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The New Casuistry

PAUL R. TREMBLAY*

Of one thing we may be sure. If inquiries are to have substantial basis, if they are not to be wholly in the air, the theorist must take his departure from the problems which men actually meet in their own conduct. He may define and refine these; he may divide and systematize; he may abstract the problems from their concrete contexts in individual lives; he may classify them when he has thus detached them; but if he gets away from them, he is talking about something his own brain has invented, not about moral realities.

John Dewey and James Tufts¹

[A] "new casuistry" has appeared in which the old "method of cases" has been revived. . . .

Hugo Adam Bedau²

I. PRACTICING PHILOSOPHY

Let us suppose, just for the moment, that "plain people"³ care about ethics, that they would prefer, everything else being equal, to do the right thing, or to lead the good life.⁴ And let us imagine that lawyers share that sentiment — they

* Clinical Professor of Law, Boston College Law School. Earlier versions of this Article have been presented at the Fourth International Clinical Conference sponsored by UCLA School of Law and the Institute for Advanced Legal Studies of the University of London and held at Lake Arrowhead, CA; at the Boston College Interdisciplinary Ethics Roundtable; and at an informal colloquium at Boston College Law School. I thank the participants at those meetings for their comments, questions, and criticisms. I also thank warmly those who were kind enough to read earlier drafts of this work, and whose reactions have helped me clarify my ideas: Susan Kupfer, Aaron Mackler, Peter Margulies, Judy McMorrow, Deborah Rhode, Bill Simon, and Fred Zemans. I have also been blessed with productive research assistants during this project. My thanks to John Ridge, Johann Lee, Steven Denburg, Amy DeLisa, Christopher Johnson, and Jason Bryan for that help. Finally, I owe a great debt of gratitude to Deans Avi Soifer and Jim Rogers and to Boston College Law School for support, both financial and moral, for this effort.

1. JOHN DEWEY & JAMES TUFTS, *Ethics* 212 (1908).

2. Hugo Adam Bedau, *Making Mortal Choices: Three exercises in Moral Casuistry* 105 (1997).

3. I borrow the "plain person" phrase from Alasdair MacIntyre and Sir David Ross. Alasdair MacIntyre, *Plain Persons and Moral Philosophy: Rules, Virtues and Goods*, 66 *AM. CATH. PHIL. Q.* 3 (1992); W.D. ROSS, *THE RIGHT AND THE GOOD* 41 (1930).

4. This assumption is one necessary to any inquiry into the quality of ethical decisionmaking. Richard Posner has written recently that most individuals do not care whether their actions might be deemed correct as measured by some moral calculus. Richard Posner, *The Problematics of Moral and Legal Theory*, 111 *HARV. L. REV.* 1637 (1998). This Article is largely sympathetic to Judge Posner's critique of moral theory and his pragmatic reaction to theory, but it does not share his sentiments about how deeply persons care about doing what is right. The Kohlberg-derived studies of moral development reveal that individuals generally understand the compulsions of morality, albeit at varying levels of sophistication. See, e.g., Deborah L. Rhode, *Into The Valley Of Ethics: Professional Responsibility and Educational Reform*, 1995 *LAW & CONTEMP. PROBS.* 139; Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 *CLIN. L. REV.* 505, 506–22

too would prefer to practice law in an ethical manner, by and large.⁵ We could also assume, further, that “ethics” for lawyers means something different from, and more than, simply following a set of rules established by the legal profession, rules with obligatory qualities implying penalties for their violation. Many within the profession seem to think of “legal ethics” as such rule-obligations, but it is fair for us to assume that ethics can and does mean a lot more.⁶

We can readily accept these premises, but doing so implies some benchmark,

(1995); Susan Daicoff, (*Oxymoron?*) *Ethical Decisionmaking By Attorneys: An Empirical Study*, 48 FLA. L. REV. 197 (1996). The impassioned presence in our nation’s public life of committed moral debate about such issues as abortion, sexuality and sexual orientation, end-of-life decisions, and the like, further evidence this assumption. See, e.g., JAMES DAVIDSON HUNTER, *CULTURE WARS* (1991).

In any event, even if my assumption were flawed, it would still be true that *some* ordinary people care about the moral character of their lives. With that foundation we may then proceed to explore how those individuals ought to assess that quality, which is the purpose of this Article. See also David Luban, *Epistemology and Moral Education*, 33 J. LEGAL EDUC. 636, 645 (1983) [hereinafter Luban, *Epistemology*] (reviewing the “internalism” claim that “the mere knowledge of what is moral carries with it the motivation to be moral”).

5. I also accept this assumption, see *supra* note 4, but the peculiar role obligations of lawyers leaves it subject to some doubt. It is not uncommon to encounter serious critical observation of the lawyering world that questions whether modern practice includes a commitment to ethical integrity. See, e.g., David Luban & Michael Millemann, *Good Judgment: Teaching Ethics in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 57 (1995) (criticizing the *Model Rules* for a diminished role for moral suasion to accompany the *Rules’* legalistic framework, and observing that with greater discretion unconstrained by such suasion, lawyers will act in role-directed ways to maximize client interests at the expense of moral behavior); Tanina Rostain, *The Company We Keep: Kronman’s The Lost Lawyer and the Development of Moral Imagination in the Practice of Law*, 21 LAW & SOC. INQUIRY 1017, 1035 (1996) (reporting that “[t]he sociological findings suggest that current trends toward increased practice specialization will severely hamper the development of [the] affective qualities [necessary for moral practice]. A radical reorganization of the legal profession may be required if deliberative ideals are to be realized on any meaningful scale.”); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) (lamenting the alleged lost sense of statesmanship among lawyers); MARY ANN GLENDON, *A NATION UNDER LAWYERS* (1994).

These grim reports notwithstanding, I argue that my assumption is a fair one. The critics and doubters are unquestionably correct in their observations about contemporary law practice, but those observations cannot refute the claim that lawyers *care* about ethical practice, notwithstanding the increased pressures within the profession away from that ideal. Studies documenting the dissatisfaction of lawyers whose professional lives include such pressures support the understanding that many lawyers would prefer to act in ways which are not so conflicted. See, e.g., Peter A. Joy, *What We Talk About When We Talk About Professionalism: A Review of Lawyers’ Ideals/Lawyers’ Practices: Transformations in the American Legal Profession* [Robert L. Nelson et al. eds., 1992], 8 GEO. J. LEGAL ETHICS 987, 1005 (1994); KRONMAN, *supra*, at 2. The experience of clinical teachers, of which I am one, persistently confirms the proposition that law students care deeply about ethical propriety. See Luban & Millemann, *supra*, at 65–69; Joan O’Sullivan et al., *Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice*, 3 CLIN. L. REV. 109 (1996); Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 592 (1987) [hereinafter Spiegel, *Theory and Practice*].

6. Many observers of the legal profession have criticized its wont to conflate ethics with rules. See, e.g., Thomas L. Shaffer, *The Ethics of Radical Individualism*, 65 TEXAS L. REV. 963 (1987); Luban, *Epistemology*, *supra* note 4; William H. Simon, *The Trouble with Legal Ethics*, 41 J. LEG. EDUC. 65, 65–66 (1991); Reed Elizabeth Loder, *Tighter Rules of Professional Conduct: Saltwater for Thirst?*, 1 GEO. J. LEGAL ETHICS 311 (1987) [hereinafter Loder, *Tighter Rules*]; Gerald Wetlaufer, *The Ethics of Lying in Negotiation*, 75 IOWA L. REV. 1219 (1990). But see Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901 (1995) (arguing for more comprehensive coverage of moral complexity within rules).

or standard, or similar criterion to differentiate “better” decisions from “worse” ones. Without some identifiable method by which to evaluate ethical choice, “caring” about ethics is meaningless. Unless we defend the proposition that *any* choice is acceptable so long as it violates no outstanding rule (a proposition with few defenders), we implicitly accept the reality of normative standards. This, of course, comes as no surprise, but the nature and source of those standards remain remarkably elusive, especially in the discourse of legal ethics. This Article represents an effort to identify sources of moral agreement without descending into the meta-discussions of the philosophers.

The most conventional approach to questions about moral authority is to suggest some version of moral theory as the underpinning of ethical choice.⁷ Those suggestions intimate a deductive reasoning process. Moral theory serves as the major premise in a syllogism; the facts of any given case might then be “applied” to arrive at a conclusion.⁸ This theory conception not only introduces many misgivings, including its frequent inaccessibility and the problem of competing theories, but it also misunderstands our practices. We may not be entirely sure about the process we use to resolve moral dilemmas, but deducing answers from a coherent theory is unlikely to be high on the list for most of us. A more refined, and more recent, approach suggests instead that moral choices emerge not from syllogistic, end-based reasoning but instead from the right kind of character and virtue.⁹ This “virtue ethics” model eschews a focus on quandaries in favor of identifying effective qualities of personhood. Its difficulties, though, are also many. Lawyers tend to respect competing virtues, like the rival theories above, and have scanty standards by which to decide among them. Virtue also possesses what best might be called a “slipperiness” when applied to discrete dilemmas.

In the pages below, this Article argues that these dominant approaches fail to inform practicing lawyers — plain persons usually lacking philosophical training — about how best to resolve their tensions. This Article introduces here and seeks to defend an alternative insight about ethical choice, one grounded in the wisdom

7. See, e.g., MORTIMER D. SCHWARTZ ET AL., *PROBLEMS IN LEGAL ETHICS* 3–26 (4th ed. 1997) (including readings on utilitarianism, the golden rule, and Kantianism in order to “equip [law students] with some tools” when encountering discretionary ethics).

8. Judith Wagner DeCew and Ian Shapiro describe “the traditional approach [within moral philosophy] to the role of ethical theory” as follows:

On this view, the major goal of a moral theory is to resolve conflicts arising in moral decision making to give clear guidance on how to act. The task of theorists is to systematize moral thought and ultimately provide a principle or set of principles for overcoming or settling what at first appear to be moral dilemmas.

Judith Wagner DeCew & Ian Shapiro, *Introduction*, in *NOMOS XXXVII, THEORY AND PRACTICE 2* (Ian Shapiro & Judith Wagner DeCew eds., 1995).

9. See, e.g., James F. Keenan, *Virtue Ethics: Making a Case as It Comes of Age*, 67 *THOUGHT* 115, 115 (1992) (“Since 1973, . . . virtue ethics has gained a wider audience and greater critical reception.”); ALASDAIR MACINTYRE, *AFTER VIRTUE* (2d ed. 1984); JEFFREY STOUT, *ETHICS AFTER BABEL* 266–72 (1988) (exploring Alasdair MacIntyre’s influence on moral philosophy and applied ethics through his emphasis on virtues).

of the Jesuits of the Middle Ages, the clinical experiences of modern bioethicists, and the practical judgments of plain persons. This alternative is casuistry.¹⁰ Casuistry accepts the central truths of such grand theories as consequentialism and Kantianism. It acknowledges the importance of virtue and character, with special emphasis on practical wisdom and judgment. It melds these insights, though, with a recognition of the importance of cases and context in moral thinking, in a process that offers better concrete guidance to those who must “practice philosophy.”¹¹

Casuistry represents a case-based, particularized, context-driven method of normative decisionmaking.¹² Casuistry starts with *paradigm cases*, examples upon which most observers will readily agree, and reasons analogically from those agreed-upon cases to more complex cases representing ethical conflict. By understanding and emphasizing sources of agreement, casuistry elides the all-too-common stalemate in ethics talk, where “the only alternatives [are] dogmatism and relativism.”¹³ The lawyer as casuist need not decide, nor know, whether she is a Kantian, a utilitarian, or a Rawlsian. Indeed, in one case a lawyer might act “deontologically,” and in a different circumstance act “consequentially,” and be right in both instances. Casuistry leaves the deep and difficult philosophy debates to the philosophers, and aims its insights to the clinician, the practitioner, and the plain person. In its rejection of positivism and categorical thinking, and its emphasis on context, particularity, and *phronesis*, casuistry claims as intellectual forebears such influences as ancient rhetoric, Aristotelian ethics, American pragmatism, and some important strains of postmodernism.

The “new casuistry” has achieved a notable prominence over the last decade in moral philosophy and especially in bioethics.¹⁴ Except perhaps as a pejorative

10. The art described here is known by several labels, although “casuistry” is by far the most common. Alternative descriptions include “contextualism,” Earl L. Winkler, *From Kantianism to Contextualism: The Rise and Fall of the Paradigm Theory in Bioethics*, in *APPLIED ETHICS: A READER* 344 (Earl L. Winkler & Jerrold R. Coomb eds., 1993); “clinical ethics,” ALBERT R. JONSEN ET AL., *CLINICAL ETHICS: A PRACTICAL APPROACH TO ETHICAL DECISIONS IN CLINICAL MEDICINE* (3d ed. 1992); *CLINICAL ETHICS: THEORY AND PRACTICE* 195 (B. Hoffmaster et al. eds., 1989) [hereinafter *THEORY AND PRACTICE*]; “case-based ethics,” John Arras, *Principles and Particularity: The Role of Cases in Bioethics*, 69 *IND. L.J.* 983 (1994) [hereinafter Arras, *Principles and Particularity*]; “inductivism,” TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 17 (4th ed. 1994) [hereinafter BEAUCHAMP & CHILDRESS, *PRINCIPLES IV*]; the “determination model,” GLENN C. GRABER & DAVID C. THOMASMA, *THEORY AND PRACTICE IN MEDICAL ETHICS* 97 (1989); and the “origination model,” *id.* at 125.

11. I borrow this very apt phrase from a recent book by Richard Shusterman, who argues that philosophers ought to live their lives in aesthetic ways that might exemplify their philosophical ideals. RICHARD SHUSTERMAN, *PRACTICING PHILOSOPHY: PRAGMATISM AND THE PHILOSOPHICAL LIFE* (1997).

12. For the most comprehensive exploration of the revival of casuistry as an ethical model, see ALBERT JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* (1988).

13. MARK G. KUCZEWSKI, *FRAGMENTATION AND CONSENSUS: COMMUNITARIAN AND CASUIST BIOETHICS* 81 (1997); see also Ronald H. Mckinney, *The New Casuistry versus Narrative Ethics: A Postmodern Analysis*, 39 *PHIL. TODAY* 331, 332 (1995) (“[C]asuistry . . . avoids both relativism and absolutism.”).

14. For a discussion of this “new casuistry,” see, e.g., BEDAU, *supra* note 2, at 105; KUCZEWSKI, *supra* note 13, at 60–62; Stanley Hauerwas, *Reconciling The Practice of Reason: Casuistry in a Christian Context*, in

synonym for “sophistry,”¹⁵ though, it has yet to appear within legal ethics. This Article is one beginning effort to revive casuistry for lawyers.

The Article develops its defense of casuistry in the following way. Part II begins with a “discretionary ethics” story, intended to introduce the dominant paradigms of ethical reasoning, the deductive and the virtue-based models. That Part argues that theories, principles, and virtue ethics, despite their elegance, are unsatisfactory when used by those in the untidy world of practice. Part III develops the idea of casuistry, its justification as a source of moral meaning, and its component understandings. In Part IV this Article endeavors to show how casuistry works, with examples of a casuist approach compared to the dominant paradigms. Using case examples borrowed from an important recent work defending “communicative ethics,”¹⁶ I show that casuistry tends to be more coherent, more practicable, and more reliable than alternative reasoning methods.

MORAL THEORY AND MORAL JUDGMENTS IN MEDICAL ETHICS 135 (Baruch A. Brody ed., 1988) [hereinafter MORAL THEORY AND MORAL JUDGMENTS]; Mckinney, *supra* note 13, at 331.

15. In 1945 the then-prominent philosopher Edgar Sheffield Brightman wrote the following entry for “casuistry”:

- 1) The application of ethical principles to specific cases. 2) Quibbling, rationalization, sophistry or an attempt to justify what does not merit justification; this meaning is often associated with methods used by Jesuits. See equivocation.

BEAUCHAMP & CHILDRESS, PRINCIPLES IV, *supra* note 10, at 93 (quoting EDGAR SHEFFIELD BRIGHTMAN, AN ENCYCLOPEDIA OF RELIGION (1945)). The second of Brightman’s definitions persists today, as reference to law review articles easily shows. See Margaret K. Krasik, *The Lights Of Science And Experience: Historical Perspectives on Legal Attitudes Toward the Role of Medical Expertise in Guardianship of the Elderly*, 33 AM. J. LEGAL HIST. 201, 228 (1989) (referring critically to “legal casuistry and sophistry”); Shari O’Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C. L. REV. 127, 146 (1986) (“sophistry . . . [and] the ingenious casuistry”); W. William Hodes, *The Code of Professional Responsibility, the Kutak Rules, and the Trial Lawyer’s Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739, 813 n.151 (1985) (remarking that traditional opponents Geoffrey Hazard and Monroe Freedman are “for once united,” as Hazard refers to a perjury evasion device as “casuistry” while Freedman terms it “sophistry”).

Albert Jonsen reports that casuistry is also sometimes known, again pejoratively, as “Jesuitry,” developing as it has from the work of the Jesuits of the Middle Ages. Albert R. Jonsen, *Casuistry: An Alternative or Complement to Principles?*, 5 KENNEDY INST. OF ETHICS J. 237, 240 (1995) [hereinafter Jonsen, *Alternative or Complement*]. Jonsen, interestingly, was trained as a Jesuit. See Albert Jonsen, *On Being A Casuist*, in CLINICAL MEDICAL ETHICS 117, 118 (Terrence F. Ackerman et al. eds., 1987).

One of the few sources that includes a more respectful casuist approach in assessing legal ethics is Robert W. Tuttle, *The Fiduciary’s Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889; see also Robert W. Tuttle, *Death’s Casuistry*, 81 MARQ. L. REV. 371 (1998). There is actually a natural affinity between casuistry and the law. Casuists repeatedly compare its process of reliance on paradigm cases as precedent for new disputes, and proceeding through the use of analogical reasoning, with common law jurisprudence. See, e.g., JONSEN & TOULMIN, *supra* note 12, at 297–98; Arras, *Principles and Particularity*, *supra* note 10, at 1001. The justification of the common law’s reliance on analogical reasoning, as well as the accuracy of that claim, is the subject of some recent controversy in jurisprudential scholarship. See *infra* note 135.

16. See Susan G. Kupfer, *Authentic Legal Practices*, 10 GEO. J. LEGAL ETHICS 33, 90–92 (1996) (proposing a “discursive method” of ethics based upon postmodern conceptions of community dialogue). While Kupfer’s analysis of moral reasoning through postmodern and communitarian thought offers many insights, it does not appear to suggest a category separate from the alternatives I discuss in this Article. The discursive method encourages dialogue as a method of discerning appropriate moral conduct, but within that dialogic encounter, it seems, the discourse must rely on some conceptions of normative value. In other words, there must be something to talk *about* in the discursive method. That “something” must be either some form of moral theory

II. DOMINANT PARADIGMS OF MORAL REASONING: THEORIES, PRINCIPLES, AND VIRTUES

A. A TALE OF DISCRETIONARY ETHICS

The reasoning and insight underlying casuistry have relevance for law practice or legal ethics broadly defined,¹⁷ but the scope of the argument here is a more limited one. This part explores the implications of casuistry for “discretionary ethics”¹⁸ — that part of the ethics of law practice in which the regulatory

or principles, or virtues, or a type of case-based, bottom-up reasoning from paradigmatic cases. Kupfer’s discussion, in fact, implies all three at different points. *See, e.g., id.*, at 59 (“[S]tudent attorneys . . . need a theory with which to confront and give meaning to their practices. . . . We need to teach our students how to reason using moral premises.”); *id.* at 44–45 (approving of Dean Kronman’s suggestion of the importance of good character and virtue, along with the acquisition of judgment, to effective moral practice); *id.* at 36–37 (stressing postmodernism’s focus on “particularity and context,” and a rejection that “there are normative general principles that should govern professional conduct”).

17. One could make arguments for the role of casuistry in understanding and critiquing how judges make decisions or how lawyers make strategic choices, or to question the role of rules versus discretionary norms as the most effective model of legal ethics “regulation.” Such arguments, in fact, have been made, if perhaps not always under the rubric of casuistry. For instance, the topic of judges’ discretion in decisionmaking, and the preferences for discretionary judgment versus rules-bound activity, has been a live one at least since the days of the legal realists. *See, e.g.,* Martin P. Golding, *Jurisprudence and Legal Philosophy in 20th Century America: Major Themes and Developments*, 36 J. LEGAL EDUC. 441 (1986) (surveying jurisprudential debate from Holmes through Fuller); CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996) (defending a casuistic vision of how judges perform their duties); Posner, *supra* note 4. Similarly, whether legal ethics ought to be the subject of stricter and more comprehensive rules, or instead dedicated to development of moral character and individual responsibility, has received thoughtful and extended attention. *See, e.g.,* Loder, *Tighter Rules*, *supra* note 6, at 323; Luban, *Epistemology*, *supra* note 4; Fred Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223 (1993).

18. Discretionary ethics can best be understood through the following scheme. Consider a lawyer faced with an instance of moral conflict, in which she must decide between proceeding with course of action “x,” on the one hand, or an alternative course of action “y,” on the other. Her dilemma may or may not be subject to the body of professional regulation. This lawyer’s experience will inevitably fit into one of the following five categories:

1. The moral implications strongly favor x and the (professional) legal obligations demand x.
2. The moral implications are deeply in conflict, and the (professional) legal obligations demand x.
3. The moral implications strongly favor x, but the (professional) legal obligations demand y.
4. The moral obligations strongly favor x, and the (professional) legal obligations permit the lawyer discretion to act in any fashion.
5. The moral obligations are deeply in conflict, and the (professional) legal obligations permit the lawyer discretion to act in any fashion.

This scheme not only shows the relationship among the three parts of legal ethics I have just described, but highlights the particular importance of discretionary ethics. In two of these instances, the lawyer acts without any discernible difficulty. Scenario 1 and scenario 4 present virtually no reason for a lawyer to pause and wrestle with moral conflict. The lawyer simply acts in consonance with her moral commitments, either because she “must” (1), or because she “may” (4). Scenario 2 presents greater tension, but not as great as 3 or 5. The second type of conflict assumes some serious worry by a lawyer about what she ought to do, but there are strong arguments from competing sides, and her lawful obligation demands that she favor one over the other. If those

schemes now in place have conferred full discretion on lawyers to act in the best way they can.

This part begins with an example. A young lawyer, Mark, works in a legal services office in a very poor community. Mark represents Edna, who came to Mark's office with a notice from the Department of Public Welfare (DPW) terminating the TANF¹⁹ welfare benefits on which she relies to support her three children. According to the DPW notice, Edna did not provide adequate documentation or "verifications" necessary to maintain benefits for another year. Mark's research shows that, while the welfare administrators were correct in their determination, the verifications are easily acquired, and the regulations permit Edna to submit these verifications at an appeal hearing, with no penalty.²⁰ These are among the "easy" cases in a poverty law practice.

Edna's case has a complication, however. Mark's interview of Edna discloses that her uncle routinely gives her money for food and clothes for her children. That money is regular and, by Mark's reading of the state welfare regulations, reportable and "countable."²¹ Edna also baby-sits on a predictable schedule but has never informed the welfare office about that money, which is also reportable and countable by Mark's reading of applicable law. The reporting and counting of

obligations are indeed relatively evenly weighted (otherwise she slips to a Category 3 conflict), she presumably will obey her legal obligation with a minimum of regret.

Contrast that process with situations 3 and 5. Category 3 is what I understand to represent the "moral activism" quandary. The difficulty in acting in these instances is pronounced, as the competing obligations are each weighted heavily (the duty to obey the law and one's role obligations, versus the duty to act in a morally upstanding fashion), but one of those obligations is *the law*. To elect the other one is to engage in a form of civil disobedience, and at times doing so is the morally compelling choice.

Category 5 represents discretionary ethics. It includes all of those choices which display moral entanglement but in which the lawyer is left to her own good judgment about how to act. Instances of discretionary ethics are quite common, and tend to produce considerable angst in lawyers. Law teachers in practice observe that angst regularly, and the observation is not surprising, since, unlike in much of their work lives, lawyers must accept *full responsibility* for their actions in discretionary ethics affairs. Note also that while conceptually (and "legally") a distinction must be drawn between discretionary ethics and moral activism, in fact the latter is a subset of the former for my purposes. In both instances, a lawyer must look not to prevailing professional standards to decide how to act, but instead to other sources of moral guidance. It matters little, at bottom, whether that moral fount is used for the hard discretionary ethics choices or the hard moral activism, a/k/a civil disobedience, choices.

19. TANF is an acronym for Temporary Assistance for Needy Families, the federal welfare program that replaced Aid to Families with Dependent Children (AFDC). See Title I of the Personal Responsibility and Work Responsibility Act of 1996, 42 U.S.C. §§ 601-617. TANF is a far more restrictive scheme of aid for needy families than was the not-overly-generous AFDC. Indeed, the Act abolishes the former entitlement under AFDC: "This part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part." *Id.* See Sylvia Law, *Ending Welfare as We Know It*, 49 STAN. L. REV. 471, 488 (1997); Mark Neal Aaronson, *Scapegoating the Poor: Welfare Reform All Over Again and the Undermining of Democratic Citizenship*, 7 HAST. WOMEN'S L.J. 213 (1996).

20. In Massachusetts, for instance, a welfare recipient whose benefits were subject to termination because she did not provide adequate verification of some fact may maintain her benefits if she provides the required documentation at her appeal hearing. 106 CODE OF MASSACHUSETTS REGULATIONS § 343.55(A) (1997).

21. See 106 CODE OF MASSACHUSETTS REGULATIONS § 204.200 (1997).

these two sources of income would leave Edna eligible for a very small amount of welfare benefits. She would not be barred from participation in the program, but the level of her benefits would be affected significantly if she were to report the income.²²

Mark is in a dilemma. He has a lawful, non-frivolous, and indeed quite promising defense to DPW's effort to terminate Edna's welfare benefits. In doing so, though, he participates, arguably, in a form of "welfare fraud," for Mark's success at the hearing will advance Edna's unlawful procurement of TANF funds. While Mark's research shows that no substantive law *forbids* him from working on this hearing,²³ his representation of Edna raises moral concerns that need to be justified.

If an ethicist were to buttonhole Mark before his hearing and ask him to explain or justify his choices here, the ethicist might encounter something like the following:

I know this is a tough call. Edna will received a lot of money that she does not "deserve" in a substantive sense, and I play a part in that result. But there are legal arguments on her behalf supporting her continued eligibility, so it's not *illegal* for me to do what Edna asks. But not everything that's legal is moral, I understand.

So how do I justify this on a moral level? I worry a lot about that. On the one hand, there's my commitment to Edna as my client, and my agreement to be her advocate. I confess I am also swayed by her need for the money. Edna finds it very hard, literally impossible perhaps, to survive on what the welfare officials offer her for a monthly grant. The money comes from this large government agency which has never been too friendly to our clients, and they'll never miss this few thousand dollars per year given their multi-million dollar budgets. There are political arguments persuading me that welfare grants are never set at subsistence levels, so it's not as though Edna is being greedy or anything.

On the other hand, I am taking advantage of an agency and a hearing officer who will decide this case without knowing the true implication of his or her

22. I deliberately have chosen to leave Edna with a trivial level of TANF benefits rather than to define her predicament in a way that rendered her flatly ineligible for benefits. I do so in order to approximate what I perceive as a "discretionary ethics" plight for the lawyer, instead of one involving "moral activism." If Edna is, by any neutral interpretation of the law, not entitled to participate in the welfare scheme, it more closely resembles lawlessness for her lawyer to argue technical issues that maintain her on the program. This excess of lawyer role is what I understand to be the essence of moral activism. If, on the other hand, the best neutral interpretation of the law confirms her eligibility, her lawyer's arguments directed toward maintaining her on the program, while eliding the question of the appropriate *amount* of assistance she will receive, is hardly "lawless." Because it still raises some moral issues but not legal ones, the example qualifies as a discretionary ethics matter.

23. I have crafted this example to avoid Mark's active participation in client fraud, which of course would be plainly forbidden by the codes governing lawyer conduct, *see, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.2(d), 4.1(b) (1983) [hereinafter MODEL RULES] as well as by what Geoffrey Hazard terms the "other law" within the "law of lawyering." Geoffrey C. Hazard, *Lawyers and Client Fraud: They Still Don't Get It*, 6 GEO. J. LEGAL ETHICS 701 (1993). If my assumptions here are correct, Mark will suffer no formal professional sanction for his work on this hearing.

decision. Edna has no *right* to this money, and it is only my careful lawyering that keeps the money in her pocket. I hate it when big firm lawyers use those tactics to take advantage of the IRS, or bankruptcy debtors, or consumers. I am sure that they all think that their particular case justifies their sharp tactics, just as I'm trying to do here.

In the end, I will make the arguments for Edna because she is my client and because she is poor. I would not *violate* the law for those reasons, but, again, everything I do in this case is legal, and that makes it harder for me to opt for a path that my client doesn't want. The fact that it is my *role* to make the best legal arguments for Edna also persuades me a great deal. This is, after all, what lawyers are hired to do.

Mark seems to be reasonably thoughtful here, and considerate of the appropriate moral implications. His sentiments probably exemplify how lawyers tend to think about discretionary ethics matters. At the same time, his deliberation is *ad hoc* — it lacks reference to evaluative standards or benchmarks by which to judge the success of the endeavor, other than its ultimate reliance on the role obligations, which, as the ethicist would teach us, cannot serve as an operative trump in this kind of moral reasoning.²⁴

The pertinent question, of course, is whether some method or process might serve Mark better in his struggle through discretionary ethics.²⁵ That inquiry ought to have meaning for most practitioners, even if its goals seem rather elusive. Either one believes that there are coherent ways to understand moral disagreement, or one does not. For the latter individuals, there is no such method of practical ethics that can ever “work,” and we can safely ignore them. The rest of us, while not denying that moral reality is controversial and that objective answers about moral reality are, at the very least, debatable, nevertheless accept that *some* basis exists by which to discuss questions of value.

These considerations invite a search for a process of ethical reasoning with the following characteristics:

- 1) The process must be *coherent*, so that its users can, logically and analytically, compare its application and evaluate its usefulness.
- 2) The process must be accessible to plain people who have not studied moral philosophy.²⁶
- 3) Related to this last point, the process cannot, as a condition for its

24. For the most comprehensive argument against viewing role obligations as trumping ordinary moral sentiments, see DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 104–47 (1988).

25. For a discussion of the value of some structure to ethical deliberation, see Camille A. Gear, Note, *The Ideology of Domination: Barriers to Client Autonomy in Legal Ethics Literature*, 107 *YALE L.J.* 2473, 2476 (1998) (describing clinical experience in which the author “longed for an ethics paradigm” that would assist her to accomplish her ethical goals).

26. So much of what is written in this area fails this test rather dramatically. Abstract language and abstruse concepts are common complaints within professional discussion of moral philosophy. See, e.g., Martha Nussbaum, *The Use and Abuse of Philosophy in Legal Education*, 45 *STAN. L. REV.* 1627, 1641–42 (1993)[hereinafter Nussbaum, *Use and Abuse of Philosophy*].

usefulness, require that its users resolve the metaethical questions about the source of moral value; but at the same time,

4) any given process must assume some coherent account of the source of moral value.

5) Finally, the deliberative method should work to “unmask[] the intellectual pretensions of those who would use or misuse philosophical doctrines in support of venality and self-deception.”²⁷ In other words, the method ought to be useful in distinguishing what is sometimes known as “sophistry”²⁸ from valid moral discourse.

Much of the work of the work of 20th century ethicists, and in particular that within modern bioethics, proceeds with these requirements in mind. The important consideration is whether their work can have any meaningful influence on the practice lives of ordinary lawyers.

B. DEDUCTIVE AND ANALYTIC MODELS: THEORY AND PRINCIPLISM

1. Moral Theory

Mark’s search for a more grounded response to his ethical dilemma would probably lead him to moral theory. Legal ethics texts frequently suggest that moral theory can aid in the resolution of moral choices,²⁹ a suggestion which makes sense, as “moral theory” implies a systematic understanding of the philosophy of value.³⁰ For the most part, Mark would find that direction unhelpful. Let us explore why.

27. Jeffrie G. Murphy, *Kant on Theory and Practice*, in NOMOS XXXVII, THEORY AND PRACTICE 47, 48 (Ian Shapiro & Judith Wagner DeCew eds., 1995). Murphy cites Immanuel Kant’s concern for “moral philistines,” and those who would use “philosophical doctrines . . . to give cover of intellectual respectability to the iniquities and deceptions practiced by such persons.” “There is very little that a philosopher can do directly to combat ordinary human venality and self-deception,” but at least the philosophers can work to limit the excuses and covers for those who act that way. *Id.*

28. Webster’s New World Dictionary defines “sophistry” as “misleading but clever reasoning.” It shares the pejorative reputation that casuistry once had, although the negative connotation of sophistry remains much more insistent. The word comes to us from the work of the Sophists, a term that once meant “experts,” who were Greek philosophers who held that all morality was personal. Trained in the art of rhetoric, the Sophists came to be known as those who would use careful argument for whoever would pay their fee — a notable resemblance to what we now know as lawyers. THE OXFORD HISTORY OF WESTERN PHILOSOPHY 17–19 (Anthony Kenny ed., 1994).

If sophistry is to be condemned, though, it ought not be so for its use of rhetoric as a central theme of its teaching. The use of rhetoric is an important element of the work of the casuists as well, as we see below. *See infra* notes 212–229 and accompanying text. It is not rhetoric, with its important connection to practical judgment, that damns sophistry, but instead it would be sophistry’s lack of a moral core. *See, e.g.*, BEDAU, *supra* note 2, at 101.

29. *See, e.g.*, CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 70–76 (1986); THOMAS M. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS (6th ed. 1995); DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 7–10 (2d ed. 1992).

30. *See* Spiegel, *Theory and Practice*, *supra* note 5, at 580 (“[B]y ‘theory’ we commonly mean a set of general propositions used as an explanation. Theory has to be sufficiently abstract to be relevant to more than just particularized situations.”).

Critics have begun to address the weaknesses in moral theory by focusing on its deductive quality.³¹ The conventional expectation for theory, when unpacked, is deductive in nature. Theory produces the major premise within a syllogism; the facts of a given case serve as the minor premise; and the syllogism effects the answer.³² This syllogism thesis for moral theory is incorrect, and cannot serve as a formula to guide Mark's decisionmaking, for two distinct reasons.

The first, and weaker, reason is Mark's inability, as a plain person, to decide upon a discrete theory to guide his actions. Moral philosophy is crowded with competing theories of the right and the good. The discipline is broadly divided between deontologists and consequentialists, but even that categorization masks many more nuanced disputes among moral philosophers.³³ Presumably each theory will provide differing advice to Mark; if that is so, his choice of theory will play a significant role in how he chooses to act.³⁴ But making such a choice among the array of potential theories would be a considerable challenge for Mark, as it would be for most lawyers. The theorist position implies that practitioners must elect such a theory, certainly a counterfactual implication which, even if true, would predict blind or random choices at best.³⁵

31. See, e.g., DeCew & Shapiro, *supra* note 8, at 2–3; Henry S. Richardson, *Specifying Norms as a Way to Resolve Concrete Ethical Problems*, 19 PHIL. & PUB. AFFAIRS 279, 281 (1990) [hereinafter Richardson, *Specifying Norms*].

32. Henry Richardson calls this reasoning a "Peripatetic syllogism." See Richardson, *Specifying Norms*, *supra* note 31, at 281. Bioethicists Graber and Thomasma offer this example of the deductive syllogistic process:

Normative premise:	One ought to treat each person as an end-in-himself or herself and never merely as a person.
Description of situation:	To use a person as a subject in nontherapeutic research when he or she has not given free and informed consent to participate is to treat him or her merely as a means.
Conclusion:	One ought never to use such a person as a subject nontherapeutic research unless he or she has given free and informed consent to participate.

GRABER & THOMASMA, *supra* note 10, at 22. Graber and Thomasma employ a Kantian position as the original premise in this effort to demonstrate what they term a "moral principle . . . syllogism." *Id.*

33. For a discussion of competing philosopher ideologies, see, e.g., WILLIAM K. FRANKENA, *ETHICS* 14–22 (2d ed. 1973); GRABER & THOMASMA, *supra* note 10, at 215–16; Stanley G. Clarke & Evan Simpson, *Introduction: The Primacy of Moral Practice*, in *ANTI-THEORY IN ETHICS AND MORAL CONSERVATISM* 1, 4 (Stanley G. Clarke & Evan Simpson eds., 1989).

34. It is an odd assertion that whether an act is moral or not can depend upon one's philosophical orientation. The casuists disagree with that sentiment, but many theorists assume its validity. Students are frequently taught that differing moral theories will lead to different "right" answers to ethical questions. Consider the following example from a medical school ethics test:

Different moral perspectives can give rise to different judgments about actions. Describe a medical situation in which different decisions might be made by a Kantian (or Rawlsian) on the one hand and a utilitarian on the other. Explain what the difference would be and how it would arise.

S. GOROWITZ ET AL., *MORAL PROBLEMS IN MEDICINE* 543 (1976) quoted in Philip E. Devine, *Theory and Practice in Ethics*, in *MORAL THEORY AND MORAL JUDGMENTS*, *supra* note 14, at 213, 213.

35. The problem of expert disagreement about moral theory has been noted by others. See, e.g., David

A brief example should make this point. Mark's philosophical research might lead him to the prominent philosopher Alan Donagan; indeed, Donagan's book *The Theory of Morality*³⁶ seems by its title to fit Mark's needs perfectly. Donagan is a deontologist philosopher who maintains that theory can effect concrete action. His work "show[s] how moralists working in the Kantian tradition go from their general moral principles to judgments in individual cases."³⁷ Mark's reading of Donagan's Kantian analysis, which would be difficult, should lead him to conclude that the individual circumstances and needs of Edna's life cannot affect Mark's duties as a lawyer, which arise from universal and categorical considerations.³⁸ Mark might then conclude that a universalized and categorical approach to this dilemma would bar him from assisting Edna at her TANF hearing.

In this way Mark will have used moral philosophy to resolve his conflict. But the difficulties with that conclusion are manifest. Not only should Mark wonder whether his reading of Donagan is faithful to the author's Kantian theory,³⁹ but,

Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 498 (1990) ("[I]f the philosophers have no consensus, how can we expect lawyers to rely on them?"); Raanan Gillon, *The Four Principles Revisited: A Reappraisal*, FOUR PRINCIPLES OF HEALTH CARE ETHICS 319, 326 (Raanan Gillon ed., 1994) [hereinafter Gillon, *A Reappraisal*] ("If life-long philosophers cannot succeed at this enterprise to the satisfaction of their philosophical opponents it would surely be ludicrous even to suggest that it is appropriate for health care workers . . . to attempt it."). For a similar observation about jurisprudence, see Steven Lubet, *Is Legal Theory Good for Anything?*, 1997 U. ILL. L. REV. 193, 206 (1997) ("[I]f law professors, including some with doctorates, are unable to produce adequate theoretical writing, what hope is there for mere practitioners?").

36. ALAN DONAGAN, *THE THEORY OF MORALITY* (1977). Critics have noted Donagan's choice of title in his article, suggesting not one theory among many but rather "the" theory of morality. See e.g., Stout, *supra* note 9, at 125.

37. Alan Donagan, *The Relation of Moral Theory to Moral Judgments: A Kantian View*, in *MORAL THEORY AND MORAL JUDGMENTS*, *supra* note 14, at 171.

38. As a Kantian, Donagan holds to "a deontology: a system of absolute or categorical requirements on our conduct imposed by practical reason." *Id.* Practical reason concludes that the essence of moral action rests with respect for persons as ends, and not means. From that universal principle, and not by intuitions, one judges the correctness of one's actions. Donagan describes (using Kant's language) the "universal law of *Recht*," which "amounts to this: that when you are in a situation in which you and others cannot all accomplish purposes in themselves unobjectionable, you are to agree on a rule that will not reduce any of you to mere means to the good of others." *Id.* at 177, relying on IMMANUEL KANT, *GRUNDLEGUNG DER METAPHYSIK DER SITTEN* (2d ed. 1786). Since "individuals will differ about who is entitled to what[,] . . . [w]hat is needed is an accepted public authority to define *Recht* . . . and, when it is established, [one] must obey its laws, even though they will almost certainly be defective." Donagan, *supra* note 37, at 178. Donagan supplies an example of *Recht* as applied:

A driver of a vehicle bringing medical supplies to a scene of an accident may not break whatever universal law may be in force forbidding dangerous driving, even though every minute gained will save lives, and few will be hurt by breaking the law. . . . The uses of the streets declared wrong are wrong, no matter what good to others may result.

Id.

39. It is not entirely self-evident that the categorical principle Donagan espouses leads to the conclusion suggested above, that Mark eschew any assistance to Edna because of its affiliation with welfare fraud. Another plausible application of the law of *Recht* would conclude that, since Mark's appearance is not *unlawful* (it was, recall, an exemplar of discretionary ethics), he has no reason to decide for himself that his participation would be wrong.

more importantly, he deserves to worry whether Donagan is *right*. Donagan is a celebrated philosopher, but other equally distinguished thinkers believe that he is simply wrong in his approach.⁴⁰ Donagan is Kantian in his orientation. Perhaps the utilitarians⁴¹ or the pluralists are more persuasive.⁴² Mark needs to resolve that uncertainty, and it is fair to predict that he will not find the time to get that task done.⁴³

Thus far we have assumed that in order to use theory as a guide Mark must "opt in" *ex ante* as a deontologist or consequentialist and proceed according to his chosen dogma. If that kind of full-scale commitment is too much to expect of any non-philosopher, perhaps Mark can instead apply moral theory selectively, sometimes using the Kantian theories and at other times the utilitarian.⁴⁴ John Arras characterizes this approach as the "Consumer Reports" model of ethical reasoning,⁴⁵ in which the theorists offer up the menu of major premises from

40. See, e.g., STOUT, *supra* note 9, at 129–35 (assessing Donagan's "fundamental principle of respect from which the entire content of morality . . . can be derived," and finding that it "bears virtually no weight"); Michael J. Perry, *Some Notes on Absolutism, Consequentialism, and Incommensurability*, 79 NW. U. L. REV. 967, 971 (disagreeing with Donagan).

41. See, e.g., R.M. Hare, *Can Moral Philosophy Help?*, in PHILOSOPHICAL MEDICAL ETHICS: ITS NATURE AND SIGNIFICANCE 49 (Stuart F. Spicker & H. Tristram Engelhardt, Jr. eds. 1977) (defending a rule-utilitarian theory); Robert P. George, *Recent Criticism of Natural Law Theory*, 55 U. CHI. L. REV. 1371, 1409 (1988) ("The fundamental problem with Kantian moral theory, according to neo-scholastics (and others), is that, in refusing to ground morality in a concern for human well-being, it renders moral rules ultimately pointless.").

42. See, e.g., GRABER & THOMASMA, *supra* note 10, at 173–202 (defending a "unitary theory of clinical ethics"); BARUCH A. BRODY, *LIFE AND DEATH DECISION MAKING* 9–16 (1988) (articulating a "pluralistic theory").

43. The argument here also ignores the accompanying truth that, notwithstanding the claims of some like Donagan, most of moral theory offers little in the way of practical advice. David Luban tells the following story:

[A] morally troubled admirer once complained to Kant, "Now put yourself in my place and either damn me or give me solace. I read the metaphysic of morals and the categorical imperative, and it doesn't help a bit."

David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424, 442 (1990) [hereinafter Luban, *Mid-Course Corrections*].

44. In her excellent legal ethics textbook, Deborah Rhode implies such a selective application of theory. See DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* 13 (2d ed. 1998). In a chapter entitled "Traditions of Moral Reasoning," Rhode canvasses several approaches to moral choice, highlighting the "two primary branches" of normative theory, the teleological and the deontological. *Id.* at 14. She then poses these questions for her readers:

Which of the preceding ethical approaches best captures your view? Under what professional circumstances would you be most likely to use utilitarian, rights-based, or character-based approaches. To what extent would you expect different outcomes? Why?

Id. at 25–26.

45. Arras, *Principles and Particularity*, *supra* note 10, at 989. Arras credits the philosopher Annette Baier as a source of this insight. See ANNETTE BAIER, *Doing Without Moral Theory*, in *POSTURES OF THE MIND* 228, 235 (1985). Baier refers to the use of philosopher experts in such an enterprise as "moral valets, or professional moral judges," borrowing the phrase from Hegel. *Id.*

which the practitioners may select one or more, depending on the circumstances. Arras imagines the philosophers' teaching as follows:

Well, in this situation a Kantian would do "X," a utilitarian would promote "Y," and a natural rights theorist would advocate "Z."⁴⁶

While this "menu" conception asks less of the plain person practitioner, it begs the most critical question — how Mark chooses among the available menu options. So long as Mark's choice of philosophical theory depends itself on some theoretical construct, he remains at sea in the absence of more sophisticated philosophical training. As one philosopher puts it:

[T]he discovery that a Kantian would do this, a Millian that, and a Rawlsian something else [is] not terribly helpful for those who had to make a decision without the leisure to sort out where they stood in these debates.⁴⁷

This difficulty leads to the second, and what I call the stronger, criticism of the moral theory conception. The menu idea fails not simply because of its reliance on usually-scarce philosophical expertise, but more critically because it has the moral reasoning process backwards. It is probably true that Mark will at times act like a deontologist, and at other times will better resemble a utilitarian. *That* choice, though, is not theory-driven. The test of a theory is not further theory, but rather its fit with considered practical judgments.⁴⁸ Mark evaluates the suggestions arising from theory by reference to their fit with the circumstances he faces. Apparent disharmony will cause Mark to reject a theory, despite its intellectual or logical elegance. As Judith Jarvis Thomson writes, "it is precisely our moral views about examples, stories, and cases which constitute the data for moral theorizing."⁴⁹ The strong objection to theory, then, rejects its deductive direction as a faulty description of moral reality. The casuists exploit this realization in their appeal for a bottom-up, rather than a top-down, process of moral reasoning, as we shall see below.⁵⁰

46. *Id.* at 989.

47. Winkler, *supra* note 10, at 350.

48. This insight is frequently attributed to John Rawls and his notion of "considered moral judgments." JOHN RAWLS, *A THEORY OF JUSTICE* 49 (1971). The insight is also a natural corollary of the modern rejection of the "fact/value distinction." The traditional theorists' view of ethics separated moral meaning from the world of facts; as Annette Baier describes it, "there are beautiful souls doing their theoretical thing and averting their eyes from what is happening in the real world . . ." BAIER, *supra* note 45, at 235. Modern and postmodern philosophers have attacked the distinction, arguing that descriptions of value, "right," or "good," cannot be understood outside of felt experience and actual circumstances. See, e.g., Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics* 133 U. PA. L. REV. 291 (1985); KUCZEWSKI, *supra* note 13, at 10, 100.

49. JUDITH JARVIS THOMSON, *RIGHTS, RESTITUTION AND RISKS* 257 (1986).

50. See notes 111–37 *infra* and accompanying text.

2. Principlism

The concerns about theory's practice-fitness have led moral philosophers to suggest an alternative method grounded in more workable and focused value-statements. In reaction to the unfriendliness of the theoretical debates, some ethicists propose "principles" as a substitute for theory. Principles represent more discrete and accessible statements of value that transcend differences among theories. Effective principles, under this conception, would be justified by any coherent theory, freeing practitioners like Mark from the deep debates among the philosophers. This approach has come to be known as "principlism."⁵¹

Principlism gained prominence in the 1970s with the publication of Beauchamp and Childress's *Principles of Biomedical Ethics*,⁵² perhaps the most important applied ethics text within medicine. The principlists believed that broad consensus might be attained about mid-level principles, regardless of philosophical orientation.⁵³ Thus, in medicine Beauchamp and Childress identify four central principles — autonomy, beneficence, nonmaleficence, and justice.⁵⁴ The claim is that these clusters represent a form of "common morality,"⁵⁵ and tap into an "overlapping consensus"⁵⁶ among the otherwise distinctly different moral theories.

51. The term "principlism" seems to have been coined by two critics of the use of principles as a method of moral reasoning, K. Danner Clouser and Bernard Gert. See K. Danner Clouser & Bernard Gert, *A Critique of Principlism*, 15 J. MED. & PHIL. 219 (1990). The term is not used only by critics of this approach. The authors to whom the criticisms are most commonly directed, Tom Beauchamp and James Childress, employ it as well. See, e.g., BEAUCHAMP & CHILDRESS, PRINCIPLES IV, *supra* note 10, at 37 (noting that the term has been used "somewhat disparagingly"); Tom L. Beauchamp, *Principlism and its Alleged Competitors*, 5 KENNEDY INST. OF ETHICS J. 181 (1995) [hereinafter *Alleged Competitors*].

52. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS (1st ed. 1977) [hereinafter BEAUCHAMP & CHILDRESS, PRINCIPLES I]. Beauchamp and Childress have updated their book three times since the 1977 edition, and in doing so the formulation of the "principlist" method has evolved considerably. As we see below, the fourth edition has incorporated much from the casuistic critiques. See *id.* (2d ed. 1983) [hereinafter BEAUCHAMP & CHILDRESS, PRINCIPLES II]; *id.* (3rd ed. 1989) [hereinafter BEAUCHAMP & CHILDRESS, PRINCIPLES III]; BEAUCHAMP & CHILDRESS, PRINCIPLES IV, *supra* note 10.

53. BEAUCHAMP & CHILDRESS, PRINCIPLES IV, *supra* note 10, at 100–01. For instance, one of the authors of *Principles of Biomedical Ethics* is a utilitarian and the other a deontologist, but each agrees fully with the articulated principles. *Id.* at 110. Ezekial Emanuel calls this claim a "central tenet of principlism." Ezekial J. Emanuel, *The Beginning of the End of Principlism*, 25 HASTINGS CTR. RPT. 37, 38 (July-Aug. 1995).

54. *Id.* at *passim*. Despite considerable refinements in their earlier reliance on a pure deductivist model, Beauchamp and Childress maintain in their most recent work a firm reliance on these four principles. BEAUCHAMP & CHILDRESS, PRINCIPLES IV, *supra* note 10, at 38.

55. Emanuel, *supra* note 53, at 38. For a similar argument about "common morality" made by a philosopher working within law, see LUBAN, *supra* note 24. The propriety of that claim — that something resembling a "common morality" is sufficiently recognizable to consider it a palpable concept for lawyers — has been the subject of some debate since Luban published that book. See Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116 (1990) [hereinafter Ellmann, *Lawyering for Justice*]; David Luban, *Partisanship, Betrayal and Autonomy in the Attorney-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004 (1990); see also Reed Elizabeth Loder, *Out of Uncertainty: A Model of the Lawyer-Client Relationship*, 1 S. CAL. INTERDISC. L.J. 89, 134 (1993) [hereinafter Loder, *Out of Uncertainty*] (questioning the reliability of the concept).

56. BEAUCHAMP & CHILDRESS, PRINCIPLES IV, *supra* note 10, at 102.

Principlism “became the dominant paradigm for serious work in bioethics,”⁵⁷ and for good reason, at least initially. The notion of principles, while not offering the “ultimate ethical algorithm,”⁵⁸ permits conversation through common language and agreement about normative terms. The ethicists’ in-depth treatment of each of the principles allows practitioners to understand, for instance, when it was appropriate to act paternalistically, or when a provider might be obligated to assist another in need.

One can readily see the relevance of principles for lawyers. There is a distinct strain of principlism within contemporary legal ethics scholarship, expressing (if more ambiguously, perhaps) principles not so different from those central to bioethics. Both law and medicine, for instance, share a central commitment to autonomy⁵⁹ and justice.⁶⁰ The legal profession might not encounter the bioethicists’ concerns for nonmaleficence and beneficence, at least centrally, but lawyers instead would identify confidentiality,⁶¹ loyalty,⁶² and perhaps zeal⁶³ as comparable principles.

This is not the forum for a full exploration of the viability of principlism as a model of ethical reasoning either in medicine or law. We can note, though, that principlism fails to overcome the strong objection to the theory identified

57. Arras, *Principles and Particularity*, *supra* note 10, at 986.

58. Applied ethics texts often allude to the quest for the ultimate ethical algorithm. *See, e.g.*, JONSEN & TOULMIN, *supra* note 12, at 7; McKinney, *supra* note 13, at 332; Stephen Toulmin, *How Medicine Saved the Life of Ethics*, in *NEW DIRECTIONS IN ETHICS* 265 (Joseph P. DeMarco & Richard M. Fox eds., 1986) [hereinafter *NEW DIRECTIONS*].

59. Respect for autonomy is central to client-centered decisionmaking. *See, e.g.*, D. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1990); Robert D. Dinerstein, *Clinical Texts and Contexts*, 39 *UCLA L. REV.* 697, 700 (1992); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 *ARIZ. L. REV.* 501 (1990) [hereinafter *Dinerstein, Reappraisal and Refinement*].

60. *See* LUBAN, *supra* note 24, at 60; ANTHONY D’AMATO & ARTHUR J. JACOBSON, *JUSTICE AND THE LEGAL SYSTEM* (1992); Frank I. Michelman, *On Regulating Practices with Theories Drawn From Them: A Case of Justice as Fairness*, in *NOMOS XXXVII, THEORY AND PRACTICE*, *supra* note 8, at 309. Unlike in conventional ethics circles, practicing lawyers are known to argue that they achieve justice by advocating zealously for each individual client, rather than for “just” results in any given case. For a description of that posture and a cogent criticism of it, see William H. Simon, *Ethical Discretion in Lawyering*, 101 *HARV. L. REV.* 1083 (1988) [hereinafter *Simon, Ethical Discretion*].

61. For the best defense of the confidentiality precept, see Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 *MICH. L. REV.* 1469 (1966). While recent efforts have begun the unpacking of this principle, *see, e.g.*, Daniel R. Fischel, *Lawyers and Confidentiality*, 65 *U. CHI. L. REV.* 1 (1998); Fred C. Zacharias, *Rethinking Confidentiality*, 74 *IOWA L. REV.* 351 (1989), there nevertheless is little doubt that this commitment is central to lawyering ethics.

62. For a comprehensive, and still quite helpful, inquiry into the duty of loyalty, *see Developments in the Law: Conflicts of Interests in the Legal Profession*, 94 *HARV. L. REV.* 1244 (1981). As with confidentiality just above, the dedication to unfettered client loyalty has been subject to some rethinking in recent years, as courts and commentators recognize the interests of third parties. *See, e.g.*, Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 *GEO. J. LEGAL ETHICS* 823, 824 (1992); *Lucas v. Hamm*, 56 *Cal. 2d* 583, 589 (1961) (implying that a lawyer who drafts a will may be liable to beneficiaries for malpractice).

63. The notion of zeal as a foundational principle of legal ethics is both self-evident and increasingly controversial. In its support, *see, e.g.*, MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS’ ETHICS* 65–66 (1990). For trenchant criticism, *see, e.g.*, LUBAN, *supra* note 24, at 50–148.

above,⁶⁴ as critics now regularly acknowledge.⁶⁵ While its adherents sometimes claim otherwise,⁶⁶ principlism is fundamentally deductive in its approach,⁶⁷ an orientation implying that one first identify the relevant principle and then apply it to the facts at hand, much like the theorists' model suggests. But, like theories, principles conflict;⁶⁸ indeed, it is the very conflict between strongly-held prin-

64. Some criticism of principlism, though, arrives from the opposite direction — from the theorists, who complain that the weakness of principlism is its lack of a unified, coherent moral theory through which to resolve the particular conflicts. See Clouser & Gert, *supra* note 51, at 219 (arguing that principles neither guide action nor possess a relationship which would avoid the conflict among them arising from the premise that these principles do not all emanate from a single, unified theory); Ronald M. Green, *Method in Bioethics: A Troubled Assessment*, 15 J. MED. & PHIL. 179, 189 (1990) (questioning whether normative discussion is possible when principles conflict without a means of prioritizing the principles) [hereinafter Green, *Method in Bioethics*].

65. While principlism was aptly characterized as the "central paradigm" of applied ethics, the very titles of some critics' works capture some of the frustration with this model which has since lost much favor within the discipline. E.g., A MATTER OF PRINCIPLES?: FERMENT IN U.S. BIOETHICS (Edwin R. DuBose et al. eds., 1994); RONALD P. HAMEL ET AL., BEYOND PRINCIPALISM (1993); Emanuel, *supra* note 53, at 37 (reviewing BEAUCHAMP & CHILDRESS, PRINCIPLES IV, *supra* note 10); Stephen Toulmin, *The Tyranny of Principles*, 11 HASTINGS. CTR. REP. 31 (Dec. 1981) [hereinafter Toulmin, *Tyranny of Principles*].

66. Beauchamp and Childress deny that their method is deductive in a strict sense, but instead suggest that it melds deduction, induction, and the analogical reasoning favored by the casuists. See BEAUCHAMP & CHILDRESS, PRINCIPLES IV, *supra* note 10, at 100–01, 106–08 (discussing "principle-based, common-morality" theories and replying to criticism); Beauchamp, *Alleged Competitors*, *supra* note 51, at 182–83 (offering principles not as a comprehensive theory, but instead as applicable to biomedical ethics specifically).

67. See, e.g., Karen Hanson, *Are Principles Ever Properly Ignored? A Reply to Beauchamp on Bioethical Paradigms*, 69 IND. L.J. 975, 977–78 (1994) (discussing how principlism's reliance on a fact/value schism, with the application of the norms to the circumstances, leaves it as a fundamentally deductive method); Raymond J. Devettere, *Principles of Biomedical Ethics*, 322 NEW ENG. J. MED. 137 (1990) (reviewing BEAUCHAMP & CHILDRESS, PRINCIPLES III, *supra* note 52).

In a famous graphic, Beauchamp and Childress outlined their model in a manner which implies deduction:

4. Ethical Theories

↑

3. Principles

↑

2. Rules

↑

1. Particular Judgments and Actions

BEAUCHAMP & CHILDRESS, PRINCIPLES II, *supra* note 52, at 5. While the arrows move upward, reflecting justification, the reasoning process moves downward. "According to this diagram, judgments about what ought to be done in particular situations are justified by moral rules, which in turn are justified by principles, which ultimately are justified by ethical theories." *Id.* Beauchamp and Childress maintain the graphic throughout their four editions, with slight modification appearing in the fourth edition, omitting the language just quoted in their most recent edition.

68. The bioethicist John Arras offers a simple example. Arras, *Principles and Particularity*, *supra* note 10, at 993. A doctor wishes to lie to her patient in order to lift his spirits and facilitate recovery. One could say that this doctor's act violates the principle of autonomy and the law of informed consent. Indeed, one could deploy reasoning in this case as a deductive syllogism: "It is wrong to lie to patients. Dr. Jones has told a lie. Therefore, Dr. Jones has done something wrong." *Id.* Arras notes the obvious difficulty:

The problem, of course, is that even in a simple, straightforward case, this reasoning has suppressed a conflicting principle — the principle of beneficence. This is precisely the principle that Dr. Jones would appeal to should she try to defend her lie.

Id. Arras argues that the example just used is especially interesting because of the trumping characteristic that

ciples that represents the prototype of ethical tension.⁶⁹ Principlism only serves as a guiding “ethics paradigm”⁷⁰ if it can justify a form of *ex ante* “lexical ordering” of available principles, but, to no surprise, neither principlism nor modern moral philosophy generally has defended such a scheme.⁷¹ This has led one writer to dub the resulting frustration as “[t]he . . . unbearable [l]ightness of [p]rinciple.”⁷²

To be fair, the more recent principlist literature acknowledges this criticism, instead suggesting versions of the conception grounded in pragmatism⁷³ and

the principle of autonomy has achieved in recent years within medical culture. *Id.* That same phenomenon has been noted in legal culture as well. *See, e.g.*, William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991) (arguing against the autonomy or “informed consent” view of lawyer-client relations as indistinct from a paternalistic view); William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984) [hereinafter Simon, *Visions of Practice*] (doubting whether client autonomy is as achievable as traditional writers assume); Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987–88) (conceptualizing lawsuits as sources of collective, and not individual, benefit). *Cf.* Paul R. Tremblay, *A Tragic View of Poverty Law Practice*, 1 D.C. L. REV. 123 (1992) (critiquing the Simon and White perspective on autonomy); Mark Spiegel, *The Case of Mrs. Jones Revisited: Paternalism and Autonomy in Lawyer-Client Counseling*, 1997 BYU L. REV. 307 (responding to Simon). For a recent articulate defense of the autonomy principle, especially with poor clients, see Gear, *supra* note 25.

69. This criticism is the most common one found within the critics' work. *See, e.g.*, Arras, *Principles and Particularity*, *supra* note 10, at 992–99 (critiquing principlism as too mechanistic); Thomas H. Murray, *Medical Ethics, Moral Philosophy and Moral Tradition*, 25 SOC. SCI. & MED. 637, 638 (1987) (pointing out the shortcomings of deductivism); Toulmin, *Tyranny of Principles*, *supra* note 65 (discussing the reasons for, weaknesses of, and responses to oversimplification and generalization in ethics); Carson Strong, *Justification in Ethics*, in MORAL THEORY AND MORAL JUDGMENTS, *supra* note 14, at 193, 199 (discussing the shortcomings of an approach that balances conflicting principles in case-specific medical contexts).

70. Gear, *supra* note 25, at 2476.

71. Sir David Ross did assert a form of lexical weighting of duties, in his belief that the principle of nonmalevolence (avoiding harm) ought to take precedence over the principle of beneficence (the production of good consequences). ROSS, *supra* note 3, at 21–22. Few philosophers believe that the lexical ordering endeavor is a fruitful one. *See* Kai Nielsen, *On Being Skeptical About Applied Ethics*, in CLINICAL MEDICAL ETHICS: EXPLORATION AND ASSESSMENT 95 (Terrence F. Ackerman et al. eds., 1987) (discussing the concept of “moral expertise”); Alasdair MacIntyre, *Moral Philosophy: What Next?*, in REVISIONS: CHANGING PERSPECTIVES IN MORAL PHILOSOPHY 1, 5 (Stanley Hauerwas & Alasdair MacIntyre eds., 1983) (stating that “there are no scales” for the weighing of competing values).

Aaron Mackler, though, has suggested that lexical ordering is not entirely implausible. AARON LEONARD MACKLER, *CASES AND JUDGMENTS IN ETHICAL REASONING: AN APPRAISAL OF CONTEMPORARY CASUISTRY AND HOLISTIC MODEL FOR THE MUTUAL SUPPORT OF NORMS AND CASE JUDGMENTS* 109–13 (1992) (unpublished Ph.D. dissertation, Georgetown University) (on file with author). Mackler describes the idea of a “lexical consequentialism . . . offer[ing] a hierarchy of consequentialist appeals,” *id.* at 110, with clearer guidance to practitioners while being “less vulnerable to abuse” than a model which rests more on intuitive judgments. *Id.* at 111. Mackler's point is not to develop a full lexical ordering theory, however. He proposes it, without great elaboration, within an argument plausibly rebutting an intuitive model he finds wanting, the “pluralistic casuistry” of Baruch Brody. *See* BRODY, *supra* note 42, at 9–11 (considering “[t]he virtues of a [p]luralistic [t]heory”). On lexical ordering, *see also* SUSAN L. HURLEY, *NATURAL REASONS: PERSONALITY AND POLITY* 219, (1989) (suggesting the need for such ordering but not defending a particular scheme).

72. Winkler, *supra* note 10, at 355. He continues: “[T]he applied ethics model, even when amended by the methodology of reflective equilibrium, sustains the illusion that bioethics is essentially and primarily a matter of constructing and applying principles when in fact it is almost anything but this.” *Id.*

73. The most successful and thoughtful of the “new principlism” has been developed by Henry Richardson,

“coherentism.”⁷⁴ These newer principlists acknowledge the casuist’s insight that individual circumstances play an important role in ethical decisionmaking,⁷⁵ but insist upon a collection of “specified” norms to ensure that moral choices are “tethered” to something more substantial than individual case experiences.⁷⁶ These more sophisticated iterations of principlism continue to disappoint, however. As we shall see more fully below, the norms upon which the principlists rely, and in particular those defended as more pragmatic and coherent, derive from considered case judgments; rather than norms driving decisions, norms reflect and follow from discrete moral experience. The new effort to “specify”⁷⁷ norms implies a catalogue of *prima facie* rules which plain persons ought to know, understand, and use as they encounter ethical conflict.⁷⁸ However, this

who defends what he calls “specified principlism.” See Richardson, *supra* note 31; Richardson, *Beyond Good and Right: Toward a Constructive Ethical Pragmatism*, 24 PHIL. & PUB. AFF. 108, 130–31 (1995) (offering specification as a means of achieving flexible yet pragmatic norms). The specification arguments have been furthered by David DeGrazia as well. David DeGrazia, *Moving Forward in Bioethical Theory: Theories, Cases, and Specified Principlism*, 17 J. MED. & PHIL. 511, 523–34 (1992). The “specification” insight appears as an important revision to the original principlist doctrine. See BEAUCHAMP & CHILDRESS, PRINCIPLES IV, *supra* note 10, at 106–08 (replying to criticisms levied in the context of “principle-based, common-morality” theories).

74. BEAUCHAMP & CHILDRESS, PRINCIPLES IV, *supra* note 10, at 20–28.

75. *Id.* at 96–100.

76. “The advantage of thinking of moral reasoning in terms of [Henry R. Richardson’s] specification rather than balancing [of competing principles] is . . . that one’s final practical judgments remain tethered to a single principle capable of bestowing rational justification upon them.” Arras, *Principles and Particularity*, *supra* note 10, at 996–97. See also DeGrazia, *supra* note 73, at 527 (“[S]pecification depends on the possibility of reasoned criticism afforded by a coherence theory of ethical justification.”).

77. Richardson, *Specifying Norms*, *supra* note 31, at 279–80 (developing a metaphor of specifying norms to “resolve concrete ethical problems” when “[s]tarting from an initial set of ethical norms” applied to such instances to determine what should be done).

78. Richardson uses an example from law to emphasize the usefulness of specified norms. In the case of a lawyer representing a man accused of rape, the lawyer confronts two inconsistent principles: “It is wrong for lawyers not to pursue their clients’ interests by all means that are lawful” and “[i]t is wrong to defame someone’s character by knowingly distorting their public reputation.” *Id.* at 281–82. A cross-examination intended to make sexist jurors believe that the victim consented is supported by the former principle, but barred by the latter. Rather than simply “balance” the two principles in some fashion, Richardson proposes a more specified norm which can offer consistent guidance: “It is always wrong to defame a rape victim’s character by knowingly distorting her public reputation.” *Id.* at 283. The resulting specified norm is far less likely to conflict with other norms, and can be applied with some consistency to future similar cases.

The cross-examination example illustrates the merit of the specification method, but also its inadequacy as a deliberative method for professionals or other plain persons. In his work, Richardson argues that the norms of principlism must be understood through the pragmatist insights that stress revisability and tentativeness, and downplay a reductionist, deductive, or syllogistic thinking. He admirably strives to explicate and unpack the fuzzy process of balancing norms. His efforts, though, produce an unsatisfying method and leave questions better answered by a case-driven protocol.

Richardson argues that specified norms have the advantage of being *norms*, that is, rules or almost-rules which can direct future conduct. In his cross-examination example, the specified norm will direct conduct, and resolve ethical conflict, in future litigation in a way that the more generalized norms (“be a zealous advocate”; “do not defame”) cannot. But that very goal of specification creates its most serious problems as a working deliberative method for plain persons. Richardson claims that, under this model, “without further deliberative work, simple inspection of the specified norms will often indicate which option should be chosen.” *Id.* at 294. Norms, then, must be available for “inspection.” Because the specified norms do not develop on a case-by-case

suggestion not only overestimates the facility of most individuals, but offers nothing that the casuists alternative cannot offer in a more accessible fashion.

C. VIRTUE ETHICS

Before we examine the casuists' arguments in detail, we need to explore a final, alternative deliberative method, known best as "virtue ethics." Virtue ethics responds to the fundamental difficulty of principlism, that is, the aspiration for formal norms alongside the need for flexible application of these norms, by privileging questions of character. The question we assess briefly here is whether virtue ethics meets the concerns arising from theory and principles in a way that might be helpful to Mark, as some of its adherents claim.⁷⁹

Virtue ethics, as this new paradigm has come to be known,⁸⁰ resists conceiving

basis as practice proceeds, but instead exist as specified, antecedent action-guides, the deliberator needs access to them. As specified norms, they are many. Richardson offers a norm for rape trial defense lawyers; one assumes that a similar norm can be developed for tobacco lawyers, or Ford's lawyers defending against product liability cases after Pinto fires, or real estate lawyers foreclosing upon the widow who recently lost her job. It quickly becomes apparent that no such comprehensive catalogue of specified norms can exist or can be available to deliberators who need to act in some reasonable fashion.

The central argument of the specification model, as of principlism generally, is that without norms, ethical choice is left "un-tethered," that is, unconnected to some grander theoretical picture. But norms imply rule-following. If the norms are general, they will be too abstract, and they will frequently conflict. If they are specified, those concerns may be met, but the resulting norms will be so numerous to demand some form of cataloging. Further, while Richardson takes pains to deny that specified norms, or any norms for that matter, can be applied in a deductive, rules-based fashion, his examples are developed to apply in that fashion. If they are only presumptive — if, for instance, some rape victims may be defamed in some cases — then his method leaves those cases in the same arbitrariness as the norm-conflicts which he hopes to resolve.

A more significant challenge, though, concerns how Richardson arrives at his specified norms. In his cross-examination example, by what deliberative method did he conclude that concern for defamation of the victim trumped a winning defense for the man charged with the crime? He is right, at least most of the time, but by what higher-order process do we know he is right? John Arras identifies this as a deep blemish on the sophisticated principlism scheme. Responding to David DeGrazia's specification arguments, Arras writes:

Just as the competing principles of reproductive autonomy and "nonmaleficence" appear to require ad hoc, context specific, nuanced judgments unsupported by higher level, lexically ordered principles, so too will efforts to specify the principle of reproductive freedom down to the level of the particular case. . . . Unless DeGrazia has a rationally defensible, higher level, lexical ordering principle at his disposal, his "specifiers" are in the same boat as the principlists' "weighers and balancers."

Arras, *Principles and Particularity*, *supra* note 10, at 997.

79. See, e.g., Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 888 (1996) ("[N]either Kantianism nor utilitarianism holds the promise for legal ethics that virtue ethics does.").

80. The phrase is now commonplace. See, e.g., GRABER & THOMASMA, *supra* note 10, at 151–72 ("Virtue Model"); RHODE, *supra* note 44, at 19–20 ("Virtue-based theories"); RHODE & LUBAN, *supra* note 29, at 9–10 ("virtue ethics"); BEAUCHAMP & CHILDRESS, *PRINCIPLES IV*, *supra* note 10, at 62–69 ("character ethics: virtue-based theory"); Thomas L. Shaffer, *The Legal Profession's Rule Against Vouching for Clients: Advocacy and "The Manner That Is the Man Himself,"* 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 145, 146 (1993) [hereinafter Shaffer, *Vouching for Clients*] ("Aristotelian virtue ethics"); Loder, *Out of Uncertainty*, *supra* note 55, at 126 (same). Most writers visiting this approach credit Alasdair MacIntyre for reviving interest in the virtues within late twentieth century applied professional ethics. See MACINTYRE, *supra* note 9 (discussing

of ethics as a matter of individual choice, a conception Edmund Pincoffs refers to, “for convenience and disparagement, as Quandary Ethics.”⁸¹ Virtue ethics urges, instead, a focus on the character of the actor rather than the quality of the action. The primary object of moral evaluation is neither the act nor its consequences, but the agent — “which type of activity will make the agent a better or more prudent agent in the future.”⁸² There is a teleological element to this reasoning, to be sure: a person of great character will make the best moral choices by living the best moral life.⁸³ But the argument is not only teleological. Virtuists hold that *motive* is an essential element of moral assessment; to do the “correct” thing is less important than to act for the “correct” motive.⁸⁴ “Accordingly, one who is disposed by character to have the right motives and desires is the basic model of the moral person.”⁸⁵ Our ideal professional practitioner should be not the rule follower, but the person “disposed by character to be generous, caring, compassionate, sympathetic, fair, and the like. . . .”⁸⁶

The virtue ethics perspective does more than merely elevate the question of character above the question of proper ethical analysis of quandaries; it also privileges the stories and the relationships forming the fabric of the actors’ lives

virtue and moral theory). Significant pioneers in virtue ethics who preceded MacIntyre include Elizabeth Anscombe and Philippa Foot. See, e.g., G.E.M. Anscombe, *Modern Moral Philosophy*, 33 *PHILOSOPHY* 1 (1958); PHILIPPA FOOT, *VIRTUES AND VICES* (1978).

81. Edmund Pincoffs, *Quandary Ethics*, 80 *MIND* 552, 552 (1971). Pincoffs contrasts his critique with the following view he quotes from the casuist Stephen Toulmin: “Ethics is everybody’s concern. . . . Everyone . . . is faced with moral problems — problems about which, after more or less reflection, a decision must be reached.” STEPHEN TOULMIN, *THE PLACE OF REASON IN ETHICS* 1 (1970).

82. Keenan, *supra* note 9, at 116. Martha Nussbaum similarly argues: “The starting point of an Aristotelian inquiry in ethics is the question, ‘How should a human being live?’ . . . And the general answer . . . suggested by Aristotle himself is, ‘In accordance with all the forms of good functioning that make up a complete human life.’ ” Martha C. Nussbaum, *The Discernment of Perception: An Aristotelian Conception of Private and Public Rationality*, in *LOVE’S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* 54, 95 (1990) [hereinafter Nussbaum, *Discernment of Perception*].

83. Nussbaum, *Discernment of Perception*, *supra* note 82, at 95; Keenan, *supra* note 9, at 116–17. Keenan notes that virtue ethics “presupposes that one becomes the agent of the actions one performs and that therefore the self-understanding of the agent is necessary for determining the course of action.” *Id.* at 116. Martha Nussbaum describes the quality of practical reason that one with good character acquires as “one of becoming ‘finely aware and richly responsible’; of being a person on whom nothing is lost.” Nussbaum, *Discernment of Perception*, *supra* note 82, at 84 (citation omitted).

84. See BEAUCHAMP & CHILDRESS, *PRINCIPLES IV*, *supra* note 10, at 64 (“Virtue is intimately connected to characteristic motives. We care morally about how persons are motivated. . . . Properly motivated persons often do not merely follow rules; they also have a morally appropriate desire to act as they do.”); Keenan, *supra* note 9, at 117. The early twentieth century ethicist G.E. Moore recognized the following paradox: “[A] man may really deserve the strongest moral condemnation for choosing an action, which *actually* is right.” G.E. MOORE, *ETHICS* 195 (1912).

85. BEAUCHAMP & CHILDRESS, *PRINCIPLES IV*, *supra* note 10, at 65 (citing PHILIPPA FOOT, *supra* note 80); RODGER BEEHLER, *MORAL LIFE* (1978); Gregory W. Trianosky, *Supererogation, Wrongdoing, and Vice: On the Autonomy of the Ethics of Virtue*, 83 *J. PHIL.* 26 (1986).

86. BEAUCHAMP & CHILDRESS, *PRINCIPLES IV*, *supra* note 10, at 65–66.

and their communities over the sterile assessment of competing principles.⁸⁷ “For the *telos* in fact is a narrative, and the good is not so much a clearly defined ‘end’ as it is a sense of the journey on which that community finds itself.”⁸⁸ With a developed character, the argument goes, there are, in fact, few questions of “quandaries” at all. “Quandaries” and “decisions” assume “a relationship between persons that is mechanistic.”⁸⁹ Those foci also encourage an assumption that “I am the only party making decisions in the total process.”⁹⁰ Rather than recognizing the moral life as one embedded in a community of caring relationships, the traditional models we have explored thus far tend to atomize individuals and distort the felt reality of compassion and obligation.⁹¹

The virtuists represent ambitious exemplars of the strong critique of deductive ethics noted above,⁹² which objected to the primary reliance on theory for moral deliberation not merely because of the intransigent disagreement about theory among philosophers and the abstruse quality of that theoretical discourse (this represented the weak objection), but more importantly because theory fails to correspond to the existential truth of moral understanding. This objection denies theory a prominent place within moral deliberation because moral deliberation does not and cannot proceed along theoretical lines. It is an objection that is central to the virtue ethics tradition.

Replacing theory and rules within virtue ethics are the concepts of narrative and stories. In Aristotelian ethics, “the discernment rests with perception,”⁹³ where “discernment” is wisdom, and the “perception” arises from the particularities and the concrete.⁹⁴ Calling this the “priority of the particular,”⁹⁵ Martha Nussbaum uses that insight to challenge those, like Plato, who would wish that ethics could be governed by rules, abstract principles, and universal truths. In the intellectual tradition of feminism, pragmatism, and postmodernism, however, the virtuists discredit and undermine that Cartesian and Platonic ideal.

The concern with virtue ethics, though, continues to be its slipperiness in application. However persuasive the argument that character matters more than individual acts, it is nevertheless true that professionals who turn to questions of ethics are searching for guidance in some concrete and discrete matter. The

87. Alasdair MacIntyre, *Theology, Ethics and the Ethics of Medicine and Health Care: Comments on Papers by Novak, Mouw, Roach, Cahill, and Hart*, 4 J. MED. & PHIL. 435 (1979).

88. Stanley Hauerwas, *Casuality as Narrative Art*, 37 INTERPRETATION 377, 379 (1983).

89. *Id.* at 383.

90. John Yoder, “What Would You Do If . . .?": *An Exercise in Situation Ethics*, 2 J. REL. ETHICS 81, 82 (1974).

91. See Shaffer, *Vouching for Clients*, *supra* note 80, at 146 (developing an “argument for Aristotelian virtue ethics” based upon friendship).

92. See text accompanying *supra* notes 31–49 (addressing deductivistic weaknesses).

93. Nussbaum, *Discernment of Perception*, *supra* note 82, at 66.

94. *Id.* at 74. “Practical insight is like perceiving in the sense that it is noninferential, nondeductive; it is an ability to recognize the salient features of a complex situation.” *Id.*

95. *Id.* at 66.

“quandary ethics” critique notwithstanding, situational dilemmas motivate most professionals to explore concepts of morality. Compared to its “competitors,”⁹⁶ virtue ethics offers meager guidance to actors confronting moral conflict; the admonitions “be courageous” or “be compassionate” are of little assistance to an attorney struggling with a client who is engaging in welfare fraud in order to feed her children.

This observation is acknowledged by both virtue ethics adherents and its critics.⁹⁷ To some adherents, the criticism is not cogent, because such is the nature of moral experience. As Martha Nussbaum puts it, echoing Aristotle: “there is no general rule for this, the discrimination rests with perception.”⁹⁸ Other virtuists, though, sympathize with those who desire greater guidance.⁹⁹ The critics of virtue ethics are even more troubled by the ambiguity and “misty antiquarian”¹⁰⁰ feel of the character-ethics teachings and its resistance to systematic guidance.¹⁰¹

96. See Keenan, *supra* note 9, at 116–17 (referring to the alternative ethical models as “competitors” of virtue ethics).

97. At least two virtuists have argued that virtue ethics in fact can serve as concrete guidance in particular moral contexts. See Keenan, *supra* note 9, at 119 (attempting to articulate a “virtue casuistry” which “can give concrete moral guidance and therefore can replace other forms of moral reasoning”); Caryn L. Beck-Dudley, *No More Quandaries: A Look At Virtue Through The Eyes of Robert Solomon*, 34 AM. BUS. L.J. 117 (reviewing ROBERT C. SOLOMON, *ETHICS AND EXCELLENCE: COOPERATION AND INTEGRITY IN BUSINESS* (1993)). Beck-Dudley offers examples of Solomon’s efforts to use virtue ethics in a specific business law setting, but, as her descriptions ultimately show, the softness of the virtue standards make the application complicated. See *id.* at 130 (after explaining a bonus distribution problem, Beck-Dudley concludes, “These considerations show that even in this simple scenario, applying a uniform ‘brand’ of justice is very difficult. Ultimately, justice is tied to caring.”).

98. Nussbaum, *Discernment of Perception*, *supra* note 82, at 97. Nussbaum compares the practical wisdom of a virtuous actor to that of an experienced navigator, who cannot translate her judgments about how to steer a craft into a set of rules or principles:

The answer shows another dimension of the priority of the particular in good deliberation. For it must be: there is no general rule for this, the discrimination rests with perception. The experienced navigator will sense when to follow the rule book and when to leave it aside. The “right rule” in such matters is simply: do it the way an experienced navigator would do it. There is no safe guarantee at all, no formula, and no shortcut.

Id.

99. See, e.g., Thomas D. Eisele, *Avalon Ethics*, 67 NOTRE DAME L. REV. 1287, 1309 (1992) (reviewing THOMAS L. SHAFFER AND MARY M. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION*) (“I think that all those working in this area (among whom I number myself) need to think long and hard about the implications of our claims concerning ‘virtue ethics’ for our understanding of the morality of human actions and decisions.”); Loder, *Out of Uncertainty*, *supra* note 55, at 128 n.152 (“Those who seek assistance in deciding what course of action to follow in a given case find the emphasis in virtue ethics unsatisfactory.”).

100. Robert B. Loudon, *On Some Vices of Virtue Ethics*, 21 AM. PHIL. Q. 227, 227 (1984).

101. For several critics’ viewpoints, see, e.g., BEAUCHAMP & CHILDRESS, *PRINCIPLES IV*, *supra* note 10, at 69 (evaluating character ethics constructively); Loudon, *supra* note 100 (critiquing virtue ethics and calling for virtue ethics and rule ethics to be coordinated instead of viewed as opposites); VIRGINIA HELD, *RIGHTS AND GOODS: JUSTIFYING SOCIAL ACTION* 25 (1984) (observing that virtue ethics may be “as remote from actual realities as a morality that constructs abstract principles of justice, equality, and liberty suitable only for an ideal

It is, it seems, precisely this weakness of the virtue ethics model that casuistry can help overcome. Casuistry shares with the virtuists the strong objections to deductivism and principlism.¹⁰² The “priority of the particular”¹⁰³ is an Aristotelian insight upon which casuistry, like virtue ethics, is constructed. Like the virtuists, the casuists recognize the significance of *phronesis*, as opposed to *episteme*, within the realm of moral reasoning.¹⁰⁴ But unlike the virtuists, who have little to say about discrete choice in recognized contexts, the casuists have a great deal to say.¹⁰⁵

III. A PRAGMATIC ALTERNATIVE: CASUISTRY, CLINICAL ETHICS, AND CASE-BASED REASONING

A debate is in the offing, similar to the deconstructionist debate in literary studies and to the critical legal studies argument in jurisprudence, between the “philosophers” and the “casuists.”

Albert Jonsen¹⁰⁶

Medical ethics today must, indeed, be “casuistry”; it must deal as competently and exhaustively as possible with the concrete features of actual moral decisions of life and death and medical care.

Paul Ramsey¹⁰⁷

A. THE NEW CASUISTRY

Albert Jonsen’s quote highlights the significant division among ethicists on the

world”); RHODE & LUBAN, *supra* note 29, at 9 (“To focus on virtue in legal ethics means to turn attention away from the nature of particular actions and their consequences and to focus instead on . . . character . . .”).

102. See text accompanying *supra* notes 31–49 and 91 (discussing the deductive moral theory).

103. Nussbaum, *supra* note 82, at 66.

104. Compare *id.* at 82–84 (defending “a coherent picture of particular choice” as “becoming ‘finely aware and richly responsible,’ ” quoting HENRY JAMES, *THE PRINCESS CASAMASSIMA* 169 (1909)), with JONSEN & TOULMIN, *supra* note 12, at 26, 294 (contrasting experiential *phronesis* with abstract, theoretically obtained *episteme*).

105. The importance of a more rigorous guidance within ethical inquiry is illustrated by the following Albert Jonsen observation, which he directs toward the theorists but which applies equally, if not better, to the virtuists:

It is my opinion that moral philosophy, as it has been done in recent times, provides little guidance through cases. It points to the impressive structure of theory and principle and says to the perplexed, “There it is, explore and learn from it,” just as a tour leader might point to the Louvre or the Metropolitan and say, “Go in and look around. You will learn a lot.” Casuistry goes further. It points to the case and says, “You will find this case full of facts and maxims. Here is a plan that will route you through and call attention to the important ones. When you emerge, you will better understand the case and even be able to tell others where to look for the relevant features.”

Jonsen, *Alternative or Complement*, *supra* note 15, at 249.

106. Albert R. Jonsen, *Practice Versus Theory*, 20 HASTINGS CTR. REP. 32, 34 (July/Aug. 1990) [hereinafter Jonsen, *Practice Versus Theory*] (reviewing BEAUCHAMP & CHILDRESS, *PRINCIPLES II*, *supra* note 51; MORAL THEORY AND MORAL JUDGMENTS IN MEDICAL ETHICS (Baruch Brody ed., 1988); GLENN C. GRABER & DAVID C. THOMASMA, *THEORY AND PRACTICE IN MEDICAL ETHICS* (1989)).

107. PAUL RAMSEY, *THE PATIENT AS PERSON: EXPLORATIONS IN MEDICAL ETHICS* xvii (1970).

question of how best to approach moral choices. The prior discussion showed that the more traditional or historical approaches to applied ethics rely on methods of reasoning best described as “scientific,” derived from Enlightenment-driven notions of truth. More recently, both deductivists and virtue ethicists agree that practical wisdom, judgment, and discernment are central to ethical decisionmaking. The deductivists seek to meld that *phronesis* with discrete norms, while virtuists accept a more direct, if not impressionistic, role for the faculty of discernment. Casuistry, as we shall see, begins to bridge the chasm between the *faux* science of principlism and the untetheredness of virtue ethics.

Albert Jonsen and Stephen Toulmin, the scholars most responsible for its revival, describe casuistry as follows:

[Casuistry is] the analysis of moral issues, using procedures of reasoning based on paradigms and analogies, leading to the formulation of expert opinions about the existence and stringency of particular moral obligations, framed in terms of rules or maxims that are general but not universal or invariable, since they hold good with certainty only in the typical conditions of the agent and circumstances of action.¹⁰⁸

Casuistry does not pursue universal truths and it does not rely on foundations of moral belief derived from some developed intellectual scheme. It instead looks more modestly, if not intensely, at the circumstances of the particular case that demand moral inquiry, resisting abstract or formal theories in favor of identifying paradigm cases from which one can reason analogously and contextually. Casuistry then arrives at “probable certitude” through the exercise of reflective, practical judgment. Like principlism, it builds upon shared moral sentiment; like virtue ethics, it discerns that sentiment in the particulars of cases.

This Article explores the underpinnings of casuistry in the following Part, and takes up, in Part IV, a comparison of casuistry to its alternatives, through the use of some examples from clinical law practice. This analysis reveals that casuistry, while different in its approach from much of conventional ethical discourse, is surprisingly evocative of common law reasoning with its reliance on precedent and analogical reasoning. It is also quite illustrative of the actual *practice* of

108. JONSEN & TOULMIN, *supra* note 12, at 257. A reviewer of the Jonsen and Toulmin book offers this slightly different description:

Casuistry is the method of ethical case analysis. It is distinguished from analyses that begin with spiritually known or academically articulated universal ethical rules that are applied to individual cases. Casuistry begins by fully exposing the details of a case, analogizes to previously discussed paradigm cases, and arrives at an experienced conclusion about how customary moral obligations apply in the individual circumstances of the case.

Steven H. Miles, *Ethics*, 262 JAMA 961, 962 (1989) (reviewing ALBERT JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY* (1988)).

ethics,¹⁰⁹ if not of the structured discussion of ethics. In this respect, it can claim affinity with the traditions of feminism, pragmatism, that part of postmodern thinking that resists the abstracting effects of theory,¹¹⁰ and early twentieth-century legal realism.¹¹¹

B. CASUISTRY'S COMPONENT UNDERSTANDINGS

1. The "Wellsprings question": cases as the source of moral knowledge

Casuistry's most critical premise is that moral knowledge develops incrementally through the analysis of concrete cases. We have already discussed the weaknesses of moral theory¹¹² and mid-level principles¹¹³ in practice settings. Casuists credit theories and principles as developed insights formed from considered reactions to individual cases. A lawyer understanding that insight can more readily accept conflict between theories or among principles by looking more particularly at the cases that account for the competing sentiments. In the end, the cases drive the sentiment.

Casuistry, thus, is prescriptive. It advises moral actors to think through questions differently from the manner which a theorist would suggest, by beginning with cases in context. It is also ontological and metaphysical, in that its prescription arises from a particular conception of how we know what is right. That claim, best left to the philosophers for its full defense, warrants some brief development here.

Let us call this question about the source of moral truth the "wellsprings question."¹¹⁴ The casuists observe that moral theory seldom has contributed

109. See Arras, *Principles and Particularity*, *supra* note 10, at 1001 ("[T]his account of reasoning . . . accurately describes how ethicists actually think, both in clinical situations and in the classroom.").

110. The resistance to theory and attraction to contextual, situation-based reasoning is very prevalent in modern jurisprudence. As Daniel Farber and Phillip Frickey write, "An impressive array of recent legal commentary has suggested a movement away from grand theory toward something new, variously called 'intuitionism,' 'prudence,' and 'practical reason.'" Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1645-46 (1987); see also Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618, 1625-26 (1996) (noting the resurgence of reliance upon Aristotle in recent legal scholarship); Cornell, *supra* note 48 (assessing the critique of liberalism in ethics of Alasdair MacIntyre and Roberto Unger).

111. The American Legal Realists were skeptical of theory as a determining construct for court decisions, much as casuists doubt the role which theory plays in moral choice. See Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1498-99 (1996) (contrasting Realism's inductive process, whereby legal conclusions are determined first and legal justifications are later identified which support these, with Formalism's deductive process under which law is applied to facts to reach a conclusion); Oliver W. Holmes, Jr., *Codes and the Arrangements of Law*, 44 HARV. L. REV. 725, 725 (1931) (stating that a court "decides the case first and determines the principle afterwards") (reprinted from 5 AM. L. REV. 1 (1870)), quoted in Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 746 (1993).

112. *Supra* text accompanying notes 31-50.

113. *Supra* text accompanying notes 64-78.

114. I borrow this phrase from Jonsen and Toulmin. See JONSEN & TOULMIN, *supra* note 12, at 294-95 ("the natural springs of moral action").

meaningful insights to the resolution of practical problems;¹¹⁵ instead, the “locus of moral certitude”¹¹⁶ remains with the particular cases. What moral theory can do well, at times, is summarize what we know about moral truth from our encounters with concrete cases. This insight is not new, and represents an important part of feminist¹¹⁷ and pragmatist¹¹⁸ thought.

Consider, for example, a lawyer torn about whether to respect her client's choice to reconcile with and return to a man who has been physically violent to her and who has sexually abused their teenage daughter.¹¹⁹ She wishes to do what is best in this circumstance, and to resolve the moral question in the most appropriate way, whatever that means.¹²⁰ How she proceeds will depend, at least in part, on how she comprehends the wellsprings question.

This lawyer will not use theory to resolve her crisis. As developed earlier, the argument that elaborate theories operate to generate answers is unpersuasive, and

115. Jonsen, *Practice Versus Theory*, *supra* note 106, at 33. David Wiggins offers an explanation for the seduction of deductive schemes:

I entertain the unfriendly suspicion that those who feel they *must* seek more than all this provides want a scientific theory of rationality not so much from a passion for science, even where there can be no science, but because they hope and desire, by some conceptual alchemy, to turn such a theory into a system of rules by which to spare themselves some of the agony of thinking and all the torment of feeling and understanding that is actually involved in reasoned deliberation.

David Wiggins, *Deliberation and Practical Reason*, in *ESSAYS ON ARISTOTLE'S ETHICS 237* (A. Rorty ed., 1980) quoted in Charles Guignon, *Existential Ethics* 73, 87–88, in *NEW DIRECTIONS*, *supra* note 58.

116. JONSEN & TOULMIN, *supra* note 12, at 16.

117. Feminist thought has long championed the personal and the particular over the abstraction and bloodless rationality of rules and principles. See, e.g., CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). Gilligan wrote of the importance of “the particular,” *id.* at 101, which “allows the understanding of cause and consequence which engages the compassion and tolerance repeatedly noted to distinguish the moral judgments of women.” *Id.* at 100. That preference moves women's thinking “away from the hierarchical ordering of principles and the formal procedures of decision making.” *Id.* at 101. Martha Minow and Elizabeth Spelman note that the consideration of “context,” which is the equivalent to the casuists' obsession with the particular, “unites the work of early twentieth-century pragmatists and the late twentieth-century feminists and critical race theorists.” Martha Minow & Elizabeth V. Spelman, *In Context*, in *PRAGMATISM IN LAW AND SOCIETY* 247, 247 (Michael Brint & William Weaver eds., 1991) (citations omitted).

118. Jonsen and Toulmin cite the pragmatists William James and John Dewey as “striking exceptions” to the abstracting and systematizing efforts of twentieth century philosophers. JONSEN & TOULMIN, *supra* note 12, at 281. The authors quote William James's thoughts reflecting his acceptance of the priority of the particular:

There is no such thing possible as an ethical philosophy dogmatically made up in advance. . . . There can be no final truth in ethics any more than in physics, until the last man has had his experience and said his say.

William James, *The Moral Philosopher and the Moral Life*, in *THE WRITINGS OF WILLIAM JAMES* 610, 610–11 (John J. McDermott ed., 1977), quoted in JONSEN & TOULMIN, *supra* note 12, at 282. For further discussion about the intellectual links between pragmatism and casuistry, see *infra* note 141.

119. This example represents a true experience from our law school clinical program. For an extended description of the case written by the clinical professor who supervised the student working on the case, see Leslie G. Espinoza, *Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender*, 95 MICH. L. REV. 901 (1997).

120. See Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19 (1997) (exploring the role that personal moral commitments ought to play in professional choices).

moral philosophers by and large agree.¹²¹ Theories will, of course, often generate honorable suggestions, but the honor of the advice is neither measured nor determined by the theory. Were a sophisticated theory to conclude, for instance, that slavery is defensible, or that torturing the innocents is acceptable, it is the theory that would be jettisoned, not the settled views about slavery or torture.¹²² This understanding serves as the basis for Rawls's notion of "reflective equilibrium,"¹²³ which observes that we reach moral stasis by balancing our "considered moral judgments" with more universal theories or principles, amending the latter when they cannot harmonize with the former.¹²⁴

Theorists seldom assert this crude thesis, though,¹²⁵ arguing instead for

121. See text accompanying *supra* notes 73–78 (discussing a more recent principlist approach).

122. This argument is a frequent and important one in contemporary moral philosophy. See, e.g., SROUT, *supra* note 9, at 40 ("If a moral theory implied that raping women was generally a good thing, morally speaking, all competent moral judges in our community would reject that theory as false."); Strong, *supra* note 69, at 208 ("Any higher-level theory of ethics which turned out to be inconsistent with the middle-level principles would, in virtue of that inconsistency, be reasonably considered inadequate."); Kai Nelson, *On Being Skeptical About Applied Ethics*, in CLINICAL MEDICAL ETHICS: EXPLORATION AND ASSESSMENT 95 (Terrence F. Ackerman et al. eds., 1987). Kai Nelson borrows from G.E. Moore's skepticism about skepticism to make the point:

Moore pointed out (in effect) that in a rather large cluster of standard contexts I could be more confident that I have two hands and that I put on my underwear before I put on my pants than I could be of any philosophical theory, no matter how cogently reasoned, that concluded that there is no external world or that time is unreal. It is more reasonable to believe the empirical truisms and assume that somewhere there is a yet undetected lacuna in the philosophical argument than to accept the philosophical argument and reject the empirical truisms.

Similarly, in moral domains, it is more reasonable to believe that we know or can reasonably believe or reasonably securely accept that it is wrong to kill people just for the fun of it, torture the innocent, treat a person simply as a means to one's own ends, routinely fail to keep one's promises, break faith with people and the like than to accept any philosophical theory which claims we cannot know or reasonably believe or reasonably securely accept that we may not do such things.

Id. at 101–02.

123. RAWLS, *supra* note 48, at 49.

124. For an exploration of the role that considered moral judgments play in the process of "reflective equilibrium," see Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 J. PHIL. 256 (1979) (arguing for an important place for theory in the process of reflective equilibrium); Margaret Holmgran, *The Wide and Narrow of Reflective Equilibrium*, 19 CAN. J. PHIL. 43 (1989) (disputing Daniels' claim for a greater role for theory).

Cass Sunstein acknowledges the affinity between the analogical reasoning of casuistry and reflective equilibrium, arguing that the latter unnecessarily theorizes a process that can achieve its purposes without that added abstraction. Sunstein, *supra* note 111, at 753, 781–83.

125. The philosopher Raymond Devettere writes that "No serious moral philosopher or theologian advocating principles and rules reduces ethics to this [deductive formulation]." Devettere, *supra* note 67, at 137; see also Winkler, *supra* note 10, at 354 ("[T]here are very few strict deductivists left in bioethics"). The same point made here has been made within the jurisprudential debate about the role of theory as determinative of judge's actions. See Scott J. Shapiro, *Fear of Theory*, 64 U. CHI. L. REV. 389, 395 (1997). Shapiro notes:

most reasonable ethical theories generally produce the same results. Utilitarians, Kantians[,] and Aristotelians all think they can explain why we should keep our promises, give to charity, and refrain from murder. This "overlapping consensus" is hardly surprising — if any of these theories conflicted with a large number of our moral intuitions, we would have rejected it long ago.

Id. at 400.

theory's usefulness as a *corrigible* source of moral insight.¹²⁶ But that argument does not seem to fare much better, however. To assert that the simple theorist version is untenable is to suggest that we rely on some discernment or faculty to decide when we would accept the theory-derived conclusions and when we would not. This understanding is difficult to square with the theorists' wellsprings stance. If we rely on something outside of theory to determine when to reject the theory, then the theory itself will seldom be of use in cases of deep conflict.¹²⁷ In those cases in which we *accept* the theory's solution, we have done so because of a considered discernment that the solution is acceptable, not because of the theory itself. And in those cases where we have rejected the theory-derived solution, we are obviously influenced by something outside the theory. In either event, it is not theory that provides the guidance.¹²⁸

It is therefore not at all implausible for lawyers to accept the critical premise of casuistry — that moral insight stems from the particularities of concrete cases. This is not meant to deny theory an important place in moral deliberation, nor to ignore the insights of theoretical moral philosophy. Each competing moral theory represents sentiments derived from paradigm cases, and can summarize those sentiments in effective ways. A welcome benefit of casuistry, in fact, is that one can accept the arguments of competing theories selectively, without concluding that the theory is defective when a counter-example appears for which the theory cannot account.¹²⁹

2. The Role of Paradigm Cases and Analogical Reasoning

Theories and principles, despite their faults, offer a semblance of comfort. The worry is that their absence leaves only relativism, or perhaps nihilism.¹³⁰ The casuists avoid despair by recognizing the centrality of paradigm cases, "in which the actions to be taken are clear and agreed on by virtually anyone familiar with

126. This is among the more sophisticated arguments defended by Beauchamp and Childress. BEAUCHAMP & CHILDRESS, *PRINCIPLES IV*, *supra* note 10, at 100–01. It reflects the insights of W.D. Ross about prima facie obligations. See ROSS, *supra* note 3, at 19–20 (describing his conception of prima facie duties). By "corrigible," I mean that the theory or the principle serves as a presumptive or prima facie basis of action, unless contraindicated by competing moral concerns.

127. See Shapiro, *supra* note 125, at 399 ("[General] theories are scarcely relevant in adjudication.").

128. For different versions of this fundamental argument, see STOUT, *supra* note 9, at 40; Baier, *supra* note 45; Clarke & Simpson, *supra* note 33, at 8–9; Stephen Toulmin, *Ethics and Equity: The Tyranny of Principles*, 15 *LAW SOC. GAZETTE* 240, 242 (1981) [hereinafter Toulmin, *Ethics and Equity*]. Toulmin elaborates on this point in his work with Albert Jonsen. JONSEN & TOULMIN, *supra* note 12, at 296–303.

129. KUCZEWSKI, *supra* note 13, at 87–88.

130. Some critics of casuistry profess this concern. See Kevin Wm. Wildes, *The Priesthood of Bioethics and the Return of Casuistry*, 18 *J. MED. & PHIL.* 33 (1993) (arguing that several casuistries will emerge without a shared common ground of morals and values); Tom Tomlinson, *Casuistry in Medical Ethics: Rehabilitated, Or Repeat Offender?*, 15 *THEOR. MED.* 14, 18 (1994); cf. Clouser & Gert, *supra* note 51, at 230–31 (claiming that principlism's use of analogical reasoning is relativistic). For a response, see Cheryl Noble, *Normative Ethical Theories*, in Clarke & Simpson, *supra* note 33, at 49, 49–50.

the case and its particulars.”¹³¹ The force of paradigm cases is largely intuitive.¹³² Once she identifies one or more paradigm cases, a casuist proceeds in a fashion quite familiar to lawyers: she employs a common law reasoning style,¹³³ comparing the case at hand with a collection of available easy cases. Through “moral triangulation,” she reasons by analogy from the exemplars, identifying the morally relevant features of the paradigm cases, the features of the cases which account for their ready acceptance,¹³⁴ and comparing the newer, less certain case with each paradigm case to discern which comes closest to the case under consideration.¹³⁵

A review of the casuistry literature illustrates an assumption, rather than an explicit defense, of the notion of paradigm cases. That defense, though, seems not too difficult to establish.¹³⁶ The assumption about agreement on easy cases follows in a self-evident way from the very discussion of ethics. Of course, the nihilist or the relativist might object to the idea of such baseline agreement, but they have no interest in the present moral deliberation project, and neither do we care about their skepticism, at least for now. We discuss topics like casuistry only when the participants wish to make more informed moral decisions.¹³⁷ Participants who would assert that all values are nothing more than personal preferences

131. KUCZEWSKI, *supra* note 13, at 72. Albert Jonsen’s definition of a paradigm case is as follows:

This would be a case in which the circumstances were clear, the relevant maxim unambiguous and the rebuttals weak, in the minds of almost any observer. The claim that this action is wrong (or right) is widely persuasive. There is little need to present arguments for the rightness (or wrongness) of the case and it is very hard to argue against its rightness (or wrongness).

Albert R. Jonsen, *Casuistry as Methodology in Clinical Ethics*, 12 THEOR. MED. 295, 301 (1991) [hereinafter Jonsen, *Casuistry as Methodology*]

132. See BEDAU, *supra* note 2, at 102 (“Casuistry as a method of practical reasoning tends to rely on some form of intuitionism as well as on some set of moral norms more or less beyond dispute.”). This sentiment does not represent what Jeffrey Stout has called “intuitionism,” or the belief that noninferential reports about normative matters are necessarily “incorrigible, indubitable, infallible, [or] immediately demonstrable.” See STOUT, *supra* note 9, at 41.

133. See SUNSTEIN, *supra* note 17, at 121–35 (defending analogical reasoning in light of the weaknesses of rules-based reasoning).

134. Strong, *supra* note 69, at 203.

135. This process has been termed “morisprudence” because of its resemblance to the legal case method of analysis. See Stephen Toulmin, *The Case for Cosmic Prudence*, 56 TENN. L. REV. 29, 39 (1988) [hereinafter Toulmin, *Cosmic Prudence*]; John D. Arras, *Getting Down to Cases: The Revival of Casuistry in Bioethics*, 16 J. MED. & PHIL. 29, 33 (1991) [hereinafter Arras, *Getting Down to Cases*]. The resemblance is not perfect, however. The jurisprudential concept relies on *stare decisis*, with a presumptive mandate to follow precedent regardless of the judge’s assessment of the correctness of a prior ruling. Casuistry implies no such rigidity. Larry Alexander, accepting a similar distinction between the role of paradigm cases in law and in ethics, argues that the binding nature of precedent within law leaves analogical reasoning a poor method for resolving legal disputes. Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57, 82–86 (1996).

136. In at least one setting in which I presented an earlier version of this Article, the participants found the concept of paradigm cases difficult to accept. As I develop below, for purposes of a pragmatic casuistry, our ability to discuss moral concepts itself demonstrates the existence of paradigm cases.

137. The “discussion,” indeed, often will be with oneself, as when a lawyer will need to make a rapid judgment call without the benefit of a dialogue with others.

have no reason to be talking about ethics at all. And for the rest, their presence assumes some common agreement (e.g., “torture of the innocents is wrong”).

Another way of recognizing the fundamental availability of paradigm cases is through the analysis of moral conflict. A nihilist or true relativist experiences no moral conflict (how could they?), but the rest of us do so often. That conflict is the result of two competing but incompatible “principles” (to borrow from the earlier discussion) seeming to apply to a new case. Each of those principles represents an easier case where no such conflict exists. It is inconceivable — literally so — that one can respect a principle without acknowledging an easy case where that principle would fit. It would be an odd principle indeed that could not be described by an example demonstrating it. In Mark’s case, for illustration, he easily concludes that he would never ethically lie to a welfare official in order to obtain benefits to which he was not entitled. He equally easily concludes that he would never refuse to make a direct argument applying law to facts as a legal advocate for a client who had hired him to respect her rights. He may call these conclusions “principles,” but they really arise from cases. His current dilemma arises because he cannot use either of these cases as a simple analogy for his current plight.

It makes sense, then, at least in the pragmatic way described here, for lawyers to work from the paradigm cases they readily recognize. Like their use of precedent in common law jurisprudence, paradigm cases establish a common shared basis from which to craft moral arguments and to make moral choices.

3. “Fallibilism” and “Probable Certitude”

Casuists claim that their approach to moral deliberation differs from that of the theorists and the principlists in an important way.¹³⁸ The respective methods vary in the way they utilize shared agreements arising from considered judgments. One touted difference is that casuists do not pretend to secure certainty about the case before them,¹³⁹ accepting instead what they call “probable certitude.”

138. See, e.g., JONSEN & TOULMIN, *supra* note 12, at 329–30 (discussing John Arras’s question whether deducing answers from principles is any different from the casuistic reasoning from paradigm cases). See also Arras, *Getting Down to Cases*, *supra* note 135, at 39–41 (questioning whether casuistry functions without the use of either “ethical principles or [a] theoretical apparatus”).

139. JONSEN & TOULMIN, *supra* note 12, at 293–96; KUCZEWSKI, *supra* note 13, at 69. The casuists and the virtuists argue for “probable certitude” as though it is distinctly different from the goals of the competing theorist model. That conclusion is entirely evident conceptually. The principlist model resembles an effort to achieve the level of scientific rationality that ethicists of the nineteenth and early twentieth centuries pursued. For examples of these systemization efforts, see HENRY SIDGWICK, *THE METHODS OF ETHICS* (4th ed. 1890); C.D. BROAD, *FIVE TYPES OF ETHICAL THEORY* (1930). A precursor to both of these influential texts might be Henry More, a Fellow of Christ’s College at Cambridge in the seventeenth century, whose circle became known as the Cambridge Platonists, and who attempted to craft a systematic and axiomatic approach to ethics. See Toulmin, *Cosmic Prudence*, *supra* note 135, at 37–38 (describing Henry More’s work).

If, conceptually, the theorists look as though they pursue the holy grail of certain and universal truth, an examination of their texts belies that conclusion. The leading principlists, Beauchamp and Childress, deny

Casuistry's goal is the best solution, all things considered.¹⁴⁰ This approach is evocative of pragmatism, especially Charles Peirce and John Dewey's conception of "fallibilism."¹⁴¹ Cass Sunstein notes that this pragmatic search for "principled consistency" within practical reasoning represents, "[a]t least under real-world constraints, . . . what we mean by truth, or right answers, in law or even morality."¹⁴²

Despite the humility of this concession, casuistry actually offers more concrete assistance than the alternative paradigms. Theorists promise at once too much and too little; aiming for "applied ethics," principlism can imply a geometric and hence reasonably certain resolution to practical problems,¹⁴³ only ultimately to disappoint.¹⁴⁴ At the same time, moral philosophers often promise no such help at all, taking the high road of academic inquiry.¹⁴⁵ As Albert Jonsen writes:

The casuist and the moral philosopher will differ greatly on this point. The moral philosopher will often warn the audience, "I do not presume to deliver an answer; I merely examine the process of thought whereby *you* might seek your own answer." The casuist would say, "You must, of course, make your own decision, but I can offer you a resolution to the problem which others, on due

aspiration to a geometric-like resolution of moral conflict. See BEAUCHAMP & CHILDRESS, *PRINCIPLES IV*, *supra* note 10, at 107 ("[W]e acknowledge that conflicts among principles cannot be resolved a priori."). Even more theory-friendly ethicists, such as Ronald Green, K. Danner Clouser, and Bernard Gert, recognize the importance of judgment in applying theory to whatever facts are represented in the case at hand. Green, *Method in Bioethics*, *supra* note 64; Clouser & Gert, *supra* note 51, at 234–45.

140. JONSEN & TOULMIN, *supra* note 12, at 304.

141. See Franklin G. Miller et al., *Clinical Pragmatism: John Dewey and Clinical Ethics*, 13 J. CONTEMP. HEALTH L. & POL'Y 27 (1996) (appraising the paradigm shift in bioethics from principlism to "clinical ethics," showing how the emphasis within clinical ethics on tentative, best-under-the-circumstances conclusions emanates from the work of the early twentieth-century pragmatists). The "fallibilism" doctrine originated with Peirce as a portrayal of scientific thought. See *id.*, at 32, citing Charles Peirce, *The Scientific Attitude and Fallibilism*, in *THE PHILOSOPHICAL WRITINGS OF CHARLES PEIRCE* 42–60 (Justus Buchler ed., 1955). Dewey extended Peirce's fallibilism to the domain of moral value, where it fits into the casuist enterprise. *Id.*, citing John Dewey, *The Quest for Certainty: A Study of the Relation of Knowledge and Action* (1929) in 4 JOHN DEWEY: THE LATER WORKS, 1925–1953 (Jo Ann Boydston ed. 1981).

Casuist writers and commentators frequently acknowledge the connection between early twentieth-century pragmatism and the revived casuistry. See, e.g., JONSEN & TOULMIN, *supra* note 12, at 281–83 (discussing William James' pragmatism); Susan M. Wolf, *Shifting Paradigms in Bioethics and Health Law: The Rise of a New Pragmatism*, 20 AM. J.L. & MED. 395, 395 (1994) (analyzing pragmatism's influence in bioethics); Susan M. Wolf, *Foreword: Bioethics—From Mirror to Window*, 15 ST. LOUIS U. PUB. L. REV. 183 (1996) (discussing bioethics and law symposium recognizing the deconstruction of traditional paradigms in bioethics); William J. Winslade, *Ethics Consultation: Cases in Context*, 57 ALB. L. REV. 679, 683 (1994) (offering a personal glimpse into his becoming an ethics consultant influenced by pragmatism); see also *supra* note 111 (listing sources that discuss legal realism's skepticism of theory "as a determining construct for court decisions").

142. Sunstein, *supra* note 111, at 778.

143. See *supra* notes 51–63 and accompanying text (discussing principlism). See also Noble, *supra* note 130, at 50 ("It goes without saying that the philosophers who are engaging themselves in the formulation and analysis of normative theories regard themselves as having rejected a scientific model for ethics, but in fundamental ways they have not done so.").

144. See *supra* notes 74–78 and accompanying text (discussing same).

145. See Richard M. Fox & Joseph P. DeMarco, *The Challenge of Applied Ethics*, in *NEW DIRECTIONS IN ETHICS* 1, 12, *supra* note 58 ("[P]hilosophers engaged in applied ethics have sometimes been ridiculed and even ignored by their more theoretically oriented colleagues.").

examination, have found reasonable. If your case is the same or closely analogous, this resolution is likely to be the best one."¹⁴⁶

4. The Role of *Phronesis* and the Importance of Context

Casuistry is impatient with "thin" descriptions of moral dilemmas and with simple hypothetical examples. It resists abstraction, claiming that appropriate judgments are only found when all of the relevant circumstances are understood. Like feminist thought,¹⁴⁷ casuistry understands knowledge to be contextually acquired. Lawyers acting in good faith will understand and learn not by carefully deducing propositions through chains of reasoning, but instead by the faculty of judgment, prudence, or Aristotle's *phronesis*.¹⁴⁸ Here the casuists and the virtuists meet.¹⁴⁹ Good ethical judgment takes into consideration relevant relationships, roles, power imbalances, emotional needs, community expectations, vulnerabilities, and so forth, just as the virtue ethics adherents profess.¹⁵⁰

This characteristic of casuistry has implications for the teaching of ethics, if not for the teaching of law practice generally.¹⁵¹ It demands "thick" descriptions of context.¹⁵² Sophisticated hypothetical problems may work, but even they will usually lack sufficient texture. It is the clinic that offers the most promising environment for students to experience the levels of tension and ambiguity necessary to develop practical judgment.¹⁵³

146. Jonsen, *On Being a Casuist*, *supra* note 15, at 124 (emphasis in original).

147. See, e.g., Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990) (identifying and critically examining feminist legal methods and suggesting that knowledge is based upon experience); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991) (examining the relationship between theory and practice in feminist jurisprudence).

148. JONSEN & TOULMIN, *supra* note 12, at 19. See ARISTOTLE, NICOMACHEAN ETHICS 1140b4 (defining prudence as "a disposition with true reason and ability for actions concerning what is good or bad for man"). For a discussion of the role of practical wisdom in law school clinical teaching, see Mark Aaronson, *We Ask You to Consider: Learning About Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247 (1998) [hereinafter Aaronson, *Practical Judgment in Lawyering*].

149. See text accompanying *supra* notes 102–04 (discussing the similarities between casuistry and the virtuists).

150. E.g., Nussbaum, *Discernment of Perception*, *supra* note 82.

151. Many have argued that good lawyering requires the same kind of attention to judgment, nuance, and complexity that casuistry demands in ethical decisionmaking. See, e.g., Aaronson, *Practical Judgment in Lawyering*, *supra* note 148; Anthony G. Amsterdam, *Clinical Legal Education—A 21st-Century Perspective*, 34 J. LEGAL EDUC. 612 (1984); Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories about Lawyering*, 29 CLEV. ST. L. REV. 555 (1980); Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731 (1993); Spiegel, *Theory and Practice*, *supra* note 5.

152. See Arras, *Getting Down to Cases*, *supra* note 135, at 37 ("[H]ypothetical cases, so beloved of academic philosophers, tend to be theory-driven."); Jonsen, *On Being a Casuist*, *supra* note 15, at 117 ("It is a truism in bioethics that one should focus on cases and that teaching is best done through cases.").

153. Casuists working within bioethics have made this point repeatedly. See, e.g., Arras, *Getting Down to Cases*, *supra* note 134, at 37 ("Real cases . . . are more likely to display the sort of moral complexity and untidiness that demand the (non-deductive) weighing and balancing of competing moral considerations and the casuistical virtues of discernment and practical judgment (*phronesis*)."). The benefit of the clinical setting in law schools to the teaching of legal ethics has long been recognized as well. See, e.g., Luban & Millemann,

Casuistry not only demands context, but it also insists upon a form of *expertise*.¹⁵⁴ All practitioners are not equally “wise.” Those who are better at casuistry, and therefore at moral reasoning itself, are those who have developed the wisdom, or the *phronesis*, necessary to develop considered moral judgments. These experts need not be moral philosophers; indeed, there is good reason to doubt whether philosophers have any special insight into the proper resolution of practical moral problems.¹⁵⁵ At the same time, though, the wisdom so admired by casuists and Aristotelians is not unrelated to philosophical study. As Martha Nussbaum notes, immersion in the humanities and in fiction is an important and perhaps necessary means to achieving the practical wisdom that persons of great character exemplify.¹⁵⁶ The idea of “moral expertise” integrates learning and practice. In this way, casuistry acknowledges the contributions of philosophical study while rejecting much of the methodology of modern applied ethics.

5. Casuistry’s Rekindling of the Art of Rhetoric

The final component of the new casuistry is its emphasis on a form of argument that has sparse explicit place in modern discourse: that of rhetoric. Rhetoric, like casuistry, has developed a notably pejorative connotation in recent times.¹⁵⁷ To the new casuists, this understanding of rhetoric is unfortunate, and misses

supra note 5; Luban, *Epistemology and Moral Education*, *supra* note 4; Paul R. Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9 (1995) [hereinafter Tremblay, *Practiced Moral Activism*]; O’Sullivan, *supra* note 5. See also Gear, *supra* note 25, at 2476 (reflecting the tension of ethical conflict felt in a clinical experience). For an early articulation of this premise, see Amsterdam, *supra* note 151. For more pessimistic or critical arguments about the benefits of clinical legal education and the training of moral lawyers, see Robert J. Condlin, *Clinical Education in the Seventies: An Appraisal of the Decade*, 33 J. LEGAL EDUC. 604 (1983); Robert J. Condlin, “Tastes Great, Less Filling”: *The Law School Clinic and Political Critique*, 35 J. LEGAL EDUC. 45 (1986); cf. KRONMAN, *supra* note 5, at 113–21 (insisting that the Socratic method of appellate case analysis is one of the best ways to teach *phronesis*).

154. See *supra* note 108, depicting Jonsen and Toulmin’s definition of casuistry to include “the formulation of expert opinions” as a component of casuistry.

155. In this regard the casuists reintroduce and confirm, in many ways, the cliché of academic “ivory tower” types whose theories have little application to the rough-and-tumble of the real world. The debate about the role of philosophers in the practice of medical ethics is a rich one, if only because of the regular use of such “experts” in hospitals, usually as part of “ethics committees.” For a glimpse into this literature, see, e.g., E. Haavi Morreim, *Philosophy Lessons from the Clinical Setting: Seven Sayings That Used to Annoy Me*, 7 THEOR. MED. 47 (1986); Loretta M. Kopelman, *What Is Applied about “Applied” Philosophy?*, 15 J. MED. & PHIL. 199 (1990); Larry R. Churchill & Alan W. Cross, *Moralist, Technician, Sophist, Teacher/Learner: Reflections on the Ethicist in the Clinical Setting*, 7 THEOR. MED. 3 (1986); Françoise Baylis, *Persons with Moral Expertise and Moral Experts: Wherein Lies the Difference?*, in THEORY AND PRACTICE, *supra* note 10, at 89; Arthur L. Caplan, *Moral Experts and Moral Expertise: Do Either Exist?*, in THEORY AND PRACTICE, *supra* note 10, at 59.

156. Nussbaum, *Discernment of Perception*, *supra* note 82, at 74–75. This same point has been made powerfully in a recent magazine article. See Earl Shorris, *On the Uses of a Liberal Education: As a Weapon in the Hands of the Restless Poor*, HARPER’S MAG., Sept. 1997, at 50 (using literature to reach poor adolescents).

157. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1946 (1971) (defining rhetoric, *inter alia*, as “artificial elegance of language: discourse without conviction or earnest feeling”). A “rhetorical” question, in common conversation, is one that does not anticipate an answer, or which readily implies one. To describe an argument as “rhetoric” is to convey the argument’s flourish at the expense of its substance.

entirely the quality of argument that rhetoric represented in classical Greece and in ancient Rome.¹⁵⁸ The qualities of classical rhetoric form the essence of casuistic reasoning, and contrast with the reasoning of the theorists.¹⁵⁹

Jonsen and Toulmin compare the role of a rhetorician with that of a lawyer/advocate.¹⁶⁰ A lawyer looks to develop a “theory of the case,” searching among all theories for the one that fits best the particular circumstances of the case before her. The lawyer will develop arguments through *logical reasoning* (chains of inferences and relationships between propositions, for instance) alongside those that *persuade*, by convincing the audience that the story heard makes the most sense under the circumstances. The lawyer is employing the tools of rhetoric, and so, in the same way, is the casuist.¹⁶¹

Jonsen and Toulmin contend that the role of rhetoric within casuistry is inextricably connected to the reasoning method that distinguishes casuistry from other forms of “applied ethics.”¹⁶² The conventional reasoning rejected by the casuists assumes a capacity to resolve questions with some degree of finality, in “geometrical” fashion.¹⁶³ Rhetoric, the lawyer’s art, works amidst uncertainty and ambiguity. It marshals the best arguments not merely to persuade (perhaps the cynical perception of the lawyer’s use of rhetoric), but also to make the most sense of the ambiguity “all things considered,”¹⁶⁴ and to achieve a form of coherence for that particular moment.¹⁶⁵ The rhetorician understands that today’s case might be resolved differently from yesterday’s, and can explain the differences in relevant circumstances to justify the distinction.

Jonsen and Toulmin, among others,¹⁶⁶ identify several features of classical rhetoric that are central to casuistry. A full rehearsal of the casuists’ elaborate

158. See, e.g., JONSEN & TOULMIN, *supra* note 12, at 72–73 (discussing Aristotelian rhetoric).

159. Mark Kuczewski views casuistry’s reliance on rhetoric as a mixed blessing:

This rhetorical character is, at once, the strength and weakness of casuistry. It is a strength because it keeps the discussion close to common sense and to premises whose warrants are derived from experience. It is a weakness because casuistry must constantly face the challenge that it may degenerate into mere sophistry or become an apology for the status quo.

KUCZEWSKI, *supra* note 13, at 68.

160. JONSEN & TOULMIN, *supra* note 12, at 297–98.

161. For the argument that the practice of law is a form of the practice of rhetoric, see James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985). White’s rhetoric is not the ignoble version alluded to just above, but “the central art by which community and culture are established, maintained, and transformed. So regarded, rhetoric is continuous with law, and like it, has justice as its ultimate subject.” *Id.* at 684.

162. JONSEN & TOULMIN, *supra* note 12, at 295–96.

163. *Id.* at 293–96. See also *supra* notes 51–63, 144, and accompanying text (discussing principlism and geometric approach).

164. This phrase is employed by Heidi Li Feldman in her defense of virtue ethics. See Feldman, *supra* note 79, at 910, 924, 941.

165. See White, *supra* note 68, at 546 (suggesting that particularized cultural forms of communication would inform and educate a tribunal of the cause at issue).

166. See James M. Tallmon, *How Jonsen Really Views Casuistry: A Note on the Abuse of Father Wildes*, 19 J. MED. & PHIL. 103, 104–10 (1994) (discussing what Tallmon calls “Jonsen on Rhetorical Reason in Casuistry”)

arguments is not necessary for our “plain person” lawyering purposes, but a brief highlight of these might be instructive. First is the concept of *topics* (“*topoi*”).¹⁶⁷ *Topoi*, the plural form of *topos* (“place”), are the places where one looks “to gather materials with which to construct arguments.”¹⁶⁸ Aristotle distinguished between two types of *topoi*, “common topics” and “special topics.”¹⁶⁹ “Common topics,” less important to casuistry, are the forms of argument that would apply in any reasoning process (causality, analogy, proportion, etc.). “Special topics,” those which represent “the recurrent and invariant features that constitute”¹⁷⁰ a particular activity, on the other hand, are central to casuistic reasoning. In business, the special topics would be “investment, profit, productivity, etc.”;¹⁷¹ in clinical medicine, the special topics could be medical indications, patient preferences, quality of life, and social and economic context.¹⁷² In law, the special topics might include informed consent, conflicts of interest, access to justice, and confidentiality.¹⁷³ These topics will structure any discussion of ethics in context and serve to begin the identification of paradigm cases and “*maxims*.”

Maxims are the second concept derived from classical rhetoric.¹⁷⁴ They serve as the paradigmatic normative raw material for casuistry. Casuists replace deduction with the employment of maxims — the rules of thumb, common wisdoms, folk sayings, or self-evident “common morality” with which, at least superficially, we all agree.¹⁷⁵ Maxims are a staple of classical rhetoric. The Roman rhetorician Boethius described maxims as:

[K]nown per se, in such a way that there cannot be anything more known by which it could be proved. Since these propositions produce appropriate belief

[hereinafter Tollman, *How Jonsen Really Views Casuistry*]; James M. Tallmon, *Casuistry and the Role of Rhetorical Reason in Ethical Inquiry*, 28 PHIL. & RHETORIC 377 (1995).

167. James Tallmon writes that, “If clinical casuistry is inextricably bound to any matrix, it is that matrix derived from the classical lore of rhetorical topics.” Tallmon, *How Jonsen Really Views Casuistry*, *supra* note 166, at 105.

168. *Id.*

169. *Id.*

170. Jonsen, *Alternative or Complement*, *supra* note 15, at 242; Jonsen, *Casuistry as Methodology*, *supra* note 131, at 300.

171. Jonsen, *Casuistry as Methodology*, *supra* note 131, at 300.

172. These four topics have been chosen by JONSEN ET AL., *supra* note 10, at 5–7.

173. Jonsen has described the special topics as “are often found as the chapter headings of basic textbooks.” Jonsen, *Alternative or Complement*, *supra* note 15, at 242. The role of special topics in rhetoric is to orient the forthcoming discussion. They have “an invariant structure and variable content.” Jonsen, *Casuistry as Methodology*, *supra* note 131, at 300. The “invariant structure” but “variable content” concept is best expressed by Tallmon’s metaphor of a cookbook. All culinary art includes the following special topics: combination of ingredients; temperature; handling; and measurements. Those are “invariant structures” to cooking. In every case of performing the art of cooking, one will visit these special topics, even though the actual recipes will vary considerably in content. *See* Tallmon, *How Jonsen Really Views Casuistry*, *supra* note 166, at 110. Each topic possesses an “inner logic,” *id.* at 106, which implies subtopics, which a case analyst will parse in order to reveal the issue at hand.

174. The use of maxims is derived from Aristotle’s notion of “enthymemes,” arguments which are presumptively correct based upon our common understanding. JONSEN & TOULMIN, *supra* note 12, at 73.

175. *Id.* at 252–53; Jonsen, *On Being a Casuist*, *supra* note 15, at 121–22; Tallmon, *How Jonsen Really Views Casuistry*, *supra* note 166, at 108–09.

in themselves by nature, they not only need no argument from without for belief but also are generally the starting point for the proof of other things.¹⁷⁶

Maxims are exemplified by paradigm cases. In law, some maxims might include, “you always follow your client’s instructions”; “lawyers do not turn away clients without good reason”; “it is wrong to reveal a client’s information”; “it is wrong to lie to another lawyer”; and “a lawyer should first advance her client’s case.” Each of these would be arguments relied upon by any good lawyer in debating an important issue. Each may, and indeed will, have exceptions arising from certain combinations of circumstances, and that is understood. The role for the case analyst is to embrace the maxims in such a way as to make the most sense of the case before her.¹⁷⁷ Her arguments will not necessarily be long, complex chains of reasoning, but instead will be more abbreviated evocation of the maxims, in what classical rhetoricians called “enthymemes.”¹⁷⁸

The next rhetorical device employed by casuists is that of “*taxonomies*.” Any morally complex case will invoke one or more of the field’s special topics. Those topics will help frame the issue at stake in the case, and that issue should suggest several maxims. If a maxim applies, then the line of inquiry ends. In most interesting cases, a maxim will not easily apply without dissonance. That being

176. ANICIUS MANLIUS SEVERINUS BOETHIUS, *DE TOPICIS DIFFERENTIIS* 1176D 33 (Eleonore Stump ed. 1978), quoted in Tallmon, *How Jonsen Really Views Casuistry*, *supra* note 166, at 107. Jonsen makes the same argument:

It is important to note that casuists never attempt to systematize maxims: they do not use them as axioms to construct an argument; they do not marshal them into lexical orderings; they do not even worry much about “justifying them.” They simply invoke them, much as ordinary folk do in arguing moral matters. Their primary concern is whether this maxim “fits” these circumstances.

Jonsen, *On Being a Casuist*, *supra* note 15, at 122.

177. Tallmon suggests a further role for maxims: They “help guide the inquiry by alerting those involved that the line from specificity to abstractness is about to be crossed.” Tallmon, *How Jonsen Really Views Casuistry*, *supra* note 166, at 108. A critique or deconstruction of a maxim signifies a leaving of the practical realm for the contemplative realm, and that risks unproductive digression. “The professional colloquium, not the clinical consult, is the more appropriate place for contemplation of ethical principles.” *Id.*

178. Jonsen, *Alternative or Complement*, *supra* note 15, at 244. See Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 983 (1996) (defining “enthymeme” as “[a] term to refer to any argument — valid or invalid, deductive or nondeductive — the logical form of which is not perspicuous from its original manner of presentation. Judicial opinions and other legal arguments are usually enthymematic in this sense”); Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think about Causation, Reasonableness, and Responsibility*, 47 HASTINGS L.J. 61, 165 (1995) (“[T]he logical arguments attorneys make to jurors may be understood in terms of the classical rhetorical model of the enthymeme.”); James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 814 (1995) (offering enthymeme as a form of persuasive argument of lawyers and judicial opinions).

Ronald Mckinney agrees that casuistry relies on ethymemes as rhetorical devices, and contrasts that form of argument with a story-telling method more common within narrative ethics. Mckinney describes “the ‘judgments of rationality’ characteristic of casuistry with the ‘judgments of affectivity,’ which are proper to the more ‘existential,’ narrative approach to moral reasoning.” Mckinney, *supra* note 13, at 337 (quoting William C. Spohn, *The Reasoning Heart: An American Approach to Christian Discernment*, in *INTRODUCTION TO CHRISTIAN ETHICS: A READER* 563, 564 (Ronald Hamel & Kenneth Himes eds., 1989)).

so, the next rhetorical step, according to the casuists, is to identify a *taxonomy* of cases, starting with paradigm cases on either side of the issue and continuing with cases of lesser certainty. The case at issue is then fit within the array or continuum of cases, and the case comparison process ensues.¹⁷⁹

Classical rhetoric was always intended to persuade audiences on questions of importance to the polity or the community. While that understanding of rhetoric may be diminished today, it need not be lost. The affinity between law and rhetoric, and that between casuistry and rhetoric, combined with the frequent analogies within casuistry to the common law method, only emphasizes the importance of connecting the practice of casuistry and the practice of legal ethics in an explicit way.

VI. CASUISTRY IN ACTION

[I]t turns out that, like the bourgeois gentilhomme, we've all been "practicing casuistry" all along. . .

*John Arras*¹⁸⁰

A. INTRODUCTION TO THE EXAMPLES

At this point in the analysis, we must respect casuistry's most fundamental insight. The discussion thus far has consisted of ideas —intellectual ferment about the relationship between abstract theory and the complex world of practice. That discussion has shown the benefits of a deliberative method that respects practice and doubts theory, but, tautologically perhaps, it has not yet included practice elements. It is to that task that this Article now turns. In doing so, though, we confront the paradox of scholarship in this realm: even the "practice" elements that arrive here will not be practice at all, but will at best be hypotheticals or glossed-over stories. Casuists remind us that hypotheticals fail to

179. Jonsen, *Casuistry as Methodology*, *supra* note 131, at 301–02. Jonsen writes, "The taxonomy of cases is crucially important in casuistry. It puts the instant case into its moral context and reveals the weight of argument that might countervail a presumption of rightness or wrongness." *Id.*

180. John D. Arras, *The Abuse of Casuistry: A History of Moral Reasoning*, 20 HASTINGS CTR. RPRT. 35 (July 1990) (reviewing JONSEN & TOULMIN, *supra* note 12). Arras refers to the frequently-quoted dialogue of Molière:

Mr. Jourdain: I am in love with a lady of quality and I want you to help me write her a little note. . . .

Philosopher: Certainly. You want it in verse no doubt?

Mr. Jourdain: No. None of your verse for me.

Philosopher: You want it in prose then?

Mr. Jourdain: No, I don't want it in either.

Philosopher: [But] my dear sir, if you want to express yourself at all there are only verse or prose for it. . . .

Mr. Jourdain: Talking, as I am now, which is that?

Philosopher: That is prose. . . .

Mr. Jourdain: Here I've been talking prose for forty years and never known it, and mighty grateful I am for you telling me!

MOLIÈRE, *THE WOULD-BE GENTLEMAN* (1670), *quoted in* Miles, *supra* note 107, at 961.

achieve the splendor (or, perhaps more often, the imperfections) of real cases. The clinic or law firm cases cannot be captured within the classroom, and certainly not in an article to be read for the classroom.¹⁸¹ This tension is indeed inevitable, and irresolvable, for writing and reading is what we do. So, hypotheticals it will be.

To model the casuist method, I choose to revisit two of the examples discussed and explored in Susan Kupfer's important article proposing a model of "communicative ethics."¹⁸² Using these examples provides certain benefits. Her stories are real ones arising from her clinical practice. She has publicly discussed them, both from her students' perspective as well as from the perspective of her ethical model. And, I happen to think that her resolution is different from what might occur using the casuistry approach. As I review each case, I shall note not just the casuist perspective, but I shall also compare the other "competing" methods as

181. See Luban & Millemann, *supra* note 5 (espousing the advantages of clinic work for teaching professional values). Cf. Peter Toll Hoffman, *Clinical Scholarship and Skills Training*, 1 CLINICAL L. REV. 93 (1994) (contending that clinical education is essentially skills training, and that most scholarship known to be "clinical" has less relevance to that goal).

182. Kupfer, *supra* note 16. Kupfer undertakes to craft a workable ethic for lawyers based upon postmodern thought, and in this effort she highlights important resemblances with casuistry but also some significant differences. Kupfer emphasizes the postmodern privileging of *discourse* as an element of a coherent "discursive practice." *Id.* at 63–64. Relying on the continental theories of Jürgen Habermas and Hans-George Gadamer she proposes a form of "[c]ommunicative ethics, or discourse ethics," which she argues can constitute a "rational procedure for establishment of values through intersubjective practice." *Id.* at 86–87 (citing Jürgen Habermas, *Morality in Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics?*, in MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 195 (Christian Lenhardt & Shierry Weber Nicholsen trans. 1990); JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (Thomas McCarthy trans. 1984); HANS-GEORG GADAMER, *TRUTH AND METHOD* (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1993)). Kupfer describes the discourse ethics as follows:

The salient characteristic of communicative ethics is intersubjectivity. It is a relation that affects both the identity of the individual and the collective sense of the community. Values are determined by rigorous debate according to strict procedures that aim to involve all concerned persons. The goal is communicative; agreement is sought among those participating. This differs from strategic action, in which the participants seek the solution that will best maximize their own interests. Ethics is removed from the realm of subjective individuality and moved into the realm of language and communication.

Kupfer, *supra* note 16, at 87–88 (citations omitted). At first glance, Kupfer's discourse ethics looks quite different from casuistry. It is more centrally dialogic, does not employ the rhetorical conceptions of paradigm cases or analogical reasoning, and seems to privilege the process of conversation over the quality of the resulting choices. Viewed more carefully, however, Kupfer's proposal, if I read it right, shares quite a bit of casuistry's sentiments and perhaps its process as well. Kupfer's device of dialogue accomplishes ethical progress through the device of *reason-giving*. *Id.* at 90–91. "[R]easons (articulated rationales for behavior) are a method of universalizing ethical judgment." *Id.* at 91. I suspect that Kupfer's reasons are casuistry's maxims, the shared conceptions from which ethical concord might ensue. And, while discourse ethics is wholly intersubjective (where the casuists imply individual reasoning), Kupfer reminds us of the insight of Christine Korsgaard, who "argues that reasons presume a relationship, which implies the existence of another person; normative claims can thus only be imposed on others if we would impose them on ourselves." *Id.* at 98 n.240 (citing Christine M. Korsgaard, *The Reasons We Can Share: An Attack on the Distinction Between Agent-Relative and Agent-Neutral Values*, in ALTRUISM 24, 51 (Ellen Frankel Paul et al. eds., 1993)). Compare RAWLS, *supra* note 48, at 580 ("[J]ustification is argument addressed to those who disagree with us, or to ourselves when we are of two minds.").

well. After my discussion of the Kupfer examples, I briefly return to our earlier story of Mark and his dilemma about “welfare fraud.”¹⁸³

B. THE FIRST EXAMPLE: “THE ZEALOUS ADVOCATE”¹⁸⁴

1. The Case

In this case, a student attorney represented a nineteen year-old man in his claim for unemployment insurance benefits after the client was discharged from his work. The client’s employer objected to his collecting benefits because, it alleged, the man’s conduct amounted to “intentional misconduct in willful disregard of the employer’s interest.”¹⁸⁵ The employer bears the burden of proving that set of facts, which includes the requisite state of mind for “willfulness.”¹⁸⁶ The student, in his preparation for the appeal, had learned that the man was mentally retarded and, with his client’s consent, had obtained school records evidencing borderline I.Q.

The client, however, refused to permit the student to argue a theory that would characterize him as retarded or disabled. To overcome this resistance, the student arranged to have the client “called out of the room during the hearing,”¹⁸⁷ at which time the student presented his evidence and arguments on the mental impairment theory.¹⁸⁸ The client was awarded unemployment benefits by the hearing officer, who apparently cited to the evidence in the favorable decision.¹⁸⁹ After the case was completed, the student defended his choice, in class, by characterizing it as one “raising strategic considerations,” presumably placing it within the realm of the lawyer’s discretion and not a choice requiring client consent.¹⁹⁰ If the student is right about the scope of obligation, then this choice qualifies as a discretionary ethics matter.

183. See *supra* notes 19–25 and accompanying text (presenting the “Mark” story).

184. Kupfer, *supra* note 16, at 48.

185. While each state develops its own standards and procedures for processing unemployment compensation claims, the intentional or gross misconduct standard is the basic requirement of the overarching federal unemployment scheme. See, e.g., 20 C.F.R. § 615.8 (1998) (discussing extended benefits payable through unemployment compensation programs).

186. See, e.g., *Still v. Commissioner of Employment & Training*, 672 N.E.2d 105 (1996) (clarifying that “knowing” implies intent for purposes of statute disqualifying employees from receiving unemployment benefits).

187. Kupfer, *supra* note 16, at 48.

188. *Id.*

189. *Id.*

190. *Id.* The conclusion that permission from the client was not mandatory seems warranted under the standards established by bar authorities. Indeed, but for defining the objectives of the representation, and deciding on settlements and pleas, virtually no lawyering decisions include veto power for clients. See, e.g., MODEL RULES Rule 1.2(a) (“A lawyer shall abide by a client’s decisions concerning the objectives of representation, . . . and shall consult with the client as to the means by which they are to be pursued.”). Whether the decision in the case at hand constitutes an “objective” is arguable, although most formal authorities would view the matter, like the student did, as “means” and not “ends.” Cf. *Jones v. Barnes*, 463 U.S. 745 (1983) (holding that an indigent defendant has no constitutional right to direct his lawyer’s choice of arguments); American Bar Association, Center for Professional Responsibility, Annotated Model Rules of Professional

Kupfer's treatment of this case first shows the student's rather lame defense of his actions.¹⁹¹ Later in her article, she defends a more compassionate stance by the application of the discursive ethics method.¹⁹² Kupfer's response to this story is far more thoughtful, sensitive, and *correct* than is the student's response. It is not at all apparent, however, that the improvement results from following the discursive method.¹⁹³ I hope to show that the more comfortable resolution Kupfer demonstrates is more aptly compatible with a casuist vision and method than with the method she espouses.

Following the discursive method, Kupfer suggests a reciprocal "dialogue within the community" between the client and the lawyer about the moral conflict. That dialogue, though, only contemplates the student changing *his* mind based upon his learned understanding of the perspective of "the Other." The proposed method does not allow for the possibility that the client would change his position. And, if the two members of the dialogic community cannot reach consensus, Kupfer concludes that the lawyer must follow the client's moral direction as a professional obligation.¹⁹⁴

Kupfer is *right* in her assessment of who should "give" here, but that sense of

Conduct 34 (2d ed. 1996) ("In civil matters the lawyer's decision on tactics or means of achieving the client's objectives may be accorded more deference . . ."). Few commentators agree with the wisdom of that sentiment, however. See, e.g., Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) (arguing for a more textured view of the ends/means distinction); Dinerstein, *Reappraisal*, *supra* note 59 (advocating a more client-centered attorney-client relationship).

191. Kupfer, *supra* note 16, at 48 ("[While] [t]he cost to client autonomy was quite high," the matter was a strategic one, and "I would make the same choice . . . again." The ethical implications of the conduct were not otherwise discussed.").

192. *Id.* at 102-04.

193. Kupfer first suggests, consistent with the communicative ethics model she develops in her article, a Habermasian "dialogue within the community." *Id.* at 103. That community, in this case, consists of the client and the student. The proposed dialogue involves the important notion of reciprocity, where each party learns to view the world from the perspective of the "Other." *Id.* What becomes clear, though, is that the perspective of the client is privileged over that of the student. Her description of the interaction makes very plain the hope that the student will learn why he is wrong. If the parties remain at a standstill (that the client might change his mind based upon this dialogue is unmentioned), then "the lawyer *must agree with the client's moral position* and figure out a way to work within its boundaries." *Id.* at 104 (emphasis added). Kupfer then implies that this result is *required* in any event, so that even if the student remains unconvinced on moral grounds, his legal obligation trumps any moral considerations ("[T]he lawyer must acknowledge that the client's position . . . is the one the lawyer *must execute* under the *Model Code* and the *Model Rules*"). *Id.* (emphasis added).

If Kupfer is correct in her last sentiment, then this case would not qualify as a discretionary ethics matter at all, and the only remaining moral choice for her student is whether he wishes to proceed as a "moral activist," and disregard the obligatory professional standard. That choice is not addressed, largely (I suspect) because the student's choice appears so apparently wrong. As I describe below, though, it is not wrong because of the privilege of client interests and perspectives over those of the student. Indeed, Kupfer, earlier in her article, seemed to agree. She argued elegantly that "In considering the relative autonomy of lawyers and their clients, there needs to be more emphasis on the autonomy of the attorney." *Id.* at 40 (footnote omitted); *see also id.* at 76 ("To overcome this tendency [of students to abandon their initial resistance to group norms when entering a profession] likely to be present in law students, law schools need to emphasize autonomy as an essential component of ethical decisionmaking.").

194. *Id.* at 104.

“rightness” precedes the dialogue rather than follows from or is produced by it. There is a moral sensibility that attaches to this case that Kupfer plainly shares, and that sensibility informs her suggestions about how the case should be discussed. Her example, for that reason, is a very nice one to use to explore the way that the applied ethics models, including casuistry, could respond to the tensions presented in it.¹⁹⁵

2. The Deductivists’ Approach

The unemployment case exhibits moral conflict because it contains elements of at least two competing values. The first is beneficence, or the desire to “do good”; the second is autonomy, or the right to control one’s own life. The right of the client to choose his own fate conflicts with the desire on the lawyer’s part to accomplish the action that increases the benefits for the client. At the level of moral *theory*, we can compare how a deontologist and a utilitarian might respond to that tension.

a. The Deontologist

This case might seem a very easy call for a Kantian, “obligation-based”¹⁹⁶ theorist. Recall that a deontological perspective holds that “some features of actions *other than or in addition to consequences* make actions right or wrong.”¹⁹⁷ That view honors Kant’s categorical imperative: “I ought never to act except in such a way that I can also will that my maxim become a universal law.”¹⁹⁸ Since the student’s urge to manipulate the case to win benefits follows from the perceived good consequences of doing so, notwithstanding the dignity cost to his client, a Kantian presumably would not allow that consequence to drive the choice. In addition, since Kantian theory elevates respect for the dignity of each human being as a rational creature,¹⁹⁹ it follows that such a stance would invite the “rights-based” conclusion that the teenager’s choice, regardless of its wisdom, ought to be respected.

However, this answer may not end the matter just yet. If the consequentialist concerns are defined away by the Kantian, the student ought to wonder why the client’s privacy rights trump the student’s obligation to win the case, or even the client’s obligation to support himself. Beauchamp and Childress point out that Kant was not a defender of autonomy in the way we understand it today; Kant, they tell us, distinguished between “moral autonomy,” by which a person

195. Some might see this example as too “easy,” as I suspect that most readers will share Kupfer’s intuitive reaction that her student was wrong. As I describe soon, this perception follows from certain factual assumptions about the case. If the context of the case were a bit different, it could readily seem less clear-cut.

196. BEAUCHAMP & CHILDRESS, *PRINCIPLES IV*, *supra* note 10, at 56.

197. *Id.* (emphasis added).

198. *Id.* at 57.

199. DONAGAN, *supra* note 36, at 63–66.

“knowingly acts in accordance with the universally valid moral principles that pass the requirements of the categorical imperative,”²⁰⁰ and “heteronomy,” which represents “any controlling influence over the will other than motivation by moral principles,” including “passion, ambition, or self-interest.”²⁰¹ To proceed as a deontologist, the student must ascertain that the client’s decision to forego unemployment benefits was motivated by moral concerns and not by the “passion” of his embarrassment about his low I.Q.²⁰²

To the philosophers, this assessment might appear hopelessly naïve. Most sophisticated deontological thinking would most likely easily find that the man’s right to privacy and his right to autonomy trump whatever other concerns the student might have for the man’s self-interest (and, even more easily, the student’s desire to win his case).²⁰³ The point is that the *theory* of deontology, standing alone, does not self-evidently lead to a solution even in the not-terribly-controversial example at hand. We hold for the moment the question of whether deontological *rules or principles* (in contrast to *theory*) would serve as more reliable guidance in a case like this.

b. The Consequentialist

We have seen how the unemployment case does not lend itself to an apparent resolution under deontological theory, although it may well be a simple case for a sophisticated deontologist. The question seems even more muddled for the consequentialists. Consider “rule-utilitarianism,” the most defended version of consequentialism.²⁰⁴ That theory would have the student adopt that rule or set of rules “the implementation of which would maximize utility,”²⁰⁵ such that “[h]e ought always to produce the maximal balance of positive value over disvalue.”²⁰⁶ If he acted as a utilitarian in the unemployment case, would that theory suggest to him a way to proceed?

The answer has to be that we do not know, and perhaps cannot know. As Carson Strong argues, we need data to support the assumptions which would underlie our actions within this model.²⁰⁷ Is utility maximized by respecting the privacy rights of this client? To answer that question we would need information

200. BEAUCHAMP & CHILDRESS, PRINCIPLES IV, *supra* note 10, at 58.

201. *Id.*

202. *See supra* note 68 (noting an evolving view of “autonomy” in recent ethics literature).

203. *See, e.g.,* DONAGAN, *supra* note 36, at 66 (arguing that a modern Kantian “philosophical core” within the Hebrew-Christian tradition can be expressed in this rational principle: “It is impermissible not to respect every human being, oneself or any other, as a rational creature”). Other prominent deontologists include Henry Sidgwick and W. D. Ross. *See* FRANKENA, *supra* note 33, at 17 (discussing rule-based deontology).

204. *See* Strong, *supra* note 69, at 194 (commenting that rule utilitarianism is “a normative theory whose defense receives as much attention as any these days”).

205. *Id.*

206. BEAUCHAMP & CHILDRESS, PRINCIPLES IV, *supra* note 10, at 47.

207. Strong, *supra* note 69, at 196.

about his level of unhappiness derived from the manipulation and resulting characterization of his mental qualities, and the length of time of that discomfort, versus the happiness the client would achieve by having the money he otherwise would lose by protecting his privacy. “[F]or each policy a rule-utilitarian might defend, there would be a similar assumption concerning a balancing of harms. However, sociological data are not available to support these various assumptions.”²⁰⁸

It seems plain that it would be very difficult for the law student to perform the calculations necessary to implement a utilitarian assessment in this case. The theory, as such, does not aid the practitioner very well. That ineffectiveness in practice is the first objection to reliance on this theory as a deliberative method. A second objection to such use is that utilitarianism might justify the student’s actions in this case, but we know (as Kupfer describes the case) that what the student did was wrong. Utilitarianism, as a theory, would then conflict with our considered moral judgments.

c. The Principlist

Most ethicists, as noted above, no longer suggest broad or abstract conceptions of moral theory, like utilitarianism or Kantianism, to guide a law student in a case like this, instead proposing mid-level principles. Here, the applicable principles would be beneficence and autonomy. The first would constitute a prima facie obligation²⁰⁹ on the part of the law student to maximize the interests of his client, which ordinarily would mean to assist him to win his case.²¹⁰ The second would counsel the student, again as a prima facie duty, to respect the instructions of the client, to permit the teenager to control his own affairs even at some risk of harm to his interests.²¹¹

208. *Id.*

209. See BEAUCHAMP & CHILDRESS, PRINCIPLES IV, *supra* note 10, at 104–06 (construing “principles as prima facie binding” in a discussion of the nature of principles); ROSS, *supra* note 3, at 20 (defending prima facie duty analysis).

210. See Edward J. Eberle, *Three Foundations of Legal Ethics: Autonomy, Community, and Morality*, 7 GEO. J. LEGAL ETHICS 89 (1993) (furthering client interests as a moral commitment of lawyering); Ellmann, *Lawyering for Justice*, *supra* note 55, at 131–41 (defending the commitment of zealous advocacy against David Luban’s moral critique). The defense of zeal and commitment to client interests seldom includes a defense of paternalistic zeal against client instructions. Only in cases of disabled or young clients does one confront the argument that the best interests of the client might override the choices of the client. See note 211 *infra*.

211. Most of the literature regarding children as clients privileges the child’s choice over her perceived best interests when the child is capable of independent judgment. See, e.g., Linda L. Long, *When the Client Is a Child: Dilemmas in the Lawyer’s Role*, 21 J. FAM. L. 607 (1982–83); Symposium, *Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 4 (1996) (discussing the need for children’s lawyers to permit children who are clients to direct the course of their own representation when the children are capable of doing so). Cf. David Luban, *Paternalism and the Legal Profession*, 1981 WISC. L. REV. 454 (extending paternalistic role of attorney to representation involving ordinary, capable adults); Monroe Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 204 (1978) (“[An] attorney acts both professionally and morally in assisting clients to maximize their autonomy, . . . [but] the attorney acts unprofessionally and

The two principles conflict: the law student believed that the beneficence principle ought to take priority, while his supervisor believed that the autonomy principle should carry greater weight. Our sensibility is that she is right and he is wrong, but the principlist doctrine does not tell us why that is so. It might be that the principlist doctrine, if pressed, would concede that autonomy trumps beneficence in a "lexical ordering" kind of way.²¹² But, before we easily so conclude that autonomy deserves such a trumping privilege, consider a variation of the unemployment case:

This time, the client is not a teenager but the father of four young children, ranging in age from one to six. His wife is disabled by chronic arthritis and receives Social Security disability benefits. The client has been the primary support for this family. Once he lost his job his family has suffered considerable economic stress. Despite the great need for money, he, like the 19-year-old, refuses to permit a strategy that exploits, for purposes of the administrative hearing, his limited intellectual abilities.

At worst, this variation nudges us to rethink our visceral commitment to client autonomy; at best, it reverses our reactions to the student's strategy conclusions.²¹³ The presence of potential harm to others, and of an apparent choice by this man to place his pride over the physical well-being of his children, pushes us to apply different principles in this case. And we would be right in doing so. That is the insight of the casuist.

3. A Casuistry Approach

The casuist's approach to the unemployment case would look different from

immorally by depriving clients of their autonomy, . . . by . . . preempting their moral decisions, or by depriving them of the ability to carry out their lawful decisions."').

212. In bioethics as well as in law, the value of autonomy carries far greater weight than does that of beneficence. See KUCZEWSKI, *supra* note 13, at 77–78 (discussing autonomy in bioethics and law); JONSEN ET AL., *supra* note 10, at 37–38 (discussing autonomy in bioethics); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1102 (1994) (arguing that lawyers must act in the interests of clients, and that "[t]he Dark Secret of Progressive Lawyering is that effective lawyers cannot avoid making judgments in terms of their own values and influencing their clients to adopt those judgments.'). For an examination of recent critical scrutiny of this preference, see, e.g., MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

213. The idea that autonomy ought to be respected regardless of the implications for a client's or a patient's relevant community has less currency than it might have had in the past. The communitarian critique of that classically liberal conception has influenced much recent scholarship. See, e.g., 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); Tremblay, *Practiced Moral Activism*, *supra* note 153 (criticizing competence as the sole criterion against which to measure decisions to interfere with a client's individual choices). But see Gear, *supra* note 25 (criticizing the recent trend to downplay the interest in client autonomy).

Note that with the revised fact setting we still might quibble with the way the student accomplished his "beneficent" goal, having employed deception and manipulation as he did, but even then, if that method was the only way to accomplish the morally preferable goal, our quibbles might be calmed.

the deductivist's approach.²¹⁴ She will not search for a theory or a principle, or a lexical ordering of principles, to decide how to proceed, or to evaluate the law student's choice to proceed as he did. She will instead rely on the principles available as orienting points, develop paradigm cases from those principles, consider carefully the relevant moral factors present in the paradigm cases, and then explore the specifics of those factors in the case at hand. Then using analogical reasoning and the practice of "moral triangulation," she will assess whether the case at hand better resembles one paradigmatic case or another. She will then make her best judgment of that conclusion, all things considered, understanding that she has at best probable certitude for her choices.²¹⁵ Carson Strong calls this the "case comparison" method.²¹⁶

Two principles apply in this case, as noted: beneficence and autonomy. Each principle can be stated as a "maxim": "Advance your client's legal interests" and "Follow your client's wishes." Carson Strong suggests first that, where it is apparent that more than one principle has moral applicability, we identify clear cases representing each principle.²¹⁷ Note that for this process to unfold, the practitioner must acknowledge each competing consideration. A law student who *only* saw the beneficence factor here could not use the "case comparison" method, of course, but such a student would not perceive ethical conflict at all (and would thus have no use for any of the methods we have explored). Any deliberative method, then, will call for some minimal ability to recognize ethical tension in practice.

Here, Kupfer's student *does* recognize the tension between the principles. He reported to his Professional Responsibility class that "[t]he cost to client autonomy was quite high."²¹⁸ The student obviously saw the costs as worth the candle, though, given how he proceeded. The fact that his actions also implicate a possible conflict of interest — his need to be a successful lawyer with a "win" on

214. For a helpful dialogue consisting of an attempted casuistic treatment of a clinical case and then a critique of that effort claiming that it is inadequately casuistic, see Martin L. Smith & Kevin P. Martin, *Confidentiality in the Age of AIDS: A Case Study in Clinical Ethics*, 4 J. CLINICAL ETHICS 236 (1993); Athena Beldecos & Robert M. Arnold, *Gathering Information and Casuistic Analysis*, 4 J. CLINICAL ETHICS 241 (1993). For a book-length treatment of the practice of casuistry in a medical clinical setting, see JONSEN ET AL., *supra* note 10.

215. The casuist method just described does not preclude, by any means, the dialogic process suggested by Kupfer in her proposed discursive method. See Kupfer, *supra* note 16, at 90–93 (considering how individual ethics could be justified when individuals disagree as to appropriate outcomes). The reciprocal dialogue modeled within discursive ethics can be of considerable help in identifying the details of the case, including the interests at stake and the desires of the client (as well as the motivations of the lawyer). But it also seems true that such dialogue is not an essential feature of the casuistic method. It is distinct from, but fully compatible with, a "discourse ethics" approach.

216. Strong, *supra* note 69, at 201–03. Strong's process has been praised by Albert Jonsen, whose process for casuistry developed in *The Abuse of Casuistry* shares much of what I have described here, in Jonsen, *Practice Versus Theory*, *supra* note 106, at 33; JONSEN & TOULMIN, *supra* note 12, at 306–07.

217. Strong, *supra* note 69, at 202. See also JONSEN & TOULMIN, *supra* note 12, at 252 (noting movement toward complex cases for analytical purposes).

218. Kupfer, *supra* note 16, at 48.

his record might affect his decisionmaking — means that he will need to include a third principle, that of loyalty.²¹⁹ That principle ought also to be represented by a paradigm case, as well as a maxim — say, “Never let your interests interfere with your duty to your client.”

The casuist would need to call upon paradigm cases to stand for each of the conflicting principles that come to bear on this dispute. Because casuistry is not yet an established practice within legal ethics, these cases are not yet part of the lore or “stock stories”²²⁰ of the profession, at least not explicitly. Such a collection of precedential stock stories would arise from the “special topics” within law practice,²²¹ and can, in time, be represented by maxims.²²² Legal ethicists have not yet mastered this method as well as bioethicists have. For present purposes, though, we can imagine the cases and maxims, as well as the special topics identified earlier.²²³

A paradigm case for the autonomy principle ought to be reasonably accessible to the casuist. The principle stands for the proposition that a person’s choices about his life ought to be respected. His conception of what is good is one of the choices deserving of respect. A client who chooses to settle a case for emotional satisfaction, closure, avoidance of litigation, and a small amount of money rather than to proceed to trial for a chance to win more money at greater emotional risk represents a clear, evocative paradigm case that captures the principle of autonomy.²²⁴ A casuist could work with the law student to have him identify cases where the principle he accepts would be exemplified.

Cases capturing beneficence might be harder to locate, especially those that are not trite. The reason for this is that the value of autonomy is so privileged within American moral philosophy, and certainly within law.²²⁵ Beneficence is certainly a value, no doubt, and easily represented by everyday cases in which the lawyer’s obligation is to act zealously. For the stock story to have weight as a paradigm case, though, it ought to serve as a clear case in which beneficence trumps other competing interests.²²⁶

219. The “principle” of loyalty is, of course, a long-standing and fully accepted one within legal ethics. See Eberle, *supra* note 210, at 99–103 (describing autonomy as an ethical foundation).

220. See Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984) (developing the role of “stock stories” in lawyering practice).

221. See *supra* notes 170–173 and accompanying text (discussing “special topics”).

222. Jonsen, *Casuistry as Methodology*, *supra* note 131, at 298; see also *supra* notes 174–78 and accompanying text (discussing maxims).

223. See *supra* notes 170–73 and accompanying text (discussing same).

224. The fact that this principle also happens to be “the law” through, e.g., MODEL RULES Rule 1.2(a), or agency doctrine, e.g., RESTATEMENT (SECOND) OF AGENCY § 33 (1958) (stating the general principle that agents are bound by the authority of their principal) and RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 31 (Am. L. Inst. Tent. Draft No. 1, Mar. 29, 1996) (outlining the lawyer’s duty to inform and consult with client), is not dispositive of its status as a paradigm case, but neither does its obligatory nature forfeit its moral appeal as an “easy” case.

225. See *supra* notes 193, 200–03, and 212 and accompanying text (discussing value of autonomy).

226. See, e.g., Strong, *supra* note 69, at 201–07 (using medical ethics cases in which intervention against the

Two such “beneficence” cases come to mind. One is the case of the disabled client.²²⁷ We could construct a paradigm case in which a lawyer opts not to follow the express choices of a client because it is very apparent that the client is not able to understand the available choices *and* it is equally clear that the client would, if competent, choose the option that maximizes her interests.²²⁸ The second case would be a variation on the present case, where the interest of the client to be protected is less central and the harm to the client, and to his immediate family, is patent and direct. We could achieve consensus on these stories, that in these cases it would be morally appropriate to act against what otherwise would be autonomy interests.

The casuist would then, following Carson Strong’s model, proceed to identify the morally relevant ways in which the cases of the type in question can differ from one another.²²⁹ This step is not hard in our case. The “autonomy” stock stories differ from the “beneficence” stories in these morally relevant ways: the paradigm case for autonomy reflects clear understanding by the client of the risks, and/or no egregious harm to the client or to others.²³⁰ The case for beneficence reflects either no clear choice by the client or such grave harm to those around him, or to himself, that respecting his choice, even if freely adopted, is unacceptable.

The next step consists of moral triangulation, the comparison between the case at hand and the two or more paradigm cases, looking at the morally relevant factors just identified and the very specific details of the case at hand. This step should immediately reveal why Kupfer seems right and her student wrong *as she describes the case to us*. I read the story as one where the nineteen year-old will not suffer grave harm by losing his unemployment case. I see no family, no minor children, and no other factors that might alter the resemblance of this case to the autonomy stock story. He appears to understand the choice before him, and the injury to his dignity seems plausible. If we add in the two other factors I have not

wishes of a patient is clearly justified by the harm caused to immediate family members by a decision to respect the patient’s choice of non-treatment). Of course, if no such stock stories or paradigm cases could be found, then the matter in question cannot claim the status of a principle. In other words, if no paradigm case can be found in which a lawyer is easily justified to disrespect his client’s express wishes for the client’s, or the client’s relevant community’s, best interests, then cases like the present one have no moral conflict. The presence of moral conflict by hypothesis implies competing paradigm cases.

227. See, e.g., Paul R. Tremblay, *Impromptu Lawyering and De Facto Guardians*, 62 *FORDHAM L. REV.* 1429, 1435 n.21 (1994) (reporting that all members of a conference working group would act without express authority if needed to avoid irreparable harm in a case where the affected person ostensibly was disabled).

228. MODEL RULES Rule 1.14 Comment [2] represents this principle, permitting a lawyer to act as “de facto guardian” when necessary to protect a client’s interests. For consideration of the limits of a lawyer’s discretion, see *supra* note 190.

229. Strong, *supra* note 69, at 202–03.

230. I concede that this last element may not be part of a paradigm case. I include it because it *may* represent a paradigm case in some form. This exercise demonstrates the Jonsen and Toulmin argument of the need for the profession to collect and refine the paradigm cases. See Jonsen, *Casuistry as Methodology*, *supra* note 131, at 301–03 (discussing taxonomic organization of cases).

explored — the student's deceptive manipulation of the client and his possible conflict of interest — and quickly imagine the paradigm cases for each of these principles, the case becomes even clearer.

Yet, there are two important insights from the casuists embedded in this assessment. The first is that *the details count for a lot*. We have not developed a “rule” that holds that clients always deserve respect in settings like this unemployment case. Make this man forty-five, give him sick, young children and a disabled wife, and the result is not necessarily the same. The second point is that the conversation with the client, so central to the discursive method, does not end matters in the casuist world. Kupfer employs the dialogue to nudge her student to respect his client more,²³¹ and that is a laudable goal. But the casuists will warn that, even after such reciprocal conversation, this student may have to do the same thing as he did before. It all depends on the results of the conversation and the specific circumstances of the case.

C. THE SECOND EXAMPLE: “THE PROCEDURALIST”²³²

In much briefer fashion, I now attempt a similar casuist assessment of a second of Professor Kupfer's cases. In this case, a law student faces a tactical choice to use a court process instrumentally or substantively.²³³ The student represents an elderly couple in an eviction proceeding. The *pro se* landlord filed a complaint in court too soon under prevailing law. If the student were to object to the misfiling quickly, the case could be refiled by the landlord, and then heard on the merits. If the student deliberately delayed his objection, the landlord would lose his right to sue once the present case was dismissed for its procedural impropriety. The student's clients would then win, but not on the merits. The student perceived this to be a true dilemma.²³⁴

As with the “zealous advocate,” Kupfer returns to this case to assess the moral implications within discursive ethics.²³⁵ My purpose here is not to critique that model's response as such,²³⁶ but instead to visit the case as would a casuist.

231. See *supra* notes 193–94 and accompanying text (discussing Kupfer's dialogue method).

232. Kupfer, *supra* note 16, at 49.

233. The choice Kupfer describes fits nicely the distinctions developed by William Simon in his essay on ethical discretion. See Simon, *Ethical Discretion*, *supra* note 60, at 1096–1113 (discussing the tensions between substance and procedure, purpose and form, and broad and narrow framing, as these tensions apply to reconciling legal values related to the client's desired ends).

234. This description paraphrases Kupfer's account. Kupfer, *supra* note 16, at 49.

235. *Id.* at 108–11.

236. Kupfer respects her student for his intuitive sense of injustice and unfairness. She sees the matter, though, as one governed by the lawyer's professional role. *Id.* at 109 (“[t]he professional paradigm of loyalty and zealous representation demands accommodation” by the student to the demands of the adversary system). That observation implies that the matter is not one of discretionary ethics, since the role obligations command a certain outcome. Kupfer does not rest with that conclusion, however, suggesting at the same time that the matter ought to be resolved through the discursive ethics method.

The case then turns out to have curious implications for that method. Kupfer suggests three “dialogic

Kupfer implies that there are no conflicting principles here,²³⁷ but I think that view misunderstands her description of her student's angst and the level of moral complexity in her story. There are, indeed, conflicting moral principles here, even if observers might see the conflict as quite one-sided: the commitment to zealous advocacy (a variation of the beneficence norm described above)²³⁸ and a commitment to fairness. The former is so well-established that it requires no discussion. The latter, though, is gaining respectability.²³⁹ It even has its stock stories. Think of *Spaulding v. Zimmerman*.²⁴⁰ The zealous advocacy principle, usually immune to objections about unfairness, cedes in *Spaulding* to such complaints when a child's life is at stake. As in this eviction case, the defendants in *Spaulding* gained substantial benefits by complying with strict court procedure. We condemn them for using the process in that way, despite conventional role morality.²⁴¹ Other paradigm cases might include *Zabella v.*

communities" in this case: the clients, the student's colleagues, and the adversary. The latter would serve as the most pointed moral community (the landlord is, after all, the one suffering the harm here that leads to the moral discomfort), and that conversation would present the most morally charged of the available conversations. But that conversation cannot take place. It is the deception of the landlord that leads to the technical "win" that troubles the student. Any moral dialogue would spill the proverbial beans. Kupfer apparently realizes this irony; she omits any discussion of the dialogue with that moral community.

Kupfer correctly predicts that dialogue with the first two communities will result in heavy criticism of the student's concerns, but that hardly resolves the student's moral angst or the ethical issue creating that angst. As with the unemployment case, Kupfer again concludes that the clients' views will trump the student's:

In this instance the lawyer, once the clients have expressed their opposition to his proposed course of action, is not free to go forward with his plan. He must understand, given the constraints of his representation, that he needs to accede to their wishes if they do not agree with him.

Id. While the precept of client-centeredness is no doubt a powerful one, this offer of a trump within the moral dialogue mischaracterizes the moral issue at hand. Kupfer's view comes up short in two important ways. First, if this is a matter covered by substantive obligatory standards, then what is the purpose of the moral dialogue? The lawyer will know what he "must" do before any conversation takes place. See *supra* note 193 (discussing a similar observation of the "Zealous Advocate"). And second, if there are moral issues here, what is the benefit of a dialogue if the clients' will is entitled to such privilege? As I have written elsewhere:

At the risk of propounding the obvious, it is important to note that any moral lawyering stance will be client-unfriendly, almost by definition. Any activist stance that we observe will have a premise that asserts that lawyers may reject certain client-chosen means or goals as ethically inappropriate.

Tremblay, *Practiced Moral Activism*, *supra* note 153, at 31 (footnotes omitted). See also, Scott Burnham, *Teaching Legal Ethics in Contracts*, 41 J. LEGAL EDUC. 105, 106 (1991) (noting that taking advantage "for the client" is "a true ethical dilemma: not a conflict between good and evil but a conflict between two goods").

237. Kupfer, *supra* note 16, at 109 ("Through this dialogue, the substantive policies behind the lawyer's rationale will be exposed; the underlying principles behind the clients' position will be expressed.").

238. See text accompanying *supra* note 54 (summarizing the four principles defended by Beauchamp and Childress).

239. For the best articulation of the principle represented by this student's desire for procedural fairness, see Simon, *Ethical Discretion*, *supra* note 60. See also a description of two "activist" models, those of David Luban and William Simon, in Tremblay, *Practiced Moral Activism*, *supra* note 153, at 12–19.

240. *Spaulding v. Zimmerman*, 116 N.W.2d 704 (1962) (setting aside a court-approved settlement on behalf of a minor after the court discovered the defendant did not disclose its awareness of the plaintiff's life threatening medical condition of which the plaintiff was not aware).

241. For criticism of the lawyering in *Spaulding*, see, e.g., David Luban, *The Adversary System Excuse*, in

*Pakel*²⁴² or the *Valdez v. Alloway's Garage* simulation.²⁴³ Cases like *Spaulding*, *Zabella*, and *Valdez* find their way into professional responsibility texts because they represent, or at least conjure up, paradigm cases in which winning by a technicality offends our moral conceptions.²⁴⁴

The question for the lawyer in the eviction case, then, is to identify the morally relevant differences between the two sets of paradigm cases and to use those factors to analogize to the eviction case. Once again, we see that Kupfer's judgment about the morally preferable choice is right, but it is important to understand why she is right, and how dependent that sentiment is on the context of the case. We can assume certain facts here — facts the law student would need to know. What is the relevant harm to the landlord in this case? He is described as a college professor, thus not too poor²⁴⁵ and not too unsophisticated. What are his remedies once this proceeding is dismissed with prejudice? Because this is a setting requiring administrative proceedings to be held before any formal eviction complaint may be brought,²⁴⁶ the landlord impliedly will get at least part of the monthly rent during the period of delay (and maybe all, if this is not a non-payment case).²⁴⁷ We do not know the harm to the tenants, or the fairness of the procedures which the tenants must endure in order to have their rights adjudicated.²⁴⁸

All of these factors would need to be explored and understood for a proper casuist assessment to occur. In many cases, the moral qualms presented by the student in this eviction case would be determined to be entirely legitimate ones.

THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83, 115 (David Luban ed. 1983) [hereinafter THE GOOD LAWYER]; GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 5–10 (2d. ed. 1994); HOWARD LESNICK, BEING A LAWYER: INDIVIDUAL CHOICE AND RESPONSIBILITY IN THE PRACTICE OF LAW 25–26 (1992).

242. 242 F.2d 452 (7th Cir. 1957), discussed in Susan Wolf, *Ethics, Legal Ethics, and the Ethics of Law*, in THE GOOD LAWYER, *supra* note 241, at 38, 46, 59; LUBAN, LAWYERS AND JUSTICE, *supra* note 24, at 9–10; LESNICK, *supra* note 241, at 26–27. In *Zabella*, the court held that the use of a procedural statute of limitations defense to avoid payment of a just debt owed to a needy former friend was valid where there was no writing.

243. See GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY 586–91 (1978) (outlining the *Valdez* scenario). This evocative story is also discussed in Simon, *Ethical Discretion*, *supra* note 60, at 1098–99. In *Valdez*, a sloppy, overworked personal injury plaintiffs' lawyer overlooks a favorable change in the law and settles a wrongful death case for a mere fraction of the case's worth. The more polished and well-resourced insurance lawyer blithely exploits the plaintiffs' lawyer's incompetence.

244. This has been David Luban's fundamental assertion in his moral activism writing. E.g., Luban, *The Adversary System Excuse*, *supra* note 241; LUBAN, LAWYERS AND JUSTICE, *supra* note 24.

245. Perhaps I make too facile an assumption here. The important point, though, is that the landlord's income might matter.

246. See Kupfer, *supra* note 16, at 49.

247. See Tremblay, *Practiced Moral Activism*, *supra* note 153, at 33–42, for a discussion of an eviction case in which the tenants were withholding rent during the delay. In that case, without using an explicit casuist analysis, I argued that the actions of the tenants raised serious moral concerns that law professors, in their work with clinic students, ought to explore deeply.

248. See Simon, *Ethical Discretion*, *supra* note 60, at 1097–98 (stressing the significance of the reliability of the available judicial or administrative processes).

No simple principle²⁴⁹ can decide when the fairness concerns will override the obligations of advocacy. As we are wont to do implicitly, casuistry allows us to build upon our intuitive judgments to make those kinds of calls in as rigorous a fashion as this reality can permit. John Arras is right — “we’ve all been ‘practicing casuistry’ all along.”²⁵⁰ We just did not realize we were doing so.

D. A THIRD EXAMPLE: CASUISTRY AND WELFARE FRAUD

We return now to the example with which I introduced the idea of discretionary ethics.²⁵¹ In this case, Mark, the legal services lawyer, represents a woman who is not eligible for a full welfare grant, but who needs the money to raise her family, and, through Mark’s instrumental and lawful tactics, can maintain all of her grant. Mark experiences tension in this representation; he is not comfortable using procedural tactics to obtain goods not covered by the applicable administrative scheme.²⁵² At the same time, his professional role obligation suggests that he “win” his client’s case, and the prospect of Edna lacking funds to feed her children is an unpleasant one. Hence his dilemma. Because both acting and not acting are *legal*, the law of lawyering does not help Mark here.²⁵³

We saw earlier how unhelpful either moral theory or the *prima facie* principles

249. The influence of principlist thinking in modern ethical thought is a pesky one. We see it throughout Kupfer’s excellent article. Despite a commitment to the nuanced, contextual, antitheoretical ideas of the postmoderns, Kupfer in fact approaches each of her four cases with a decidedly principlist bent. In each case the lawyer’s professional role obligations are afforded great weight, as we saw in the discussion of the two cases in the text. Compare Kupfer, *supra* note 16, at 36–37 (rejecting formalism in favor of pragmatic and postmodern methodology “focusing on particularity and context”), with *id.* at 101–111 (resolving four student cases with great deference to role obligations and client autonomy). The model of reasoning in which one employs an external criterion and applies it to a set of facts to determine a conclusion is a steadfast vestige of classical liberal thought, and its persistence even among sophisticated and critical thinkers is impressive.

250. Arras, *supra* note 180, at 35.

251. See *supra* notes 19–25 and accompanying text (presenting the discretionary ethics scenario).

252. In this respect, Mark adheres to William Simon’s conception of ethical discretion. Simon, *Ethical Discretion*, *supra* note 60. It is my sense that most lawyers do not share, or at least do not act upon, Simon’s thesis. If that is true, those lawyers will encounter little ethical conflict in this case, unlike Mark. That observation in itself appears to conflict with one of casuistry’s central insights, the rejection of a fact/value split. KUCZEWSKI, *supra* note 13, at 100. It implies that Mark “has” values that other lawyers do not “have,” indicating a priority of value over circumstance, which the casuists deny. Does this reflect a weakness of casuistry?

The philosophers who counsel against a strong fact/value distinction do not see the Mark/other lawyers disagreement as evidence of prior values. As the casuists point out, it is very unlikely that Mark and other practicing lawyers believe different things about what is “good,” or about the easy cases. If they disagree about Simon’s thesis of ethical discretion, it is more likely because they differ about *predictions* and about *facts*. Rather than evidencing a flaw in casuistry, this digression demonstrates how the art assists individuals who seem to have different values to discuss their disagreements in a reasoned, nondogmatic way. For an abbreviated discussion of this point, see Paul R. Tremblay, *Coherence and Incoherence in Values-Talk*, 5 CLINICAL L. REV. 325 (1998).

253. For an explanation of the “legal” basis of Mark’s declining to represent Edna and assist her to “win” the welfare hearing, see *supra* notes 22–23 and accompanying text.

are to Mark's effort to sort out his ethical discomfort.²⁵⁴ Mark's resort to casuistry does not promise any simple or formulaic solution, nor a universal one. But, like Jonsen's museum metaphor,²⁵⁵ the casuists can offer an opportunity for some reasoned consideration or discussion about Mark's plight. In fact, his deliberation will resemble that of the preceding example, as it involves similar competing considerations.

Mark's dilemma can be represented by two principles, or maxims, or paradigm cases: (1) using sharp legal tactics to obtain benefits not intended by substantive law is presumptively wrong,²⁵⁶ and (2) failing to assist a mother to feed her family by means of legal means is also presumptively wrong.²⁵⁷ Whether Mark ought to violate the first or second of these turns not on questions of moral preferences or some kind of lexical ordering, but rather on predictions about facts. Will Edna's family suffer if Mark refuses to assist her in her deception? Is her welfare grant truly a last resort? Is the legislative or regulatory scheme a fair one? Does the scheme intend to deny money to women like Edna, or are the rules developed more for administrative or bureaucratic convenience or efficiency?²⁵⁸

Sometimes, then, Mark ought to assist his client, despite his commitment not to use law instrumentally.²⁵⁹ At other times, Mark ought to refuse to do so. Mark will arrive at a decision in any given circumstance in much the same way that a judge will decide a contested question of law—by analogical reasoning from the fixed and accepted precedents.²⁶⁰

254. See *supra* notes 29–49 and accompanying text (discussing applicability of these principles to the scenario).

255. See *supra* note 105.

256. See Simon, *Ethical Discretion*, *supra* note 60, at 1083 (“[A lawyer] should have ethical discretion to refuse to assist in the pursuit of legally permissible courses of action and in the assertion of potentially enforceable legal claims.”).

257. Mark can imagine cases where that proposition is very evident. In such “easy” cases, Mark will have no doubt that his duty would be to ensure that a family whom he has agreed to represent will receive his best efforts to keep them from homelessness or painful hunger. Note that these easy cases do not imply Mark's commitment to help every family that might suffer from hunger and for which some lawful relief is available. That proposition is not an “easy” case at all, but instead contains competing principles, one of benevolence and the other representing Mark's right to time of his own. The paradigm case that Mark calls up for his dilemma involving Edna is one in which he has agreed to represent her. Note also that these paradigm cases need only be Mark's; it is not necessary — although it will be likely — that they be shared by Mark's relevant community. Mark's ethical conflict consists of his internal angst, and his “triangulation” can proceed using his own commitments.

258. These questions echo William Simon's thoughtful assessment of a lawyer's obligation to assist a client to obtain welfare benefits that seemingly are not permitted by the applicable regulations. Simon, *Ethical Discretion*, *supra* note 60, at 1105–07.

259. Similarly (although beyond the defined scope of this Article), sometimes Mark will engage in civil disobedience for the same reasons. See Judith A. McMorrow, *Civil Disobedience and the Lawyer's Obligation to the Law*, 48 WASH. & LEE L. REV. 139 (1991) (proposing a theory aligning civil disobedience and the lawyer's proper role).

260. See Sunstein, *supra* note 111, at 744–49 (discussing the structure of analogical reasoning in law); SUNSTEIN, *supra* note 17, at 77–90 (discussing analogical reasoning in the contexts of common, constitutional, and statutory law).

CONCLUSION

This Article's purpose has been to introduce to the world of legal ethics the conception of casuistry, and to borrow from the rich world of bioethics insights about case-based reasoning and clinical ethics that can inform the practice of law. In many ways the ideas developed here are nearly self-evident. The claim by John Arras and others that we are already practicing casuistry is a powerful one. We are all casuists, as we use analogies and easy cases to make the best sense of ethical conflict. The "new casuistry" helps us to identify the processes we use and to offer a structure and some governing themes for those processes.

In other ways, though, the model expressed by casuistry undercuts much of the rules- and principles-based syllogistic thinking that pervades much thinking and writing within legal ethics. Those ordinary ways of confronting ethics are in great need of refinement and rethinking, and this Article has shown how the wisdom of the casuists might guide us in that task of refinement and rethinking. If the casuists are right, this effort can aid plain persons to confront ethical complexity in a meaningful way without needing to resolve, or even understand, more sophisticated debates about moral philosophy.

If casuistry seems promising in these important ways, it also invites much more reflection by critics and supporters within the legal profession. Central to a critical assessment of casuistry are questions about conservatism and self-interested decisionmaking. Crafting a method of ethical deliberation grounded in considered judgments arising from cases risks privileging the status quo, and seems to discourage innovative or progressive ethical thinking. It also permits, in its resistance to blanket theories and principles, arguments about ethical propriety that are intended to produce certain identified results—the very abuse that the common understanding of "casuistry" has so often invoked in the past. These risks of casuistry seemingly will not trump its apparent benefits, but they must be confronted head-on if casuistry is to play a meaningful role in lawyers' ethical decisionmaking.