the frustration of law enforcement authorities. Analyzing the codified rules does not encourage her to consider needy, dastardly Garrow nor the sorrowing parents of the murdered women. Sentiments of anger, pity, revulsion, sympathy, empathy, sorrow and shame are not germane to the questions that arise under the Rules: whether withholding the location of the bodies counts as preventing, hindering or delaying discovery or apprehension of a person who has committed a crime; or whether withholding assists a person in profiting or benefiting from the commission of a crime; or whether withholding is a criminal act that reflects adversely on the lawyer's honesty, trustworthiness and

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72. MODEL RULES, *supra* note 3, Rule 1.6(a)

73. MODEL RULES, *supra* note 3, Rule 8.4(b)



fitness as a lawyer; or whether it is conduct prejudicial to the administration of justice. To answer these questions, the technocratic attorney consults the Rules, their commentary and judicial and bar association precedents, but not her sentimental responses to the specific features of the Lake Pleasant Bodies case.

## II. VIRTUE ETHICS

Virtue ethics nicely captures and elaborates some of our common-sense ideas about what constitutes good ethical deliberation. This makes it a good vehicle for pinpointing some of the defects of a black letter lawyers' ethics. Like other traditions in normative ethics, such as Kantianism and utilitarianism, virtue ethics comes in different variants, but these have common themes. Consider the following passages from some contemporary virtue ethicists.

If one attempted to reduce one's conception of what virtue requires to a set of rules, then, however subtle and thoughtful one was in drawing up the code, cases would inevitably turn up in which a mechanical application of the rules would strike one as wrong—and not necessarily because one had changed one's mind; rather, one's mind on the matter was not susceptible of capture in an universal formula. . . . If the question "How should one live?" could be given a direct answer in universal terms, the concept of virtue would have only a secondary place in moral philosophy. But the thesis of uncodifiability excludes a head-on approach to the question of whose urgency gives ethics its interest. Occasion by occasion, one knows what to do, if one does, not by applying universal principles but by being a certain kind of person: one who sees situations in a certain distinctive way.<sup>74</sup>

By contrast, utilitarianism . . . makes no room for (purely or predominantly) non-instrumental virtues—treats character traits as admirable only to the extent that they further . . . the overall good of sentient beings . . . . But for ordinary ways of thinking, there are other sources or bases for virtue status, and it is therefore more difficult for a common-sense virtue ethics . . . to be explicit about the ways in which acts or traits can be admirable. . . . [A] common-sense virtue ethics doesn't seek to impose a single pattern or principle on all the forms of value it acknowledges.<sup>75</sup>

[Aristotle] makes it clear . . . that it is in the very nature of truly rational practical choice that it cannot be made more "scientific"

74. McDowell, *supra* note 66, at 331, 336, 347.

75. MICHAEL SLOTE, FROM MORALITY TO VIRTUE 134 (1992).

without becoming worse. Instead, he tells us, the "discernment" of the correct choice rests with something that he calls "perception." From the context it is evident that this is some sort of complex responsiveness to the salient features of one's concrete situation. . . . The subtleties of a complex ethical situation must be seized in a confrontation with the situation itself, by a faculty that is suited to address it as a complex whole. Prior general formulations lack both the concreteness and the flexibility that is required. They do not contain the particularizing details of the matter at hand, with which decision must grapple; and they are not responsive to what is there, as good decision must be.<sup>76</sup>

All three of these virtue ethicists emphasize the place of dispositions, the significance of context and the role of the sentiments in making ethical judgments. They stress the plurality of the virtues. They criticize codified sets of rules as an incomplete guide for ethical judgment.

Each of these elements of virtue ethics enriches our ongoing comparison of black letter legal ethics and more typical ethical deliberation. Virtue ethicists attribute the uncodifiability of ethical deliberation to the significance of detail, nuance and particularity in ethically difficult situations. Their recognition of a plurality of virtues explains the possibility of ethical tragedy: If two traits are admirable but incompatible, a situation that calls for the exercise of both will pose a tragic dilemma. Finally, as I argue below, not only do virtue ethicists note the significance of the sentiments, but the connections drawn by virtue ethics among perception, disposition and emotional responsiveness deepen our understanding of the place of the sentiments in ethical deliberation.

I will return to the specific question of what virtue ethics can contribute to lawyers' ethics. But first we need to clarify the idea of a virtue in general, and the more specific notions of ethical virtues and various lawyerly virtues. Eventually, I want to establish that certain lawyerly virtues are antithetical to certain ethical virtues, and that a statutory, black letter lawyers' ethics elicits these antiethical, yet lawyerly, virtues.

Most thinly, we can characterize a virtue as any admirable or advantageous trait. Sometimes people have in mind a more specifically Christian notion of a virtue, so that when they think of particular virtues, traits such as beneficence or charity come to mind. Or they have

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76. MARTHA C. NUSSBAUM, *The Discernment of Perception: An Aristotelian Concept of Rationality*, in LOVE'S KNOWLEDGE 54, 55, 69 (1990) (footnote omitted).

in mind the classical Aristotelian virtues such as liberality, courage and magnanimity. Alternatively, they might have in mind Austenian virtues such as amiability, constancy and self-knowledge (virtues that Jane Austen's novels explore).<sup>77</sup> These different categories of virtues indicate that there is a thinner, more general notion of a virtue that unites them: the idea of a trait or disposition that is admirable or useful, depending on the bearer of the trait and the context. We can appreciate the versatility of this thin notion of a virtue when we remember that we can talk about the virtues of inanimate objects: In a knife, sharpness is a virtue; in a software program, user-friendliness is.

Because a virtue is teleological—meant to serve a particular end or perform a certain function—the simpler and clearer our understanding of a person's or thing's end or function, the more easily we can specify what constitutes a virtue in that person or thing. Since a knife's function is to cut, and we have a good grasp of what cutting involves, it is easy to say that sharpness is a virtue in a knife. Since computer software is supposed to enable people to use computers to accomplish various tasks, it is relatively easy to conclude that user-friendliness is a virtue in software. Note, though, that because the function of enabling people to use computers is more complicated than the function of cutting, it is harder to specify what is involved in user-friendliness than it is to say what we mean by sharpness.

Both ethical deliberation and lawyering are vastly more complicated than cutting and, I think, somewhat more complicated than enabling people to use computers easily. So, it is going to be quite difficult to itemize either exhaustively or uncontroversially the virtues of either ethical deliberators or lawyers. Because the function of an ethical deliberator is broader and more complicated than even the complex function of a lawyer, I will, of necessity, say more general and more contestable things about ethical virtues than lawyerly ones. Nonetheless, working from Armami's example of good ethical deliberation, I will say some fairly pointed things about ethical virtues. Then, I shall discuss some lawyerly virtues and their fit with ethical ones.

An ethical deliberator functions to decide how to live, what to do, all things considered. Armami's deliberations manifest three virtues of someone with this purpose: a willingness to consider but also to question codified ethics, suggesting both sufficient humility not to ignore the guidelines others have developed and a sense of personal moral

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77. See ALASDAIR MACINTYRE, *AFTER VIRTUE* 221-25 (2d ed. 1984).

responsibility for one's own ethical decisions; a willingness and ability to recognize ethical dilemma; and the capacity to respond to specific features of the situation with warranted sentiments and to be guided by these sentiments in making ethical judgments.

The exercise of the first two of these virtues—accepting both the force and limitations of codified ethics and being able to appreciate ethical tragedy—depends on the third, the disposition to respond with appropriate sentiments to salient features of ethically difficult situations. This disposition alerts the deliberator to the appropriateness or inappropriateness of the code's provisions; it enables him to appreciate the competing values that create the possibility of tragedy. Because Armani responds to the victims' parents with empathy and sorrow, he perceives the limitations of the code's dictate of confidentiality; after keeping Garrow's confidence, he experiences shame, in recognition of the tragedy of the situation. One key ethical virtue is a general disposition to have appropriate sentimental responses in ethically challenging situations.

Current philosophical literature raises a wealth of contenders for which sentiments, if any, are distinctly moral or ethical and which particular sentiments are appropriate responses to what circumstances. I cannot fully tackle these large issues here. The Lake Pleasant Bodies case demonstrates that with regard to particular situations, we have intuitive, relatively uncontentious views of which sentimental responses a specific situation calls for from a successful ethical deliberator. Armani exemplifies such a deliberator when he responds to Robert Garrow with revulsion, anger and pity, and toward the Petz and Hauck families with empathy, sympathy, sorrow and, ultimately, shame. Suppose Armani thrilled to Garrow's deeds, responded to him with hero-worship and reacted to the women's families with contempt, viewing them as Garrow's dupes. He would be a far cry from the good ethical deliberator, responding with appropriate sentiments to the circumstances.

To decide what constitutes a specifically lawyerly virtue we need to think about what traits and dispositions are specifically useful to or admirable in lawyers. This will depend on the function of lawyers. As scholars have noticed increasingly, however, nowadays lawyers do many different kinds of work.<sup>78</sup> So it may be difficult to identify any

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78. Wilkins, *supra* note 48, at 487-88; see also KELLY, *supra* note 2 (chronicling different types of law practice in detail).

traits or dispositions that would be virtues for all lawyers. Nonetheless, I want to try to do so without falling into the trap of identifying traits so generally or generically salutary that they would be good for anybody to have.

This pitfall has ensnared at least one other scholar who has urged a virtue ethics approach to lawyers' ethics. Anthony Kronman has recently written *The Lost Lawyer*; in which he argues for the resuscitation of the ideal of the "lawyer-statesman."<sup>79</sup> Kronman claims that the lawyer-statesman exemplifies the virtues of lawyers from an earlier era, virtues that present-day attorneys would do well to acquire. I do not want to address the historical dimension of Kronman's claims. Instead, I want to isolate some of the theoretical problems with his position, which are instructive in an effort to develop a better account of the lawyerly virtues.<sup>80</sup>

For Kronman, the virtues of the lawyer-statesman are essentially the virtues of a judge. The central virtues for both are practical wisdom<sup>81</sup> and civic-mindedness.<sup>82</sup> For the moment, set aside questions about the content of these virtues; grant, for now, that they are indeed virtues in judges, whose function is, ideally, to wisely resolve disputes consistent with good public policy. Kronman must still explain why the virtues of judges are the virtues of lawyers.

Kronman lists three lawyering functions: judging, counseling and advocacy. It is trivially true that the virtues of a judge suit a lawyer who is a judge. But from lawyers who perform other functions, might we not expect different virtues? Why should a partisan advocate or counselor aspire to civic-mindedness?

Kronman understands the point. In response, he argues that both the counselor and the advocate should work for the client with one

79. ANTHONY KRONMAN, *THE LOST LAWYER* (1993).

80. *The Lost Lawyer* has already received critical scrutiny from a number of angles. See, e.g., James M. Altman, *Modern Litigators and Lawyer-Statesmen*, 103 *YALE L.J.* 1031 (1994) (arguing that the lawyer-statesman ideal lost its credibility as a professional ideal over one hundred years ago, not just since the 1960s, as Kronman suggests); Robert Stevens, 44 *J. LEGAL EDUC.* 152 (1994) (book review) (arguing that Kronman makes the dubious assumption that the lawyer-statesman ideal has historically been exemplified on a broad scale); David B. Wilkins, *Practical Wisdom for Practicing Lawyers: Separating Ideals From Ideology in Legal Ethics*, 108 *HARV. L. REV.* 458, 459 (1994) (book review) ("Kronman's preoccupation with the intrinsic satisfaction of individual practitioners distorts his understanding of professional morality . . . by failing sufficiently to tie ideals to practices, and . . . by conflating personal deliberation with professional deliberation.").

81. KRONMAN, *supra* note 79, at 2-3, 53-93.

82. *Id.* at 54, 93-108.

eye toward how a judge will view the client's situation, because should the situation develop into litigation the lawyer must be able to show how the client's objectives cohere with the good of the legal order.<sup>83</sup> Furthermore, Kronman presses a psychological claim, arguing that lawyers cannot assume this judicial vantage point simply by trying on the judge's mantle; they must themselves become connoisseurs of the civic good, truly inculcating in themselves the practical wisdom and civic-mindedness that distinguish the judge.<sup>84</sup>

There are a series of problems with Krouman's argument. First, it is not particularly helpful to urge upon anyone the vague virtues of practical wisdom and civic-mindedness. These virtues are vague in two senses. They are so general that they provide little or no specific guidance for action; and they are so subject to multiple interpretation that what counts as an exercise of them will be subject to endless dispute. Second, even if we grant that it is the function of lawyers (whether in the role of judge, counselor or advocate) to develop arguments that would appeal from the judicial viewpoint, it may not be the case that actual judges very often exemplify practical wisdom or civic-mindedness. Even for a lawyer who wants the arguments to persuade a judge, it might not be a virtue to play to these traits.

Third, Krouman's psychological claim is at worst empty and at best contentious and difficult to establish. Whether someone can perfectly mimic the genuinely practically wise and civic-minded judge, even though the imitator does not possess the lawyer-statesman's virtues, is an empirical question. Kronman cannot stipulate a priori that the mimic's decisions will necessarily diverge from the judge's. Furthermore, precisely because the traits of practical wisdom and civic-mindedness are subject to multiple and competing interpretations, it is always going to be an open question as to who is the mimic and who is the genuine article if the judgments of the two differ.

Fourth, not all lawyering is done with an eye toward litigation and adjudication. Lawyers perform many tasks for clients, often with only the remotest possibility of ending up before a court. Even if it did make sense for lawyers to cultivate practical wisdom and civic-mindedness in the event that it would facilitate their dealings with courts, this would be sensible for only a subset of lawyers some of the time.

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83. *Id.* at 141.

84. *Id.* at 141, 143.

Finally, Kronman may be mistaken about ideal judicial functions, virtues or both, so that even for those lawyers who should emulate ideal judges, Kronman urges the wrong virtues.

The flaws in Kronman's use of virtue ethics instruct my effort. His account is too judicially oriented and the virtues he discusses are too vague. If he were not so bent on characterizing the lawyer's function similarly to the judge's function he would not become bogged down in the debate over whether a lawyer can be effective by mimicking rather than genuinely cultivating judicial virtues. If he did not begin by idealizing the lawyer-statesman, he might not saddle himself with such vague virtues as practical wisdom and civic-mindedness.

In fact, Kronman is at his best when he specifies more precisely the traits that behoove lawyers. Kronman lists a variety of specific lawyerly virtues: the ability to identify costs and count them with accuracy and speed;<sup>85</sup> the ability to make wise decisions about how to order and pursue incommensurable ends;<sup>86</sup> the ability to imagine the implications and effects of pursuing competing ends, especially when selecting one rather than another will transform the identity of the chooser or the polity;<sup>87</sup> and the ability to maintain simultaneously sympathy and detachment.<sup>88</sup>

I would endorse some of these traits as lawyerly virtues. But I would justify their presence, and the inclusion of others, on the basis of a different conception of the lawyer's function than the one Kronman advances.

### III. LAWYERLY VIRTUES AND THE O.P.M. AFFAIR

As I said before, it may be that the functions that lawyers fulfill are so diverse that it is impossible to specify any virtues for attorneys regardless of the specifics of their position, particularly if one is to avoid the pitfall of specifying virtues as vague as practical wisdom and civic-mindedness. Nonetheless, I submit that all lawyers handle social problems that arise from diversity of people's interests and ends, which may or may not mesh. Acting in a representative capacity, lawyers serve to enable cooperation where it is possible and to manage competition when it is not.

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85. *Id.* at 55.

86. *Id.* at 58.

87. *Id.* at 64-69.

88. *Id.* at 66-74.

Appropriating virtue ethics' teleological approach, I now take up the issue of which virtues suit agents with this function. Identifying these traits, however, requires a better understanding of the lawyer's function as I have described it, and the context in which attorneys operate. I approach these questions first by more fully explicating what I mean by cooperation and competition and then through the use of a second major example.

I am referring to cooperation and competition in broad terms.<sup>89</sup> Cooperation occurs when parties work together to further their interests, regardless of whether these interests are shared or independent. (Of course, parties can develop a shared interest in cooperation itself, as a way of furthering their other, independent interests.) Competition arises when parties' interests are mutually exclusive, and whatever actions one party takes to advance her interests thwarts the advancement of the other's. Cooperative situations are win-win; competitive ones are zero-sum.

The relationship between cooperation and competition can be extremely complex, which accounts for some of the challenge of being a good lawyer. In any given situation, cooperation and competition may not be inconsistent with one another. For example, in a two-party business negotiation each side is competing for the most advantageous terms, but both share an interest in striking a deal. Negotiation itself is a form of cooperation. So is litigation. Litigants obviously compete but they do so within a system that they each have a shared interest in respecting so as to obtain a decisive, legitimate resolution of their dispute, itself usually an end both parties desire. Because any single agent can have an array of interests, with different interests standing in different relations to somebody else's various interests, the same parties may have reason to simultaneously cooperate and compete.

The relationship between cooperation and competition also figures prominently in normative ethics.<sup>90</sup> Not surprisingly, virtue

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89. There is a wide body of literature on cooperation and competition, particularly in the field of game theory. See, e.g., ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, *GAME THEORY AND THE LAW* (1994); RUSSELL HARDIN, *ONE FOR ALL: THE LOGIC OF GROUP CONFLICT* (1995); THOMAS C. SCHELLING, *CHOICE AND CONSEQUENCE* 195-242 (1984). Although my current purposes do not necessitate as fine-grained an analysis as can be found in much of this work, my own discussion owes a debt to that literature.

90. Ethicists cast this issue in a variety of terms, considering the relative moral value of altruism and egoism, see, for example, THOMAS NAGEL, *THE POSSIBILITY OF ALTRUISM* (1970),



ethicists, along with some other moral philosophers, emphasize the role of the sentiments in judging the ethical appropriateness of cooperation or competition, and also the part they play in simply prompting one or the other. Because cooperation and competition are central both to the practice of law and to ethical life, one might expect a close overlap between lawyerly and ethical virtues. Likewise one might anticipate a strongly similar place for the sentiments in both arenas. As the following example demonstrates, however, lawyerly virtues do not entirely duplicate ethical ones; nor do the sentiments occupy the same position in ethical deliberation and in technocratic lawyering.

The O.P.M. affair is more complicated, if less lurid, than the Lake Pleasant Bodies case. It provides an opportunity to test my claims about one function of attorneys, the virtues required to perform this function, the ethical status of these virtues and the problem of relying upon black letter codification to regulate lawyers' ethics. To evaluate the attorneys involved in the O.P.M. matter, we must understand whose interests were at stake, and which moments were ripe for cooperation and which for competition. For my purposes, two dimensions of the O.P.M. affair are significant: the underlying factual situation, including O.P.M.'s frauds and the various attorneys' reactions to them; and the personal and professional relationships between O.P.M.'s owners, between these owners and the attorneys and between the various attorneys.

O.P.M.<sup>91</sup> Leasing Services, one of the nation's largest computer leasing companies, fraudulently obtained about \$225 million from lending institutions before it collapsed into bankruptcy in early 1981. O.P.M. operated by buying computers and other business equipment with borrowed money and leasing the equipment out, using the equipment and the leases as collateral for the loans. Since its founding in 1970, O.P.M. attracted customers by offering extremely low rates—rates so low that it lost money.<sup>92</sup> As early as 1972, the company's

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or the competing ethical merits of benevolence and self-interest; see also HENRY SIDGWICK, *THE METHODS OF ETHICS* 89-95, 119-61, 238-63 (1962). As with cooperation and competition, these pairs are not entirely dichotomous.

91. The initials stand for "other people's money." Stuart Taylor, Jr., *A Close-Up Look at the Fraud That Ruined O.P.M.*, N.Y. TIMES, May 1, 1983, at 4 [hereinafter Taylor, *The Fraud That Ruined O.P.M.*].

92. "Contrary to appearances, O.P.M. in fact lost money in every year of its existence. O.P.M. was insolvent virtually from inception . . ." James P. Hassett, Report of the Trustee Concerning Fraud and Other Misconduct in the Management of the Affairs of the Debtor, *In re O.P.M. Leasing Services, Inc.*, Reorg. No. 81-B-10533, at 18 (BRL) (S.D.N.Y. Apr. 25, 1983).

founders and sole owners, Myron Goodman and Mordecai Weissman, began defrauding investors to keep O.P.M. afloat.<sup>93</sup> They began by using leases as collateral for more than one loan, and later used fictitious leases to get financing for computers that did not exist.<sup>94</sup> They also altered actual leases, inflating the value of the equipment or changing key terms in order to borrow larger amounts of money.<sup>95</sup>

Until the late 1970s, Goodman pushed the company toward ever bigger loans, dramatically expanding the size of the company.<sup>96</sup> However, in late 1978, the company's financial situation became desperate,<sup>97</sup> and, to avoid bankruptcy, Goodman began to engage in fraud on a much larger scale. Goodman and several accomplices used forged and altered leases with Rockwell International, the California aerospace company, to defraud lenders of more than \$188 million.<sup>98</sup> These new loans went to meet payments on old loans until the company ended up in bankruptcy in March 1981. In the following year, Goodman, Weissman and their O.P.M. accomplices pleaded guilty to charges of fraud.<sup>99</sup>

The law firm of Singer Hutner Levine and Seeman handled O.P.M.'s legal work from the time of O.P.M.'s inception.<sup>100</sup> Goodman

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93. In mid-1972, a lessee's refusal to sign an "equipment acceptance form" triggered Weissman and Goodman's first fraudulent financing. O.P.M. needed the money that the signing would provide, so Goodman sat under a glass table, holding a flashlight while Weissman traced the lessee's genuine signature from the lease onto the equipment acceptance form. *Id.* at 20; see also Taylor, *The Fraud That Ruined O.P.M.*, *supra* note 91, at 4.

94. For example, Weissman and Goodman obtained financing from two or three institutions on the security of a single lease in the amount of at least \$4.2 million through 1976. Hasset, *supra* note 92, at 20.

95. *Id.*

96. Between 1975 and 1977, they financed "phantom" leases covering equipment that did not exist and forged leases for "piggyback" transactions where one user supposedly agreed to lease equipment upon expiration of another user's lease of the same equipment. *Id.*

97. O.P.M.'s disastrous financial situation in 1978 can be blamed on another of its marketing ploys. To attract customers, O.P.M.'s lease agreements provided that lessees could terminate their lease agreements before the end of the agreed lease term if the leased equipment became obsolete. In 1977, I.B.M. announced a new generation of computers, and lessees began returning O.P.M. computers in droves. Using a new device of deception, Goodman kept the effects hidden for over three years. O.P.M. reported profits in 1977 because Goodman convinced the company accountants to invent a method permitting O.P.M. to recognize income from equity transactions prematurely. *Id.* at 22-23.

98. *Id.* at 24.

99. The O.P.M. fraud was one of the largest frauds in history. Most of the fraud proceeds went to meet O.P.M.'s incredible cash obligations; participants did not retain any significant amounts for their personal use. *Id.* at 26.

100. Singer Hutner "played an essential role" in O.P.M.'s business. They helped negotiate leases, issued opinion letters to financing institutions, participated in corporate acquisitions and investments and closed transactions. *Id.* at 333.

selected the firm because his childhood friend, Andrew Reinhard, worked there.<sup>101</sup> Singer Hutner handled O.P.M.'s legal work for the entire decade, closing loans and writing the legal opinions that lenders relied on as to O.P.M.'s title to computers and as to the legality of O.P.M. leases. Singer Hutner also handled the personal legal affairs of the O.P.M. owners, Goodman and Weissinan. O.P.M. and Singer Hutner had an extremely close relationship.<sup>102</sup> Reinhard became a director of O.P.M., and several other Singer Hutner lawyers were company officers. O.P.M. was easily Singer Hutner's most important client. From 1976 through 1980, sixty to seventy percent of Singer Hutner's total income came from O.P.M. work.<sup>103</sup>

According to Singer Hutner lawyers, they first realized the possibility of O.P.M.'s wrongdoing in June of 1980.<sup>104</sup> On June 12, 1980, a troubled Myron Goodman went to see Joseph Hutner, a senior partner in the law firm. Goodman told Hutner that he (Goodman) had done something wrong in his stewardship of the company, something he could not fix because it involved millions of dollars.<sup>105</sup> However, Goodman refused to provide any details because Hutner could not promise to keep the information secret.<sup>106</sup> Hutner could not make such a promise because the firm represented O.P.M. itself and he thus might have to inform Weissinan, the other owner.<sup>107</sup>

Goodman's visit to Hutner was prompted, at least in part, by the actions of O.P.M.'s chief in-house accountant, John Clifton. Clifton had told Goodman that he had discovered evidence of the Rockwell lease fraud, and that he was sending the information to Reinhard in a letter. After consulting with his own lawyer, Clifton had decided to

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101. *Id.* at 31.

102. Singer Hutner committed significant resources to O.P.M. By 1980, over ten of the fifteen associates employed by the firm in New York worked exclusively on O.P.M. matters. In 1978, the firm opened a branch office in Los Angeles at Goodman's direction. *Id.* at 339-40.

103. *Id.* at 31. From 1976 through 1980, O.P.M. paid Singer Hutner legal fees of almost \$7.9 million and almost \$2 million in reimbursement for expenses. *Id.*

104. Goodman alleged, however, that Reinhard participated in the fraud. Reinhard was investigated but never indicted. Conflicting evidence suggests that several Singer Hutner lawyers were aware, beginning in 1977, that O.P.M. officials had engaged in double discounting of leases, other lease fraud and check kiting activities. *Id.* at 360. Discoveries of fraudulent leases, false financial statements and payoffs trickled in over the next three years. *Id.* at 362-63.

105. Goodman admitted to past "wrongful transactions" exceeding \$5 million. *Id.* at 33.

106. Goodman resisted pressure to provide Singer Hutner with complete details in a number of ways, including threatening to jump out of a ninth-story window at O.P.M.'s offices. *Id.* at 34.

107. *Id.* at 374.

turn the information over to Singer Hutner and then resign, leaving it to Singer Hutner to decide whether to blow the whistle on O.P.M.<sup>108</sup>

While Goodman was still in Hutner's office, Clifton's letter was delivered to Reinhard's office down the hall. Goodman was thus able to retrieve the letter from Reinhard's office.<sup>109</sup> Goodman took the Clifton letter when he left Singer Hutner that day, still refusing to explain what he had done wrong but insisting it was all in the past. Goodman, however, urged Hutner to speak with Clifton's lawyer, William J. Davis.

Hutner did go to Davis. Davis later stated that he had been prepared to give Hutner a copy of Clifton's letter and tell Hutner everything he wanted to know, but that Hutner seemed intent on trying to persuade Davis that Clifton should keep silent and take back his letter.<sup>110</sup> According to Davis, Hutner seemed anxious to preserve a "smoke screen" of deniability.<sup>111</sup> Davis stated: "I had visions of him clamping his hands over his ears and running out of the office."<sup>112</sup>

Although Hutner disagreed with Davis' account of the meeting, it is clear that Davis did provide Hutner with crucial information.<sup>113</sup> According to a Singer Hutner memorandum prepared at the time, Davis told Hutner that Clifton had evidence that O.P.M. had engaged in a multimillion-dollar fraud and that opinion letters prepared by Singer Hutner which enabled O.P.M. to obtain loans had been based on false documents. Davis also told Hutner that according to Clifton, O.P.M. would probably have to continue its wrongful activity in order to survive.

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108. Clifton testified, "[I]t was my assumption that once Singer Hutner was notified, that the fraud would stop, on the basis that Myron could not do the transactions without opinion of counsel." *Id.* at 307.

109. It is unclear exactly how Goodman obtained the letter, and whether Reinhard had read it before Goodman took it. "Goodman refused to return the letter or provide additional details of his acknowledged wrongdoing, citing his desire for assurances that Singer Hutner would keep the information secret under the attorney-client privilege." *Id.* at 33.

110. *Id.* at 376.

111. Stuart Taylor, Jr., *Ethics and the Law: A Case History*, N.Y. TIMES, Jan. 9, 1983 [hereinafter Taylor, *Ethics and the Law*] (quoting Davis).

112. *Id.*

113. Davis told Hutner that the Clifton letter "possibly revealed a felony"; that the amount at issue "dwarfed" O.P.M.'s earlier check kiting scheme; that in Clifton's opinion O.P.M. could not survive without continued wrongdoing; and that Clifton concluded that Singer Hutner had unknowingly issued incorrect opinion letters based on false documentation provided by O.P.M. Hassett, *supra* note 92, at 377.

Singer Hutner thus became aware that it might be deeply involved in a huge fraud.<sup>114</sup> The Singer Hutner lawyers decided to obtain outside legal advice to determine what their obligations were. On June 25, and a few days following, they consulted two lawyers, Joseph M. McLaughlin, then dean of Fordham Law School<sup>115</sup> and an expert on attorney-client privilege, and Henry Putzel III, a former federal prosecutor who had taught professional responsibility at Fordham. At the meeting, Hutner and several other Singer Hutner lawyers explained to McLaughlin and Putzel what they had learned from Goodman and Davis and expressed their desire to continue representing O.P.M. unless they were ethically obligated to stop.<sup>116</sup>

McLaughlin and Putzel told the Singer Hutner lawyers that they could ethically continue to represent O.P.M., closing new loans and so forth, because Goodman had assured them there was no ongoing fraud.<sup>117</sup> They advised the firm to try to discover the details of Goodman's past wrongdoing to help them guard against any continuing fraud, but not to push Goodman too hard until he obtained a lawyer—the firm's obligations to O.P.M. might be inconsistent with Goodman's best interests. In addition, Singer Hutner was required to keep everything it had already learned secret, except from Weissman. Putzel also advised the firm that it had no legal duty to withdraw the possibly fraudulently-based opinion letters that it had provided to banks for O.P.M.; according to Putzel, leaving past victims of fraud uninformed of what happened did not constitute an ongoing fraud.<sup>118</sup>

On McLaughlin and Putzel's advice, the firm did implement some prophylactic efforts to deal with the possibility of new attempts to

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114. Goodman and other O.P.M. officials purposefully separated Rockwell and Singer Hutner to protect the fraud. For example, they instructed Singer Hutner to send Rockwell's execution copies to O.P.M., on the premise that an O.P.M. employee was visiting Rockwell and would personally arrange for execution of the documents. *Id.* at 358-59.

115. Currently, Judge McLaughlin sits on the Second Circuit, U.S. Court of Appeals.

116. Hassett, *supra* note 92, at 379. Singer Hutner submitted to McLaughlin and Putzel a written list of questions. *Id.* at 381. The questions themselves indicate that Singer Hutner sought the highly technocratic counsel McLaughlin and Putzel delivered. Question 5 quotes the prevailing New York Code of Professional Responsibility, asking whether the information the firm received fell within the confidentiality provisions of the Code. Questions 2, 6 and 7 ask about the law firm's barest obligations related to disclosure. None of the seven questions includes any sentimental blend concepts, and in none does Singer Hutner ask, simply, what McLaughlin and Putzel think would be the ethically best behavior for the law firm.

117. "There is no question that the advice of McLaughlin and Putzel rested on the belief that the matter involved *past* fraud." *Id.* at 383 (emphasis added).

118. *Id.* at 390.

commit fraud.<sup>119</sup> They required O.P.M. to certify in writing the legitimacy of each new transaction. However, this proved to be an insignificant barrier for Goodman, who simply signed certifications he knew to be false.<sup>120</sup>

Goodman put off giving Singer Hutner detailed information of his "past" wrongdoing, and Goodman's new lawyer, Andrew Lawler, assured Putzel that he knew of no ongoing fraud.<sup>121</sup> Lawler's assurances are unsurprising: All of his information came from Goodman, to whom Hutner had previously explained the scope of the attorney-client privilege. Goodman thus knew that disclosures to Lawler would only be protected insofar as they did not indicate an ongoing fraud.

Although there were signs of O.P.M.'s continuing fraud—bills of sale for computers that O.P.M. did not have the money to buy, different bills of sale containing identical serial numbers, the sudden resignation of an outside accounting firm—Singer Hutner accepted O.P.M.'s explanations. Singer Hutner continued closing loans for O.P.M. despite these occurrences and despite Goodman's continuing refusal to disclose the details of his wrongdoing. Leases securing loans of \$22 million in June, \$17 million in July and \$22 million in August later proved to be fraudulent.<sup>122</sup>

In the first week of September, Goodman finally told Hutner some of the details of the fraud.<sup>123</sup> Although he still believed that the fraud had ended by June, Hutner decided that the firm ought to withdraw from representation. After a series of discussions over a two-week period, Singer Hutner voted formally to resign as O.P.M.'s general counsel.<sup>124</sup> Pursuant to Putzel's advice that withdrawal had to be accomplished in the manner least likely to cause injury to the client,

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119. *Id.* at 387-88.

120. *Id.* at 389.

121. Singer Hutner and McLaughlin and Putzel believed that Lawler's representation of Goodman provided assurance that the fraud had ended, "because they knew Lawler would never knowingly represent a client who was committing crimes." *Id.* at 390.

122. After Goodman's June 1980 confession, Singer Hutner represented O.P.M. in 15 fraudulent O.P.M.-Rockwell transactions, involving approximately \$70 million (about 40% of the total value of 47 fraudulent leases). *Id.* at 334.

123. Goodman claimed he was making a complete confession. Yet, his description of the Rockwell fraud quantified it at \$100 million short of the truth. He also insisted O.P.M.'s fraud had stopped by June 1980, when in fact fraud continued throughout the summer. *Id.* at 34.

124. *Id.* at 390-97.

the firm withdrew gradually, completing the process in December of 1980.<sup>125</sup>

Singer Hutner decided not to disclose any information about O.P.M.'s fraud.<sup>126</sup> Based on Goodman's continued assurances that the fraud had ceased, Putzel advised that Goodman's secrets were protected by the attorney-client privilege. Singer Hutner accepted this view, even after discovering that Goodman had used Singer Hutner to close fraudulent loans from June through September.

On Putzel's advice, the law firm responded to inquiries from lenders by stating that Singer Hutner and O.P.M. had mutually agreed to part ways. The firm dealt the same way with O.P.M.'s new lawyers. Singer Hutner said nothing of the fraud to the O.P.M. in-house counsel who was preparing to handle new loan closings, but instead sent a memorandum suggesting verification procedures that should be used for all O.P.M. financings. Goodman was able to edit the memorandum to remove any signals of problems with the Rockwell leases. Singer Hutner lawyers refused to answer direct questions from the in-house counsel as to the propriety of certain transactions.

Singer Hutner dealt with the law firm that ultimately replaced them, Kaye, Scholer, Fierman, Hays & Handler, in the same manner.<sup>127</sup> Although Hutner wanted to warn Peter Fishbein, an old friend and a partner at Kaye Scholer, to stay away from O.P.M., Putzel advised him he could not do so. Fishbein phoned Hutner in October 1980 and asked "if there was anything he should be aware of" in considering becoming O.P.M.'s counsel.<sup>128</sup> Fishbein said, "Look; Joe, you and I have been friends for 20 years. I will assume that if there are problems, you will say, 'Think twice.'" <sup>129</sup> Hutner's only response was that "the decision to terminate was mutual and that there was mutual agreement that the circumstances of termination would not be discussed."<sup>130</sup> Based on comments from O.P.M., Kaye Scholer assumed

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125. Singer Hutner characterized its resignation as a "mutual determination of our firm and [O.P.M.] to terminate our relationship as general counsel." The Bankruptcy Trustee called this characterization misleading. *Id.* at 34.

126. McLaughlin and Putzel did not think Singer Hutner could ethically inform law enforcement officials or affected third parties about Goodman's wrongdoing. *Id.* at 388.

127. O.P.M.'s in-house counsel and Kaye Scholer represented O.P.M. in its lease transactions after Singer Hutner's withdrawal. Kept ignorant by Goodman and Singer Hutner, O.P.M.'s staff closed six fraudulent leases, and Kaye Scholer closed one. *Id.* at 35 n.4.

128. Taylor, *Ethics and the Law*, *supra* note 111, at 31.

129. Larry Lempert, *Silence in Face of Fraud Not Compelled by Ethics*, *LEGAL TIMES*, Jan. 24, 1983, at 12.

130. Taylor, *Ethics and the Law*, *supra* note 111, at 31.

that O.P.M., which seemed to be a healthy company, had simply grown too big for Singer Hutner.<sup>131</sup>

Singer Hutner's silence allowed Goodman to continue to obtain fraudulent loans. In December 1980 and early 1981, Goodman used Kaye Scholer to close more than \$15 million in loans secured by bogus leases.<sup>132</sup>

The fraud finally came to an end in February 1981, when a routine inquiry from a bank lawyer led a Rockwell official to discover that the signatures of a Rockwell executive on two leases were forgeries.<sup>133</sup> Federal prosecutors charged Goodman, Weissman and five accomplices with fraud, and O.P.M. went into bankruptcy. Lenders sued Singer Hutner, Rockwell and several other codefendants as accomplices in O.P.M.'s fraud. The defendants settled the suits for \$65 million. None of the Singer Hutner lawyers was charged with any crime.<sup>134</sup>

The O.P.M. affair became something of a *cause célèbre*, in both the popular press and among legal ethics experts. In the affair's aftermath, Hutner claimed that he "would have been much happier protecting the other lawyers, and in particular [his] close personal friend, Peter Fishbein, from getting in bed with a criminal."<sup>135</sup> Based on Putzel's counsel, Hutner maintained that the prevailing statutory code of lawyers' ethics prevented him from doing this. Yet Geoffrey Hazard, a leading legal ethics expert hired by Fishbein, insisted that Putzel had misinterpreted the prevailing code, despite some language that seemingly warranted Putzel's reading.<sup>136</sup>

The relevant Model Code provision, Disciplinary Rule 7-102(B)(1), as modified when incorporated into New York law, stated:

A lawyer who receives information clearly establishing that . . . [his] client has, in the course of representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal

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131. Lempert, *supra* note 129.

132. Taylor, *Ethics and the Law*, *supra* note 111, at 31; *see also* Weissman v. United States, 599 F.Supp. 1366, 1369 (S.D.N.Y. 1985); *In re* O.P.M. Leasing Services, 16 B.R. 932, 934-35 (Bankr. S.D.N.Y. 1982).

133. Taylor, *The Fraud That Ruined O.P.M.*, *supra* note 91, at 4.

134. *Id.*

135. *Trustee's Criticism of Lawyers in O.P.M. Imbroglia*, LEGAL TIMES, May 2, 1983, at 20.

136. Lempert, *supra* note 129.



the fraud to the affected person or tribunal *except when the information is protected as a confidence or secret.*<sup>137</sup>

According to Hazard, the confidentiality exception provided some basis for Putzel's advice to Singer Hutner, but a further exception—to the confidentiality rule itself—trumps. This further exception excludes from confidence any communications in furtherance of the client's wrongdoing during the course of the representation. Since Goodman continued to rely on Singer Hutner's work products while revealing to Singer Hutner his fraudulent transactions, Hazard argued, Singer Hutner could have fully disclosed O.P.M.'s wrongdoing. At minimum, according to Hazard, Hutner could have alerted Fishbein to problems with the transactions that involved Singer Hutner. Hazard stated that an interpretation of the Code that found Singer Hutner lawyers neither obligated nor permitted to disclose at least that information to Kaye Scholer was "conceivable, but wrong."<sup>138</sup>

Before turning to the ethical performance of Singer Hutner, McLaughlin and Putzel and Hazard, let us first evaluate their lawyering. In the O.P.M. affair, Singer Hutner, McLaughlin and Putzel and Hazard all engaged in technocratic lawyering: They focused on mere compliance with the black letter ethics codes, rather than the issue of what would be, all things considered, ethically correct. They sought nonethical goals, treating the codes as obstacles or aids to achieving these ends, rather than as inspiration to robust ethical deliberation. For such deliberation, they substituted casuistic legal analysis of black letter law.

Without doubt, in defrauding their investors and customers, Goodman and Weissman acted both illegally and unethically. More interesting is the situation Goodman created for Singer Hutner by continuously deceiving them about O.P.M.'s condition and the nature of its dealings. Singer Hutner worked for a consistently unscrupulous, uncooperative client. As the relationship between O.P.M. and Singer Hutner progressed, the law firm had various opportunities to discover or plumb the depths of O.P.M.'s problems and wrongdoing, but the firm consistently chose not to. This meant that in one sense Singer Hutner cooperated with O.P.M.'s frauds. In a deeper sense, however, Singer Hutner's failure to probe put the firm into competition not only with O.P.M.'s customers, but with O.P.M. itself.

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137. N.Y. CODE OF PROFESSIONAL RESPONSIBILITY LAW § 1200.33 (McKinney 1995) (emphasis added).

138. Lempert, *supra* note 129.

Obviously, once O.P.M. began its fraudulent activities, its interests were in conflict with those of its customers. Insofar as Singer Hutner assisted the fraud, all the while collecting its fees, some of Singer Hutner's interests—its financial ones—also conflicted with those of O.P.M.'s investors. To this extent, Singer Hutner (wittingly or unwittingly) joined O.P.M. in adopting a competitive stance toward the lenders. Singer Hutner and O.P.M. ended up with a shared financial interest, adverse to the interests of O.P.M.'s lenders, in perpetuating O.P.M.'s fraud. To this extent, Singer Hutner cooperated with O.P.M. In doing so, however, Singer Hutner also put some of its interests in conflict with O.P.M.'s, because adequate legal representation requires a large measure of honesty from the client.

As the O.P.M. fraud scheme developed, it became ever more important for Goodman to hide his doings from Singer Hutner. The Singer Hutner lawyers, in turn, allowed this so as not to have to take legally required action on the basis of knowledge of an ongoing fraud. By superficially cooperating with O.P.M.'s scheme, Singer Hutner made it difficult for itself to effectively represent O.P.M., because Singer Hutner never had a realistic or full awareness of O.P.M.'s operations. A law firm that cannot effectively represent its client is in conflict with that client. More vividly, Singer Hutner's financial interests in continuing to represent O.P.M. put the firm in the position of *not wanting* to fully understand O.P.M.'s transactions, and this presumably interfered with its ability to represent O.P.M. Had O.P.M. come clean with Singer Hutner earlier, Singer Hutner might have been able to discourage criminal activity, ultimately reducing or eliminating criminal penalties imposed on Goodman and Weissman. Singer Hutner might have been able to assist O.P.M. in developing a legitimate, profitable way of doing business, protecting O.P.M. from massive civil liability and eventual bankruptcy. Instead, it seems that Singer Hutner always chose not to know, and hence, could not truly help.

Turning now to the other lawyers central to the O.P.M. affair, McLaughlin and Putzel, we can examine how their conduct reflected decisions about cooperation and competition.

Singer Hutner told McLaughlin and Putzel that despite the firm's knowledge of Goodman's past frauds, the firm wished to continue representing O.P.M., unless the law of professional ethics required

them to stop. Acting as lawyers often do, McLaughlin and Putzel accepted Singer Hutner's avowed goals as being in Singer Hutner's interests. They advised the firm accordingly. In fact, McLaughlin and Putzel told Singer Hutner lawyers they were required to do much of what they wanted to do in any event.

McLaughlin and Putzel helped Singer Hutner develop an approach and a legal justification for continuing to represent O.P.M. Singer Hutner's continuing silence about O.P.M.'s wrongdoing lay at the center of this plan. This silence permitted a form of cooperation between Singer Hutner and O.P.M. By not blowing the whistle on its client, the firm could continue representation, although the attorneys would be hampered by their ongoing need not to know essential information about O.P.M.'s current dealings. This apparently cooperative approach actually extended the competitive relationship between Singer Hutner and its client, a relationship that depended upon Singer Hutner keeping itself uninformed and, hence, underprepared to assist O.P.M.

By adopting McLaughlin and Putzel's strategy, Singer Hutner could conceivably justify withholding information from the victims of O.P.M.'s earlier misdeeds while protecting itself from learning about any ongoing fraud. That sort of knowledge would force disclosure. In essence, then, McLaughlin and Putzel advised Singer Hutner to require repeated assurances from Goodman that he was no longer defrauding investors and customers. Goodman repeatedly supplied these pledges, and Singer Hutner repeatedly accepted them—despite the obvious reasons for doubting Goodman's credibility and independent evidence of more fraud, such as bills of sale for computers O.P.M. could not afford, suspicious lease documents and the abrupt resignation of an independent accounting firm.

When Hutner finally decided to withdraw from representing O.P.M., Putzel advised that this be done slowly to minimize harm to O.P.M. This advice seemingly protected both O.P.M. and Singer Hutner, assuming that it was based on a proper understanding of Singer Hutner's legal obligations. As part of the protect-O.P.M. approach, Putzel advised Singer Hutner to tell curious lenders and O.P.M.'s new lawyers that the decision to part ways had been made mutually. This measure put Singer Hutner into direct conflict with the lenders, O.P.M.'s own in-house counsel and Kaye Scholer. According to Putzel, for Singer Hutner to act legally (and ethically), the firm had to deprive others of information they needed in order to protect their

own financial and professional interests. Singer Hutner had to adopt a competitive stance toward these parties. Furthermore, this strategy protracted Singer Hutner's conflict with O.P.M. itself: Singer Hutner's evasiveness both allowed O.P.M. to obtain counsel that otherwise might not have agreed to represent O.P.M. and hamstrung O.P.M.'s new lawyers through the same lack of information that had interfered with Singer Hutner's capacity to provide O.P.M. with thorough, competent representation.

In the O.P.M. affair, each lawyer's conduct included decisions about cooperation and competition. The episode confirms my broad characterization of a lawyer's function: While acting in a representative capacity, a lawyer enables cooperation and manages competition, specifically in situations involving diverse, not necessarily congruent interests. In this Article, I do not attempt a full-fledged account of good and bad lawyering. But to determine the relationship between good lawyering and good ethical deliberation, we need to make some judgments about what constitutes good lawyering. I propose to do so in the context of the O.P.M. example, albeit with the recognition that my own assessments may be subject to question.

Both Singer Hutner and McLaughlin and Putzel did what lawyers often do: what their clients want. Goodman wanted to continue O.P.M.'s operations; he wanted Singer Hutner to facilitate this; Singer Hutner did. For a time, Singer Hutner wanted to continue to represent O.P.M. as long as it could do so lawfully; McLaughlin and Putzel devised an arguable legal justification and approach to permit this. Acting in their technocratic capacities, both Singer Hutner and McLaughlin and Putzel served their clients. McLaughlin and Putzel, however, were better technocrats than Singer Hutner.

As I noted before, Singer Hutner consistently made choices about cooperation and competition that actually undermined the firm's ability to serve its client's best interests, let alone accommodate anybody else's. Even if we consider how Singer Hutner's choices may have furthered its own short-term financial interests, the firm did a poor job of considering its own long-term interests, particularly in preserving its reputation. Whatever their success or failure as ethical deliberators, the Singer Hutner attorneys performed poorly as technocratic lawyers.

Not so, however, with McLaughlin and Putzel. While they could perhaps have done a better job, their lawyering had at least some technocratic merit. At the time Singer Hutner consulted McLaughlin

and Putzel, the law firm's position was already dicey. While not actively aware of ongoing fraud, Singer Hutner had reason to suspect trouble, based on Goodman's vague confession. Working with the presumption of continued representation, McLaughlin and Putzel had to develop a strategy that would legitimate Singer Hutner's competing legal obligations under New York law. Singer Hutner had to keep its client's confidences *and* avoid aiding ongoing fraud. Putzel's prophylactic measures achieved the requisite delicate balance, protecting the law firm from subsequent legal action by O.P.M. or its investors. Likewise, when Singer Hutner decided to withdraw as O.P.M.'s counsel, Putzel recommended a course of action that would protect Singer Hutner's legal and prudential interests in treating its client's confidences with care.

McLaughlin and Putzel did not achieve technocratic perfection. Following their advice kept Singer Hutner in the dark about O.P.M.'s actual operations. It also may have created the appearance that Singer Hutner had always known more than it ever acknowledged, and that the firm's circumspection about the reasons for withdrawal was more narrowly self-protective than I have suggested. Nonetheless, given Singer Hutner's difficult position and the prevailing statutory code of ethics, McLaughlin and Putzel provided somewhat competent technocratic legal advice.

Of course, even competent lawyering can be criticized on lawyerly grounds. Geoffrey Hazard disputed Putzel's interpretation of then-current New York law, arguing that better *legal* advice would have permitted—perhaps even have dictated—disclosure of O.P.M.'s wrongdoing, at least to Kaye Scholer. Hazard's objections typify lawyerly disagreement. He grounded them in a rival interpretation of the relevant statutory text, focusing on the meaning of terms such as "confidence" and "ongoing fraud" and the relationship between one statutory provision and another. Putzel's argument depended on the same sort of skillful technocratic analysis.

Now we turn to the various attorneys' ethical performances and the role of the statutory code of legal ethics in their deliberations. Our goal is to compare the lawyers' exercise of technocratic lawyerly virtues to their exercise of ethical ones. We aim to address specifically the question of whether lawyers governed by a black letter code of ethics can—or are likely to—function well as attorneys and simultaneously engage in robust, authentic ethical deliberation.

Primarily, I am interested in the character of the lawyers' ethical deliberation, rather than whether their actions were ethically correct. I restrict my interest because the central objective of this Article is to examine the relationship between genuine ethical deliberation and technocratic legal analysis. We lack a shared, complete account of normative ethics by which to judge the attorneys' particular actions. Moreover, even genuine ethical deliberation may well deliver incorrect ethical guidance under certain circumstances. Finally, even good ethical deliberators whose deliberations have yielded good guidance sometimes fail to act accordingly. So, I do not mainly measure the authenticity of the lawyers' ethical deliberations according to the choices they ended up making. Nonetheless, because some correlation clearly exists between good, genuine ethical deliberation and good ethical choices and actions, the following analysis includes and depends upon some fairly uncontentious (I hope) specific normative judgments.

Unlike the Lake Pleasant Bodies example, which included Frank Armami's post hoc reflections, in the O.P.M. case we have little direct information about the various attorneys' thoughts and feelings as they deliberated Singer Hutner's behavior. Still, we can reconstruct the lawyers' deliberative experiences well enough, I think, to see how closely they captured the essence of ethical deliberation and to ascertain the role of the statutory code.

Relying upon virtue ethics theory and Armami's example, I have argued that the good ethical deliberator possesses at least three features: willingness to consider but question established moral precepts, thereby displaying both humility and a sense of personal moral responsibility; willingness and ability to recognize ethical dilemmas; and capacity to respond to specific features with warranted sentiments and to be guided by these sentiments in making ethical judgments. Neither Hutner nor McLaughlin and Putzel seem to have displayed these qualities. In fact, by consistently exercising technocratic legal analysis to determine how the black letter code could be construed so as to permit their preferred outcomes, it appears the lawyers stifled these trademark qualities.

When Singer Hutner consulted outside legal counsel, they did not seek McLaughlin and Putzel's advice as to what the firm should do, regardless of the law's dictates. There is no evidence that this was because either Singer Hutner or McLaughlin and Putzel reflectively equated ethical conduct with legally acceptable behavior. In fact, the

data suggest otherwise. Hutner experienced pangs of conscience over his deception of his old friend Peter Fishbein, the Kaye Scholer partner. Hutner explained his behavior by saying he was just doing as the law required—giving no sign that he ever stopped to consider whether the law's commands, as he understood them, were ethically appropriate. Nor is there any evidence that McLaughlin and Putzel, the so-called ethics experts, did more than provide technocratic legal analysis. They adopted their client's objective as their guiding principle and supplied an instrumentally effective interpretation of the relevant law. They did not challenge the ethical correctness of Singer Hutner's objective nor did they doubt the ethical legitimacy of a legal interpretation of the statutory ethics code that licensed Singer Hutner's behavior. While they consulted codified ethical rules, neither Singer Hutner nor McLaughlin and Putzel took personal moral responsibility for their respective actions and recommendations.

It seems also that none of the lawyers appreciated the various ethical dilemmas posed by the O.P.M. situation. These included the irresolvable conflicts between respecting Singer Hutner's own short- and long-term interests in the situation; between respecting O.P.M.'s interests and its investors' interests; and between respecting Singer Hutner's interests and O.P.M.'s. For the law firm, no course of action could meet the needs of all the parties, or even of all the innocent parties. Yet neither Singer Hutner nor McLaughlin and Putzel seem to have realized this. Even if we construe McLaughlin and Putzel's recommendations as a compromise between the competing interests, this simply reiterates that some were partially or wholly sacrificed. Further, we have no reason to think that Singer Hutner or McLaughlin and Putzel regarded the chosen course as a compromise. It seems, rather, that they all felt that as long as Singer Hutner abided by the letter of the New York code, this eliminated any ethical problems.

The lawyers apparently failed to appreciate the ethical dilemmas inherent in the situation or to experience the problem as one of personal moral responsibility. These sorts of failings are likely to stem from a third, most significant one: Hutner, McLaughlin and Putzel seem hardly to have engaged emotionally with the situation, if they did at all. Where sentiment did surface, the lawyers ignored it, as when Hutner quashed behavior toward Fishbein prompted by sentiments of friendship and loyalty in favor of following Putzel's legal advice. More glaring is the apparent absence of certain seemingly well-warranted sentimental responses. Nowhere does the record show that

Singer Hutner attorneys or McLaughlin and Putzel reacted with outrage on behalf of O.P.M.'s investors and customers. Hutner does not even express a sense of betrayal due to Goodman's deceit. While it is impossible to know with certainty that Hutner, McLaughlin and Putzel did not experience these sentimental responses, their behavior indicates they did not.

Without certain sentimental responses to specific features of the O.P.M. situation, it makes sense that the attorneys neither perceived the extent of the ethical dilemmas present nor felt personal moral responsibility for their actions. As we saw with Frank Armani, emotional engagement of the appropriate kind is at least part of what makes an ethical deliberator sensitive both to ethical dilemmas and to his own ethical responsibility in the circumstances.

Whether Hutner, McLaughlin and Putzel simply failed to experience this sort of emotional engagement, or did so but chose to ignore its signals, it certainly seems that the black letter provisions of New York's ethics code invited technocratic analysis, and thereby fostered their detached stance. As the post mortem quarrel between Hazard and Putzel confirms, a focus on the code turns attention toward an unsentimental analysis of technical terms such as "confidence" and "ongoing fraud." There is little or no place for sentimental response in this sort of analysis. It may in fact be that sentimental responsiveness would affirmatively interfere.

Note that the clash between good ethical deliberation and technocratic legal analysis occurs regardless of the quality of the lawyering. McLaughlin and Putzel, who provided relatively good technocratic services, fared no better as ethical deliberators than Singer Hutner, whose technocratic advice was rather poor.

#### IV. THE VALUE OF RULES? THE VALUE OF LAWYERS?

Statutory codes of professional ethics seem to trigger in lawyers dispositions that, at worst, run counter to ethical dispositions, and, at best, make them appear superfluous. The extent and strength of this tendency may be debatable, but its existence is clear. Whether the tendency should worry us is another question. In this Part, I address two arguments against concern.

The first is an argument from the general value of rules. In broad form, this argument maintains that rule-based decisionmaking has various advantages. Rules can save time, eliminate arbitrariness and



maximize correct results over numerous judgments. My own critique of statutory, codified lawyers' ethics is not a general attack on rules or rule-based decisionmaking. Yet I do maintain that whatever advantages codified black letter rules offer in other settings, they do not obtain when it comes to fostering ethical deliberation in lawyers.

Let's consider more carefully the features and merits of rules, relying upon Fred Schauer's trenchant analysis and qualified endorsement of rules.<sup>139</sup> Schauer's work actually supports the thesis that legal rules are inappropriate tools for guiding lawyers' conduct—although this support does not necessarily take the form Schauer himself might expect.

According to Schauer, rules are entrenched generalizations that serve to allocate power among various decisionmakers. As generalizations, rules are likely to be underinclusive or overinclusive in the face of various particular situations. As allocators of power, rules possess a jurisdictional dimension, instructing a decisionmaker to ignore even particulars relevant to the situation but not the rule. This directive implements the likely underinclusiveness and overinclusiveness of rules. Schauer notes that the merits of rules depend on context. As he summarizes:

Where decision-makers are likely to be trusted, and where the array of decisions they are expected to make will contain a high proportion of comparatively unique decision-prompting events with serious consequences if they are decided erroneously, we might expect the rule-based mode to be rejected, or at least its stringency tempered. But where there is reason to distrust a set of decision-makers with certain kinds of determinations, and where the array of decisions to be made seems comparatively predictable, errors of rule-based under- or over-inclusion are likely to be less prevalent than decision-maker errors, and consequently the argument for rules will be stronger.<sup>140</sup>

The live ethical controversies faced by lawyers—like all live ethical problems—fall into the category of “unique decision-prompting events with serious consequences if they are decided erroneously.” If we care about ethics at all (that we should is not a claim I can undertake to defend here), then ethical error simply is serious error: Our aim is its avoidance. Moreover, one of the reasons for the genuine difficulty of live ethical problems is the uniqueness of such cases.

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139. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND LIFE* (1991).

140. *Id.* at 152.

Often, a truly hard ethical case is formidable because it is unfamiliar. The situation presents the agent with a configuration of ethical demands previously unencountered, perhaps unanticipated. The distinctiveness of the configuration stems from the specifics of the circumstances. Armani's dilemma illustrates both sorts of uniqueness. He confronted a truly tough ethical decision because he was torn between the usual demands of client confidentiality and the unusual opportunity to alleviate the suffering of parents whose children had been murdered and the corpses still undiscovered. This unusual configuration assumed its particular shape because of significant details. The size of the community, Garrow's particular crimes and his attitude toward them, the parents' ability to contact Armani directly: Each of these specifics, and others, contributed to the ethical complexity and individuality of the situation.

Ethical problems generally may not present the sort of context best suited to decision by rules, as defined by Schauer. Whatever the merits of this broad claim, however, Schauer's account supplies specific reason to doubt the usefulness of ethics rules for lawyers.

Schauer considers rules "entrenched generalizations" and emphasizes that they consist of the meaning of these generalizations rather than in embodiment in some canonical form.<sup>141</sup> To be a bit reductionist, this is an elegant way of saying a rule consists in its spirit rather than its letter. If my earlier arguments are correct, however, many lawyers may well not be the sort of decisionmakers who respond to rules as if this were so, especially if the rules appear as black letter statutes. At least in their professional capacity, lawyers focus on the letter of a rule, and tend to see its spirit in accordance with the non-rule-based preference, intuition or objective the attorney brings to the analysis. Granting that Schauer correctly understands rules as entrenched generalizations, lawyers are trained to resist these, to see new cases as exceptions or any rule itself as less entrenched or general than another decisionmaker might. With lawyers, rules perform their jurisdictional function poorly. Attorneys presented with ethics rules can, using their powers of legal analysis, refer to circumstances the rule may mean to exclude or ignore factors the rule means to encompass, thereby escaping the rule's jurisdictional force.

Schauer himself doubts the appropriateness of jurisdictional boundaries in moral decisionmaking, and hence doubts the place of

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141. *Id.* at 72.

rules in ethical decisionmaking generally. "When making moral decisions . . . all moral agents are jurisdictionally equivalent, for it seems almost inconsistent with the very idea of morality to say that some decision with moral implications is none of my business."<sup>142</sup> I do not necessarily share Schauer's doubts. There may well be good moral or ethical reasons for rule-based decisionmaking in some ethical contexts, for certain ethical decisionmakers to rely on rules rather than regard all possibly relevant circumstances as their business. My criticisms do not generally attack rule-based decisionmaking nor rule-based *ethical* decisionmaking in every setting. My arguments take narrower aim: against the appropriateness and workability of *code-based ethical decisionmaking for lawyers*.

Proponents of codified ethics rules for lawyers might defend them in the interest of achieving uniformity and predictability of lawyers' conduct or in the name of preventing lawyers from acting as moral individualists, deciding ethically difficult situations however they please. While I too value uniformity and predictability in lawyers' conduct and can appreciate the perils of moral free agency for lawyers, I doubt that codified ethics rules implement the former values or protect against the latter danger. A good technocrat can produce colorable arguments for interpreting codified legal rules in a wide variety of ways, allowing for a wide range of behavior. She can do this with ethics codes as well. The codes do not do particularly well at producing uniform behavior or providing reliable bases for prediction. As demonstrated by the technocratic fight between Hazard and McLaughlin and Putzel and the competing technocratic analyses available to Armani, codified ethics rules can provide technocratically able lawyers with justification for opposite courses of action. Furthermore, examples like these suggest that codified ethical rules do not deter lawyers from behaving like moral free agents. Skillful technocratic analysis will often leave lawyers with at least colorable arguments in favor of a variety of actions in an ethically difficult situation. At this point the attorney will have to rely upon uncodified principles to decide what to do. Not only will she be free to exercise moral individualism, she will have to.

The second argument against worrying over the antiethical tendencies promoted by codified lawyers' ethics bites the bullet: It does not praise statutory ethics, it defends lawyers' reactions to them and,

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142. *Id.* at 232.

more generally, lawyers' typical responses to ethically difficult situations. Philosopher Bernard Williams, for example, recognizes the likelihood that lawyers will respond differently from nonlawyers to ethically difficult situations.<sup>143</sup> Furthermore, he recognizes that nonlawyers may well find the lawyers' responses repugnant.<sup>144</sup> Yet, he defends the attorneys.

According to Williams, current society may well need people to perform the functions lawyers do, and this performance may well necessitate somewhat different dispositions in lawyers than in laypeople.<sup>145</sup> Under these conditions, nonlawyers might well accept the necessity of the lawyerly dispositions and actions, even though the general public will be disposed to regard these as distasteful or repugnant.

Williams' focus on dispositions, particularly sentimental dispositions, accords with my approach to the relationship between good lawyering and good ethical deliberating. Williams' focus, however, does not lead him to assume that it makes sense for lawyers to be good ethical deliberators.

Those of more utopian hopes or expectations may look to a society in which there is no need for [professionals to possess dispositions repugnant to those with more general moral dispositions], one in which everybody is equally virtuous and nothing needs to be done that the virtuous cannot do. But that is not the society we have, and it would be a society in which not everything that we need and admire could be done.<sup>146</sup>

Not only does Williams accept the strong possibility of divergence between professional dispositions and general moral dispositions, he consistently rejects what he considers the casuistic claim that the professional dispositions are virtuous after all, given that the profession itself is morally justified. I will not, however, rehearse his argument against this claim here. In short, Williams seems to think it quite likely that good lawyers cannot be (wholly) good ethical deliberators.

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143. Bernard Williams, *Professional Morality and Its Dispositions*, in *THE GOOD LAWYER*, *supra* note 1, at 259.

144. *Id.* at 260, 263.

145. *Id.* at 266-67.

146. *Id.* at 264.

Working from this proposition, Williams then investigates what attitude toward themselves and their profession would be best for lawyers to have. He considers three possibilities: (1) "*specific professional adaptation*,"<sup>147</sup> whereby, as a result of their training, professionals entirely cease to have the general moral dispositions current in the culture; (2) professionals' training leaves their general moral dispositions largely unmodified, so that in the course of their professional practice, professionals are disposed to perform acts they themselves find repugnant or distasteful;<sup>148</sup> (3) "*nonspecific professional adaptation*,"<sup>149</sup> in which professionals retain some general moral dispositions but lack others, and therefore feel comfortable performing in accordance with their professional dispositions, despite eliciting some measure of distaste from the general public.<sup>150</sup>

According to Williams, at present professional training aims for option (1), specific professional adaptation.<sup>151</sup> He himself argues that while option (3), nonspecific professional adaptation, might seem most appealing,<sup>152</sup> option (2)—which we might call *squeamish professional adaptation*—may well be best.<sup>153</sup> Williams contends, convincingly, that we should oppose specific professional adaptation because it leaves the profession "morally alienated" from the larger community. His quarrel with nonspecific professional adaptation is the psychological tendency for it to slide into specific professional adaptation. Williams argues, again convincingly, that it may well be psychologically difficult or impossible for a trained lawyer to restrict his professional dispositions and responses to professional situations.<sup>154</sup> People seem to lack such careful control over their dispositional responses. In any event the boundaries between professional and nonprofessional situations may be genuinely vague and may seem even more so to a trained professional.

So, Williams takes up the merits of squeamish professional adaptation. He recognizes two potential problems. First, squeamish professional adaptation might produce lip-service to general moral

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147. *Id.* at 263.

148. *Id.* at 263-64.

149. *Id.* at 264.

150. *Id.* at 264-65.

151. *Id.* at 265.

152. *Id.* at 264.

153. *Id.* at 266-67.

154. *Id.* at 267.

dispositions but no real discomfort with the directives of the professional ones. In other words, lawyers might not be squeamish enough. Second, this kind of adaptation might paralyze lawyers, making it impossible for them to respond appropriately to their professional dispositions. Lawyers might become more squeamish than we want them to be. As Williams puts it:

What is needed is . . . a general structure or tone that makes it clear that among the imperfections of the world in which the professional operates there is included the impossibility of entirely reconciling what the professional needs to do with what he or she would like only to have to do. Such a formation seems all the more appropriate to lawyers, whose profession, more than most, exists because of imperfection.<sup>155</sup>

Interestingly, Frank Armani's voice seems to exemplify this moral tone. Armani did not specialize in criminal law, which perhaps explains his tendency to respond to more general moral dispositions. Yet he assumed and responded to the dispositions of the criminal lawyer. Frank Armani certainly saw and felt the impossibility of reconciling what he thought he needed to do as a professional and what he wanted to do as a person.

Recall that, in my opinion, Frank Armani confronted a genuine ethical dilemma: Whether he kept or disclosed Garrow's confidence, he would be making a tragic choice. Not everybody shares my view of the situation. Some think it clear that Armani had an authentic, overriding ethical obligation to keep mum; others think that he was straightforwardly ethically required to reveal the location of the corpses. This schism implicates some large issues, particularly the merits of an adversary system of legal justice and, within it, the peculiar position of the criminal defense lawyer. Without delving deeply into these matters, let me stress that whatever one's opinion on the disclosure question, Armani still deserves praise for the character of his ethical deliberation. Even though fine ethical deliberation may not produce ethically perfect conduct, such deliberation is in itself a laudable achievement (analogously, a skilled logician does not necessarily solve every logical proof perfectly, but, even when in ultimate error, she will usually attack the problem in an admirable way).

Despite this defense of the intrinsic merits of good ethical deliberation, those who are positive that Armani should have informed the

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155. *Id.* at 266.

police and the victims' parents may object that Armani ultimately acted no differently from the highly zealous criminal defense attorney, who is, on this view, an unethical cad. These objectors might even argue that Armani is less ethically worthy than the zealot, who at least may have deep—if mistaken—ethical convictions in favor of keeping repugnant clients' confidences. In contrast, Armani simply acted hypocritically, abiding by prevailing norms of client confidentiality despite serious ethical qualms about them.

This line of criticism is flawed. It is important not to equate or confuse the zealot with the technocrat. Whatever one's opinion of zealous criminal defense, the zealous criminal lawyer may or may not be a technocratic attorney: Her commitment to her clients could be at least somewhat tempered by other concerns, without disqualifying her as a zealous advocate. To act as the zealous lawyer is not thereby to behave technocratically.

Of course, we can legitimately question the ethical value of zealousness and the adversary system that so often produces it. For those with these concerns, however, the lawyer with qualms should be preferable to the zealous technocrat. Rather than condemn the worried lawyer for hypocrisy, the critic of the system should view her as a potential reformer. A lawyer's worries about the prevailing system can provoke her to work to change distressing norms and institutions.

What about those confident in the adversary system and zealous criminal defense? So long as the worried lawyer can achieve the requisite level of zeal,<sup>156</sup> fans of the current system should also prefer this lawyer to the pure technocrat. Maintaining the ethical high ground for the adversary system requires that its participants enjoy some degree of ethical legitimacy, particularly in the eyes of the general public. Technocratic zealots who experience and evince no doubts about the less ethically savory aspects of their jobs are far less palatable than those lawyers who perform these (arguably) necessary tasks but realize their ethically unattractive dimension.

Returning to Williams' argument, assume he is correct about the desirability of some version of squeamish professional adaptation for lawyers, and that Frank Armani, in contrast to Joseph Hutner, is its exemplar. This leaves Williams with unanswered and difficult questions—some empirical, some ethical and some conceptual. To evaluate Williams' recommendation, we have to ascertain whether a

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156. Whether worry and zeal are psychologically compatible states is an empirical question.

sufficient number of lawyers can be trained into the appropriate form of squeamish professional adaptation. We have to ascertain whether such lawyers can perform effectively. We have to investigate whether the general public would find the dispositions and behavior of such lawyers palatable. These inquiries are largely empirical. Normatively, we have to decide whether lawyering, in a form that requires repugnant professional dispositions, is in fact ethically justifiable.<sup>157</sup> This would enable us to decide whether squeamish professional adaptation is possibly ethically permissible, and whether its public endorsement or acceptance is perhaps ethically permissible.<sup>158</sup> Finally, at a conceptual level, if we assume that general moral dispositions are basically right, then accepting that it is ethically permissible for some people to eliminate or ignore them, at least somewhat, is to deny the categoricity of virtue. In other words, we would be accepting, albeit on ethical grounds, the idea that not everyone need or should be virtuous. Perhaps this is right. It does, however, fly in the face of the traditional moral edict that everybody ought to behave ethically.<sup>159</sup>

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157. David Luban's approach to role morality for lawyers requires an analogous justification for the institutions that create the lawyer's role. See LUBAN, *supra* note 1, at 129-44.

158. The profession might be ethically justifiable, but there could be independent ethical problems with squeamish professional adaptation.

159. Most Kantians, utilitarians and virtue ethicists have some sort of commitment to categoricity. Immanuel Kant forcefully expresses a strong form of categoricity:

For duty has to be a practical, unconditioned necessity of action; it must therefore hold for all rational beings (to whom alone an imperative can apply at all), and only because of this can it also be a law for all human wills. Whatever, on the other hand, is derived from the special predisposition of humanity, from certain feelings and propensities, and even, if this were possible, from some special bent peculiar to human reason and not holding necessarily for the will of every rational being—all this can indeed supply a personal maxim, but not a law: it can give us a subjective principle—not an objective one on which we should be directed to act although our every propensity, inclination, and natural bent were opposed to it; so much so that the sublimity and inner worth of the command is the more manifest in a duty, the fewer are the subjective causes for obeying it and the more those against—without, however, on this account weakening in the slightest the necessitation exercised by the law or detracting anything from its validity.

IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORAL* 92-93 (H.J. Paton trans., 1948) (1785); see also KURT BAIER, *THE MORAL POINT OF VIEW: A RATIONAL BASIS OF ETHICS* 195 (1958) (formulating a neo-Kantian version of categoricity). For consequentialist views of categoricity see I JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION*, ch. II, ¶ 1 (John Bowring ed., 1962) (1789) ("If the principle of utility be a right principle to be governed by, and that in all cases, it follows . . . that whatever principle differs from it in any case must necessarily be a wrong one."); J.S. MILL, *UTILITARIANISM* 47 (George Sher ed., 1979) (1861). In fact, consequentialist views are often attacked on the grounds that they make excessive moral demands on everyone. See generally Bernard Williams, *A Critique of Utilitarianism*, in J.C.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973); SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* 7 (1982). For one virtue ethicist's positions on categoricity see ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 113 (1988) ("To say that just actions are to be pursued for their own sake



In the end, Williams' solution for coping with the divergence between lawyerly dispositions and ethical ones may be best. Yet, since it does raise hard questions, we should at least consider other possibilities, although they too raise difficult issues.

## V. TOWARD RECONCILIATION: LAWYERS AS ETHICAL DELIBERATORS

This Article poses the question, can good lawyers be good ethical deliberators? I have argued that highly technocratic lawyers cannot. Virtue ethicists and some common wisdom both afford the sentiments a prominent place in ethical deliberation. I have argued that good technocratic lawyers, skillfully working on the basis of a statutory codes of ethics, often will fail to respond to ethically challenging situations with appropriate sentiments; indeed, they may not experience any sentimental responses at all. Currently, we train lawyers and require them to refer to such codes. Under present conditions, therefore, it is difficult, if not impossible, for many of them to achieve good ethical deliberation.

If we wished to, how might we remedy this situation? Returning to an idea hastily rejected by Bernard Williams, we might decide, after careful consideration, that a lawyer manifesting the dispositions I have described—technocratic-lawyerly dispositions—in fact behaves virtuously, at least to some degree. Williams denigrates this position for being casuistic, but if lawyers provide society with worthy services,

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is to say, not that nothing can outweigh the requirements of justice, but that the whole notion of weighing the requirement of justice against something else is from the standpoint of the virtuous a mistake. For that an action should be just is not merely one among the preferences of the virtuous person, competing as a requirement with other preferences. It is rather that being just is taken to be a condition of achieving any good at all and that being just requires caring about and valuing being just, even if it were to lead to no further good.”). Aristotle himself insists that everyone is morally responsible for all one's actions, so long as these are performed voluntarily and with knowledge of the circumstances. ARISTOTLE, NICHOMACHEAN ETHICS 1109b30ff. We cannot evade moral responsibility for our intended actions, he maintains, by appealing to aspects of our character or upbringing. ARISTOTLE, NICHOMACHEAN ETHICS 1110b8ff, 1111a6ff.

Ludwig Wittgenstein captured one flavor of categoricity, describing it in extremely strong terms:

Now let us see what we could possibly mean by the expression, “*the absolutely right road.*” I think it would be the road which *everybody* on seeing it would, with *logical necessity*, have to go, or be ashamed for not going. And similarly the *absolute good*, if it is a describable state of affairs, would be one which everybody, independent of his tastes and inclinations, would *necessarily* bring about or feel guilty for not bringing about.

LUDWIG WITTGENSTEIN, ETHICS, LIFE AND FAITH, in THE WITTGENSTEIN READER 291-92 (Anthony Kenny ed., 1994).

and to do so they need dispositions nonlawyers find repugnant, nevertheless it may be that the lawyers are morally virtuous after all. They may be all the more virtuous because they persevere in their endeavors in the face of hostile public opinion.

In one respect, however, this argument misses the point. Even if technocratic lawyers themselves are not unethical or morally bad for acting as they tend to, this does not mean they are capable of good ethical deliberation. The incompatibility between this skill and the technocrat's remains. Furthermore, even if good technocratic lawyers are not evil, it would be better, all things considered, if they could also be good ethical deliberators. We should see whether we can reconcile technocratic lawyering and good ethical deliberating.

There are two obvious routes to this end: change our ideas about good ethical deliberating or change our ideas about lawyering. In this Article, I am not going to pursue the first avenue. While virtue ethicists and common intuitions about good ethical deliberation may be entirely or partially wrong, both the philosophers and conventional wisdom seem to have caught on to something genuine and important. In conclusion, I will address how we might modify both our ideas about lawyering and the conditions under which attorneys practice, so that good lawyers might also be good ethical deliberators.

Think of the relationship between technocratic lawyering and good ethical deliberation as a tradeoff: The better somebody is at one, the worse she is at the other. So, nobody can do well at both. This oversimplifies, but it captures the essence of what I have said earlier. In response, someone might argue that I have overlooked at least part of what good lawyering entails. I have claimed that it requires facility with distinctively unsentimental legal analysis, at the expense of more sentimental ethical deliberation. My interlocutor might claim, however, that a lawyer's function *includes* providing good ethical deliberation. A genuinely fine attorney would not possess traits so antithetical to good ethical deliberation; at least, he would not hone such traits to the point where they crowd out more ethical dispositions. He would strike a balance between technocratic and ethical dispositions, and he would therefore be able to practice law ably—perhaps somewhat less easily—while retaining the traits and skills needed for good ethical deliberation. In short, he would be an honorable lawyer.

Two flaws in this reasoning emerge immediately. First, one person's balance is another's uneasy compromise. That is, the lawyer who tries to maintain lawyerly and ethical dispositions simultaneously

might find himself delivering poor legal advice *and* defective ethical deliberation. Even if this worst-case scenario is unlikely—a matter for empirical investigation—proponents of the view that a lawyer's function includes ethical deliberation need to define specifically the desirable balance between unsentimental lawyerly dispositions and more sentimental ethical ones. They must show the attainability of this balance. Finally, they must convince us that good ethical deliberation is part of the lawyer's function. That this remains to be shown is the second glaring flaw in their argument.

As it stands, the argument illicitly bootstraps the ethical dispositions into the lawyerly ideal by stipulating the lawyer's function so as to call for these dispositions. This problem is the reverse of the one Williams' view has when he argues that it may be necessary and ethically all right for lawyers to have and to act upon ethically repugnant dispositions. Just as Williams must show why anybody, or even just the lawyer, is or should be exempt from the requirement of (trying to achieve) good ethical deliberation, the bootstrapper must establish either that everybody or lawyers in particular must fulfill this charge. The answer is not obvious. For many trades and professions, no one would suggest that the function of their members includes ethical deliberation, of whatever quality. More generally, some prominent and respected moral philosophers have argued against the entire idea that the demands of morality apply universally, let alone to any particular group.<sup>160</sup>

Suppose, however, that we could vindicate the position that good lawyering includes good ethical deliberating. Then we would have to figure out how to create lawyers suited to this function. It is hard to imagine that statutory codes of ethics would have much of a role, for the reasons I have already given.

Those reasons focused on the language and structure of statutory provisions, and the reactions they trigger in lawyers. A fan of statutory regulation might suggest that statutes could be written differently, employing language and structure that would foster good ethical deliberation rather than impede it. This proposal is not promising. Drafters word statutes with rather dry, technical language specifically because this language lends itself to a certain type of legal analysis, usually put to the instrumental purposes I discussed earlier. To stand

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160. See, e.g., PHILIPPA FOOT, *Morality as a System of Hypothetical Imperatives*, in *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* (1978); WITTGENSTEIN, *supra* note 159, at 292.

a chance of triggering ethical dispositions, statutes would have to be written in terms that tend to elicit appropriate sentimental responses. For example, if we want lawyers to disregard confidentiality when innocents are suffering unnecessarily, we would have to write codes referring to "innocence," "suffering" and "sorrow," as well as "loyalty." It seems fantastic even to contemplate statutes laden with this sort of sentimental terminology. However worded, they would certainly be contentious, precisely because they would be meant to call forth specific emotional responses to ethically challenging situations, where we typically lack consensus on what these responses should be. Moreover, if virtue ethicists are correct about the uncodifiability of ethical judgment, it will not matter how we word our statutes: They will always be too general to be of assistance in highly contextual ethical decisionmaking, especially in hard cases. Finally, if we present lawyers with statutory ethical codes, these may trigger the antiethical lawyerly dispositions, no matter what their wording or structure. Lawyers' training may incline them to respond to statutes with technocratic analysis rather than ethical deliberation even when the statute is written in unusually sentimental language. Attorneys may read and respond to statutory text technocratically, no matter what its vernacular.

Although I have drawn quite a sharp contrast between the technocratic lawyer and a good ethical deliberator, even the technocratic attorney must empathize, to a degree, with various parties to the situations in which she provides her services. To attain the outcome desired by her client, the technocratic lawyer must identify with each party enough to spot opportunities for beneficial cooperation and competition. For example, to pursue Singer Hutner's twin goals of avoiding prosecution and maintaining a working relationship with O.P.M. and Goodman, McLaughlin and Putzel had to appreciate the personal and professional ties involved, as well as identify with O.P.M.'s and Goodman's needs and interests. Only then were McLaughlin and Putzel able to technocratically analyze the ethics code in a way that made Singer Hutner feel confident in extending its representation and, later, withholding information.

The technocratic lawyer's need for some sort of empathy indicates that he does exercise his sentimental capacities, at least after a fashion. But the contrast between the technocratic lawyer and the genuine ethical deliberator remains. While the technocratic attorney

uses certain sentimental capacities instrumentally to set the parameters for his strategic legal analysis, the attorney who engages in authentic ethical deliberation allows his sentimental responses to guide his practice independently of his client's goals. The technocratic lawyer deploys his sentimental capabilities strategically; the genuine ethical deliberator experiences and reflects upon his sentiments nontactically.

Strategic behavior can make for fine lawyering. When legal affairs raise ethical concerns, however, tactical use of a lawyer's sentimental capacities becomes problematic. Strategic sympathizing seems likely to detach the lawyer from ordinary sentimental responses to the ethically troubling situation, possibly skewing her responses to the point where they differ entirely from those of ordinary ethical deliberators, let alone especially good ones. Whether attorneys with a strong technocratic bent can shift to a more ethical stance when facing ethical difficulties is ultimately an empirical, psychological question. It seems highly plausible, however, that at best black letter codes do little to stimulate genuine ethical deliberation and at worst actively discourage it.

At the outset of this Article I noted the popular perception that lawyers are unethical or nonethical. Within the profession, some have argued that lawyers' ethics have declined sharply during this century.<sup>161</sup> While this alleged decline may not be as steep as it has sometimes been portrayed,<sup>162</sup> the rise of black letter regulation of lawyers' conduct comports with the idea that there has been some slippage.

Many who lament the current state of attorneys' conduct associate the problem with twentieth-century changes in the nature of law practice, especially in elite firms.<sup>163</sup> These firms, supposedly the pilots of the bar, no longer possess or provide the stability they once did. Clients parcel out their legal business per service, using different firms

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161. KRONMAN, *supra* note 79, at 12-14; LINOWITZ & MAYER, *supra* note 2, at 21-46; Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 67-74 (1992) (partially attributing the decline in ethical practice to increasingly materialistic large law firms); Harry T. Edwards, *A Lawyer's Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148, 1151-53 (1990) (deploring the growth and prominence of "money machine" large law firms) [hereinafter Edwards, *A Lawyer's Duty*].

162. See generally Robert Gordon, *Lawyers as the American Aristocracy*, Holmes Lectures (delivered Feb. 1985) (copy on file with author).

163. See CAPLAN, *supra* note 2, at 129-30; KRONMAN, *supra* note 79, at 273-91; Edwards, *A Lawyer's Duty*, *supra* note 161, at 1151-53.

for different jobs. Partners and associates change firms fairly frequently, voluntarily or otherwise.

To end on a speculative note, let me suggest that this sort of flux would be likely to erode any sort of informal "common law" of lawyers' ethics that may once have held greater sway. If such an informal common law ever existed, it may well have been dominated by idiomatic blend concepts, tailored to lawyers' ethical lives. For example, within a firm, all attorneys might have developed a shared sense of what counted as *unprofessional* or *rotten* conduct, and they may have been able to educate long-term clients about these understandings. Such an informal common law might also have made use of non-specialized ethical blend concepts, invoking concepts like *pity*, *mercy* or *loyalty*.

With the erosion of the conditions necessary for its maintenance, this sort of informal common law would disintegrate. It would not be surprising if black letter codes emerged in response, attempting to substitute crisp imperatives and permissions for the lost informal common law. If my arguments in this Article are correct, however, such codes will never be adequate replacements. It would be wiser to develop a new, more formal, more institutionalized common law of lawyers' ethics. Instead of elliptical bar disciplinary reports and the very occasional prosecution for attorney misconduct, courts, lawyers and legislatures should expand the opportunities for traditional adjudication of lawyers' ethical conduct. If juries assessed lawyer misconduct, the concepts used to evaluate attorneys' ethical performance would tend to retain some significant degree of connection to ordinary ethical blend concepts. Just as the legal concept *negligence* retains a tie to the ordinary concept of *carelessness*, case law could develop ethico-legal concepts with links to ordinary ethical concepts. Serious litigation of attorneys' ethical performances would generate a body of case law, like other such bodies, replete with the sort of contextual engagement with specific factual situations that makes for good ethical deliberation. Opinions in these cases could apply and explain traditional ethical blend concepts and, possibly, generate new ones, tailored to the special circumstances of attorneys attempting to act ethically within the confines of law practice.

Detailing the mechanisms of a new formal common law of lawyers' ethics would require another full-blown article. Briefly, I would advocate creating civil causes of action, available to those allegedly

injured by an attorney's ethical misconduct, allowing plaintiffs to recover both pecuniary and nonpecuniary damages. A civil suit does not carry the same degree of stigma as a criminal prosecution. This should increase judges' and fellow attorneys' willingness to litigate lawyers' ethical misconduct. At the same time a lively civil cause of action for attorney ethical misconduct would reintroduce shame as a deterrent. The prospect of public jury trials and potential verdicts against them may discourage lawyers from exercising technocratic skills at the expense of robust ethical deliberation. Just as physicians view a judgment of malpractice as an embarrassment to be avoided, lawyers might come to be ashamed of conduct considered unethical by a jury.

Some will object to increasing civil enforcement of ethical attorney conduct on the ground that this will produce new, unpredictable sanctions on attorneys. Even if we grant that the initial litigation over attorney ethics will be somewhat unpredictable, the more robust the common law in the area becomes the more predictable the outcomes of lawsuits will be. This should produce a pattern of lawful conduct, settlement and litigation similar to other areas policed through civil causes of action. Attorneys should be no more vulnerable to or protected from the vagaries of civil enforcement than any other group.

This objection brings us to a more pressing question, however. Just how certain could a common law of lawyers' ethics become? More specifically, if the technocratic attorney can wield his skills to render codified ethical rules rather inconclusive, why suppose that he will not be equally able to accomplish this with even a fulsome body of common law?

This issue deserves close scrutiny, closer than I can deliver here. Some preliminary reasons to think that an extensive, careful case law neither elicits nor allows for the same degree of technocratic analysis as does a statutory code: First, as I have already pointed out, common law concepts related to lawyers' ethics might well elicit the sentimental responsiveness crucial to good ethical deliberation. In turn, this sentimental responsiveness can disrupt a purely instrumentalist pursuit of a client's goals. A lawyer who finds himself experiencing pity, compassion, revulsion or any other ethically significant sentiment may well find it that much harder to concentrate solely on accomplishing whatever the client wants. He may be inclined to consider issues and ask questions he would not otherwise have even noticed. Second, case

law differs from naked statutory law in that it comes packaged in factual situations described in judicially developed terms. Simply by introducing specific factual scenarios into the law of lawyers' ethics, a common law approach reduces the range of plausible arguments about what the law requires in like circumstances. Every lawyer facing an ethically complex situation faces a particular factual setting. To the extent her situation resembles one previously identified and addressed in a judicial opinion, her choices are constrained by that judicial result. This is so even though facts can be interpreted in various ways. Case law not only sketches factual situations, it characterizes them in particular ways. This indicates to lawyers how a court will construe their own circumstances. A robust common law of lawyers' ethics would provide constraining information about what sorts of situations create which ethical responsibilities for lawyers and constraining information about how lawyers should understand the factual circumstances they confront.

In sum, common law can inspire lawyerly responses antithetical to unsentimental technocratic analysis and can make it difficult to formulate technocratic arguments in specific factual settings. Active civil litigation and a serious body of case law concerning lawyers' ethics might well trigger more honorable lawyering, a legal style more consistent with—perhaps even conducive to—authentic ethical deliberation.

## CONCLUSION

Technocratic lawyering may indeed dull sentimental responsiveness, impairing to some degree the capacity for robust, authentic ethical deliberation. Yet at the same time technocratic lawyering requires genuine lawyerly virtues, traits useful to an attorney performing her function. These include dedication (to both client and task), cleverness and creativity. All lawyers should strive for these virtues. The moral-psychological question that remains is their compatibility with the virtues of a good ethical deliberator, such as a sense of personal responsibility for one's ethical choices, the ability to recognize genuine ethical dilemmas and, perhaps most importantly, the disposition to respond to ethically difficult situations with appropriate sentiments. Honorable lawyering is possible only if an attorney can possess and exercise both technocratic and ethical virtues in combination. We do not know the different mixtures psychologically available, either to



lawyers in general or to any particular attorney. At worst, further investigation might reveal that most or even all lawyers cannot possess both technocratic and ethical virtues or cannot exercise them simultaneously in their professional practice. More likely, we will discover some measure of tradeoff between the cultivation and exercise of technocratic virtues and ethical ones. If so, we should turn our attention to minimizing this measure. Certainly, various aspects of legal education and current law practice influence which virtues lawyers have and employ. In this Article, I have identified one variable in the cultivation and exercise of lawyerly virtues: black letter ethics codes, which are quite likely to stimulate technocratic virtues at the expense of ethical ones, thereby reducing lawyers' chances of being good ethical deliberators.