What If Legal Ethics Can't Be Reduced to a Maxim?

Andrew B. Ayers
What if Legal Ethics Can’t be Reduced to a Maxim?

ANDREW B. AYERS*

TABLE OF CONTENTS

INTRODUCTION .................................................. 2

I. HOW ARE ABSTRACT VALUES RELEVANT TO LAWYERS’ PRACTICE? ........................................ 4
   A. INTRINSIC VALUE AND WHAT TO DO ABOUT IT .......... 4
   B. ONLY REDUCTIONISTS CAN OFFER MAXIMS .......... 9

II. THERE’S NO SUCH THING AS A THEORY OF LEGAL ETHICS (AND IT’S A GOOD THING TOO). ............ 12
   A. A MAXIM THAT WON’T HOLD STILL ..................... 13
   B. EXCLUDING OTHER VALUES ____________________________ 16
   C. MERE CONTINGENCY ........................................ 19
   D. FROM “THEORIES OF LEGAL ETHICS” TO THEORIES OF SPECIFIC VALUES ............................... 23

III. VALUING THINGS WELL: THE CONCEPT OF A VIRTUE .......... 24
   A. MORAL PHILOSOPHY WITHOUT MAXIMS .................. 25
   B. A DEFINITION OF VIRTUE .................................. 31

* Assistant Solicitor General, Office of the Solicitor General of New York. The views expressed here are the author’s alone. Thanks to James Ayers, David Finkelstein, Rajit Dosanjh, Zainab Chaudhry, Bruce Strong, Dinesh Kuman, Aaron Rabinowitz, and Andrea Oser for comments and consultation. Emily Ayers, Barbara Mitchell, Tom Mitchell, James Ayers, and Miriam Tremontozzi made this article possible by watching my children while I worked on it. © 2013, Andrew B. Ayers.
INTRODUCTION

Most theories of legal ethics try to explain what matters in the practice of law. Most theories focus on an abstract value, like justice, autonomy, or political legitimacy, and argue that it is what matters most. In many cases, the theory then endorses a maxim that tells lawyers how to promote the abstract value in their daily practice. But these maxims necessarily oversimplify lawyers’ ethical world.

Parts I and II of this article explain why legal ethicists should stop trying to reduce legal ethics to a maxim. It would be possible to create a comprehensive maxim for lawyers if legal ethics could be reduced to one value, or a small group of values. For example, if justice is the only value at stake in legal ethics, then lawyers should adopt a maxim like “Always do what promotes justice.” But lawyering is complex; it involves many important values and considerations. Since legal ethics can’t be reduced to a small group of values, it isn’t possible to create a single formula or maxim to guide lawyers through every practical situation.

Legal ethicists offer comprehensive maxims because they want to connect their claims about abstract values to lawyers’ daily practice. This is a good goal: it is important both to know what values are at stake in law practice and to know what lawyers should do about those values. Identifying the values can help lawyers think more clearly about their choices. It can also help policy-makers understand how best to structure the rules that govern law practice. And once the relevant values have been identified, it is unquestionably important to connect

---

them to lawyers’ practice—to know not only what matters but also what to do about it. But comprehensive practical maxims are a problematic way of connecting values to practice.

If maxims are an unhelpful way of understanding the practical relevance of abstract values, we should look for an alternative way. The second half of this article explores a way of offering practical guidance that does not involve practical maxims. Instead of offering a maxim that purports to guide lawyers through all situations, legal ethics theory can understand the practical relevance of abstract values and lawyers’ practice using a different conceptual tool: the concept of virtues.

As Part III explains, a virtue is a disposition to promote things of value appropriately and well. For example, to say that a person has the virtue of compassion is to say that she respects and promotes others’ well-being. Virtues are the practical side of abstract values.

The best way to test the usefulness of the concept of virtues is to see whether it leads to any interesting claims about legal ethics. Part IV tries to make one such claim by focusing on the close connection between virtues and practical skills. Virtues depend on skills; in order to promote any value effectively, it is necessary to have certain practical skills. One of the skills required to promote the values at stake in the practice of law is the capacity to tolerate ethical tension—to continue struggling with a dilemma even when it appears that there is no way to avoid acting against something of genuine value. The article ends with a claim that this capacity to tolerate tension is fundamentally important for lawyers, and that it can’t be adequately explained by accounts that reduce legal ethics to a maxim.

This article is part of a series that explores some of the conceptual tools—the standard kinds of arguments or patterns of reasoning—that are deployed in legal ethics theory, or what is sometimes called “philosophical legal ethics.” The goal of the series is to see these conceptual tools from the perspective of a practicing lawyer. Seeing a conceptual tool from the lawyer’s perspective means understanding how it functions in lawyers’ practical reasoning. This article looks at one conceptual tool—comprehensive practical maxims—and asks what happens when lawyers who face difficult practical decisions try to use this tool to decide what to do.

2. See discussion infra Part III.B.
3. This article is about legal ethics, not the law of lawyering. It deals with the ethical and moral norms that apply to lawyers, rather than the Rules of Professional Responsibility and the other legal authorities that constrain lawyers’ conduct. For more on this distinction, see W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 19 (2010).
4. The first article in the series is Andrew B. Ayers, The Lawyer’s Perspective: The Gap Between Individual Decisions and Collective Consequences in Legal Ethics, 36 J. LEGAL PROF. 77 (2011). It argues that there are important problems with a conceptual tool frequently deployed in legal ethics: arguments from collective consequences (arguments that ask, “What if everyone did that?”). It also elaborates on the reasons why it is important to develop an account of the intrinsic values at stake in lawyers’ practice.
The aim of the series is to help develop a repertoire of reasoning tools that practicing lawyers can use to make sense of the ethical problems they face. When lawyers are required to interpret legal texts, they draw on a familiar set of conceptual tools: the standard kinds of arguments about statutory language, the canons of interpretation, certain techniques for making analogies to precedential cases, arguments about institutional competence, and so on. Anyone who has received a decent legal education is equipped with these tools for thinking about legal texts. But there is no comparable set of familiar tools for lawyers to use in their practical and ethical reasoning. This article tries to contribute to our understanding of the ethical reasoning tools available to lawyers by looking at one commonly used tool and arguing that it is problematic. The article then looks at another conceptual tool that is less commonly used, the concept of virtues, and explores one way in which that tool might help us connect legal ethics theory to lawyers’ everyday practice.

I. HOW ARE ABSTRACT VALUES RELEVANT TO LAWYERS’ PRACTICE?

Most theoretical accounts of legal ethics aim to answer two questions. The first question is: What matters? To answer this question is to develop an account of the intrinsic values that are at stake in the practice of law. The second question is: What should we do about it? To answer this question is to explain how intrinsic values should affect lawyers’ practical reasoning. Most legal ethics theorists want to answer both questions—to explain both what matters and what lawyers should do about it. Their goal is to help lawyers make practical decisions, or to constructively criticize the practical decisions lawyers make and the beliefs lawyers form about their practice. They aim to offer thoughts and arguments that will make a difference in the lives of practicing lawyers. But this goal is often pursued in a problematic way.

A. INTRINSIC VALUE AND WHAT TO DO ABOUT IT

The first step in most theoretical accounts of legal ethics is an attempt to understand the intrinsic values that are relevant to the practice of law. An “intrinsic value” is anything that is valued for its own sake. Intrinsic values are generally distinguished from instrumental values, which are things we value for the sake of what they promote. For example, it might be said that human dignity

5. “Practical reasoning” here means any kind of thinking or attitude about questions that are practical, as opposed to theoretical—questions about what to do in a practical situation, how to react to a situation, what to commit ourselves to, and how life should be lived.

6. See, e.g., Wendel, supra note 3, at 15 (“This book aims to bridge the gap between academic philosophy...as it might apply to the practice of lawyers and the circumstances of actual practicing lawyers.”).

7. Complexities arise as soon as we try to define intrinsic value. In particular, there may be kinds of non-intrinsic value that are not instrumental. An example is the symbolic value of a wedding ring: while the ring
is an intrinsic value, in that it should be promoted for its own sake, while political institutions have merely instrumental value, in that they should be supported only insofar as they promote human dignity.8

Most theories of legal ethics focus on one particular intrinsic value. Different theories tend to emphasize different values. Among the values emphasized in existing accounts of legal ethics are justice,9 human dignity,10 constitutional rights,11 the legitimacy of our government or our justice system,12 the law itself,13 the autonomy of lawyers’ clients,14 and the relationship between lawyers and their clients.15 Once a theorist has developed an account of what has intrinsic value in the practice of law, the challenge is to explain how that intrinsic value is relevant to lawyers’ practice.

Legal ethicists often try to connect abstract values to practical decision-making through the use of practical maxims.16 A practical maxim is a prescriptive claim

---

8. A more colloquial way of saying something has intrinsic value is to say that it really matters. This phrase is somewhat imprecise, because there is a sense in which instrumental values can matter too. For example, a national army is (arguably) not valuable for its own sake, but only as an instrument for the defense of things that are themselves important. But when you are being invaded by Hitler’s Germany, your national army matters more than many things whose value is intrinsic. Still, this article will sometimes use the phrase “what matters” or “what really matters” as a substitute for “what has intrinsic value.” Philosophers sometimes use the phrase in this way too. Derek Parfit, for example, includes the phrase “what matters” in the title of his recent opus On What Matters; somewhere in the caverns of Part Six, it becomes clear that he means it as a synonym for intrinsic value. See Derek Parfit, On What Matters (2011).

9. WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 9 (1999) (“the lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice”).

10. DAVID LUBAN, LAWYERS AS UPHOLDERS OF HUMAN DIGNITY (When They Aren’t Busy Assaulting It), in LEGAL ETHICS AND HUMAN DIGNITY 65, 66 (2007) (“[W]hat makes the practice of law worthwhile is upholding human dignity... [A]dvocatorial excesses are wrong precisely when they assault human dignity instead of upholding it.”); see also MONROE H. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM 2 (1975) (arguing that lawyers’ obligations are “essential to maintaining human dignity”).


13. WENDEL, supra note 3, at 88-89 (“Democratic equality is therefore the most important value in politics... Thus, the fundamental ethical obligation of lawyers is fidelity to law.”).


16. The term “maxim” has many connotations in the Kantian tradition. Philosophers have long debated what Kant meant by “maxims,” and I hope to avoid those debates here. See Rob Gressis, Recent Work on Kantian Maxims I: Established Approaches, 5 PHIL. COMPASS 216 (2010) (discussing various understandings of Kant’s concept of maxims).
that gives guidance to lawyers about what they should do in certain kinds of situations.\textsuperscript{17} Usually, maxims are expressed in the form of propositions. One familiar maxim is the prescriptive proposition that \textit{lawyers should zealously represent their clients within the bounds of the law.}\textsuperscript{18}

Many practical maxims could be described as “rules” or “principles,” but this article will generally avoid those terms because they have a variety of specific meanings that could be distracting. The word “rule,” for example, is often distinguished in legal theory from the word “standard”—rules are precise, while standards are vague.\textsuperscript{19} Practical maxims can be precise or vague, and so they can be rules or standards.\textsuperscript{20} The word “principle” would also be an imperfect fit, because principles are not necessarily prescriptions for conduct. One might say, for example, that it is a fundamental principle that human dignity is deeply important. This principle would not be a practical maxim, because it does not tell anyone what to do.

The maxims on which this article will focus are those that purport to be comprehensive. A comprehensive practical maxim is one that purports to guide lawyers through all of the situations a lawyer might encounter, or something close to all of them.\textsuperscript{21} Examples of comprehensive maxims include the well-known formula “zealous advocacy within the bounds of law,” and William Simon’s claim that “[l]awyers should take those actions that, considering the relevant circumstances of the case, seem likely to promote justice.”\textsuperscript{22} This article

\begin{thebibliography}{9}
\bibitem{17} See id. at 217.
\bibitem{18} On the zealous-advocacy maxim, see David Wilkins, \textit{Legal Realism for Lawyers}, 104 \textit{HARV. L. REV.} 468, 471 (1990). For examples of the claim, see Monroe H. Freedman, \textit{Henry Lord Brougham and Zeal}, 34 \textit{HOFSTRA L. REV.} 1319, 1319 (2006) (“[T]he traditional aspiration of zealous advocacy remains the fundamental principle of the law of lawyering and the dominant standard of lawyerly excellence among lawyers today.” (internal quotation marks omitted)); Monroe H. Freedman, \textit{A Critique of Philosophizing About Lawyers’ Ethics}, 21 \textit{GEOR. J. LEGAL ETHICS} 91, 91 (2012) (“[M]y own view is that lawyers should exercise moral discretion in deciding whether to represent a client or cause. After having made the choice to serve as the client’s fiduciary, however, the lawyer is bound to zealously represent the client’s interests as determined! by the client after appropriate counseling by the lawyer.”); W. William Hodes, \textit{The Professional Duty to Horseshed Witnesses—Zealously, Within the Bounds of the Law}, 30 \textit{TEX. TECH. L. REV.} 1343, 1365 (1999) (“You must try to find the line between what is permitted and what is not, and then get as close to that line as you can without crossing over to the bad side. Anything less is less than zealous representation—which already leaves you on the bad side of the line. Whatever distance is left to travel up to that illusive [sic] line is territory that belongs to the client and has been wrongfully ceded away. Play that formula out in the context of [a specific ethical problem], and you have ethical lawyering in a nutshell.”).
\bibitem{20} Also, “rules” include constitutive rules (rules that set the conditions for something to be counted as an instance of a certain category in the context of some social institution or practice). See John R. Searle, \textit{The Construction of Social Reality} 48 (1995). But there are no constitutive maxims.
\bibitem{21} In contrast, some propositions that might be called “maxims” are very specific, like the Model Rules proposition that lawyers should not charge contingent fees in domestic relations cases. See \textbf{Model Rules of Prof’l Conduct R. 1.5(d)(1)} (2010) [hereinafter \textbf{Model Rules}].
\bibitem{22} Simon, \textit{supra} note 9, at 138.
\end{thebibliography}
will sometimes call comprehensive practical maxims of this kind *Master Maxims*, because they purport to trump any maxim, rule, or principle that might otherwise apply, including the *Rules of Professional Responsibility*.

It is important to understand the difference between comprehensive practical maxims and maxims that do not purport to be comprehensive, like the rules of thumb that lawyers sometimes use to guide them in their practice. When contemplating a potential conflict of interest, some lawyers ask themselves, “Could the new representation give me any reason to pull my punches?” Rules of thumb like this one are conceptual shortcuts designed to address specific questions. Because they’re not comprehensive guides to lawyering, they’re not comprehensive maxims of the kind this article criticizes.

The practical maxims with which this article is concerned are the maxims that are presented as the distillation of a “theory” or “conception” of legal ethics. Included in this category are small groups of maxims, so long as they are intended to be comprehensive when put together. One example of a comprehensive group of maxims is the so-called “Standard Conception of legal ethics,” discussed below, which consists of three related maxims rather than one Master Maxim. The word “maxim” in this article should be read as shorthand for “comprehensive practical maxims or small groups of practical maxims which together purport to be comprehensive.”

The most commonly discussed maxims in legal ethics theory may be the three related maxims that make up the “Standard Conception.”23 The first of the three maxims is the principle of *Partisanship*, under which lawyers should be partisans of their clients’ interests. The second is the principle of *Neutrality*, under which lawyers should refrain from reaching independent judgments of the moral merits of clients’ positions. The third maxim is the principle of *Nonaccountability*, under which no one—lawyer or non-lawyer—should hold a lawyer morally responsible for the goals she pursues on a client’s behalf.24 (It is a curious fact about the Standard Conception that it gives ethical instruction to non-lawyers as well as lawyers.)

Legal ethicists take different positions on the Standard Conception. Some deny


24. See William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. Rev. 29, 36 (1978) (referring to principles of partisanship and neutrality); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. Rev. 63, 73 (1980) (discussing partisanship and neutrality); Wendel, supra note 3, at 29-31. Nonaccountability is a principle about how lawyers should be judged, not a principle about what lawyers should choose to do. But it implies a principle about what lawyers should feel responsible for, and what they should take responsibility for. In this sense, it is still an example of the kind of maxim that purports to guide lawyers in their everyday practical reasoning about ethical matters—the kind of maxim with which this article is concerned.
that it is in fact the prevailing norm among lawyers. Whether or not the Standard Conception is in fact the prevailing norm, several writers defend it. Tim Dare, for example, embraces the Standard Conception, although he finds it necessary to add to it a fourth maxim, which states that lawyers should act with zeal, but not “hyper-zeal.” W. Bradley Wendel defends a modified version of the Standard Conception, under which “lawyers should act to protect the legal entitlements of clients, not advance their interests.” The aspiration to identify a good practical maxim is just one of several aspirations that Dare and Wendel have for their theories. But it is a significant one; they both describe their theories as arguments in support of their version of the Standard Conception—that is, arguments in support of a certain comprehensive set of practical maxims.

Unlike Wendel and Dare, many of the writers who discuss the Standard Conception attack it, or try to replace it with their own maxim. William Simon, for example, wants to replace the Standard Conception with a maxim that states, “Lawyers should take those actions that, considering the relevant circumstances of the case, seem likely to promote justice.”

Nobody thinks that applying a Master Maxim is a straightforward or easy process. Simon, for example, recognizes that his Master Maxim will need to be interpreted before it can tell lawyers what to do in practical situations. In fact, this is a key part of his theory, which he calls the Contextual View: he argues that his maxim requires deliberation and the exercise of judgment before it can translate into any specific recommendation about a given practical situation. So his maxim is just the beginning; he begins the work of interpreting it by applying it to various practical problems, and expresses hope that the maxim will, in time, be expanded into a system of propositions that would illustrate how it applies in

26. Dare, supra note 23, at 59, 76, 89.
27. Wendel, supra note 3, at 6.
28. Dare and Wendel each explain that they are defending the Standard Conception, or a modified version of it. See id. at 49; Dare, supra note 23, at 2.
29. Simon, supra note 9, at 138. This Master Maxim requires elucidation. Simon says that “justice” is interchangeable with “legal merit,” but his conception of “legal merit” encompasses a great deal: it includes both the positive law and the fundamental norms that he sees as underlying positive law. Id. On Simon’s Dworkinian understanding of legal merit, see Robin West, The Zealous Advocacy of Justice in a Less than Ideal Legal World, 51 Stan. L. Rev. 973, 976-78 (1999) (review of Simon, supra note 9). Simon also says that his formula leaves room for the notion that lawyers should zealously pursue clients’ goals, because zealous pursuit of clients’ goals—in many contexts, at least—seems likely to promote justice. So the application of his maxim will involve a broad-ranging inquiry into a variety of considerations. Nonetheless, Simon sees all of these considerations as aspects of the “justice” that his Master Maxim tells lawyers to promote. See Simon, supra note 9, at 11.
30. Id. at 157.
31. Id. at 139-51, 163-69.
various contexts—something like a Restatement.\textsuperscript{32} Although judgment thus plays an important role in Simon’s theory, it is judgment about just one intrinsic value—the value Simon calls “justice.” Simon believes, in other words, that lawyers should limit their thinking to this one value, however complex its interpretation and application may be. This belief that lawyering can be reduced to one value is essential to Simon’s theory; without it, his maxim would collapse.

B. ONLY REDUCTIONISTS CAN OFFER MAXIMS

It may seem obvious that legal ethics theorists should aim to offer practical maxims.\textsuperscript{33} What good is a theory if it can’t tell us what to do? But some writers have resisted the idea that legal ethics can be distilled into a formula or maxim. Fred Zacharias argued, for example, that formulas (maxims) fail to capture the complexity of lawyers’ ethical world—and, for that matter, the complexity of the positive law of lawyering.\textsuperscript{34} The following discussion aims to flesh out exactly how practical maxims oversimplify.

While writers like Simon, Dare, and Wendel differ in many respects, they share an assumption that legal ethics can be understood in general; their accounts purport to be “theories” or “conceptions” of legal ethics as a whole.\textsuperscript{35} They assume that legal ethics is something one can have a general conception of. But this is not an innocent assumption. On the contrary, it is made possible only by a specific substantive view about the intrinsic values that are at stake in the practice of lawyering.

Simon wants to restrict lawyers’ practical reasoning to only the considerations that fall into the category “justice,” however broadly he defines that category. This is what makes it possible for Simon to propose a Master Maxim. If Simon did not want to limit lawyers’ practical reasoning to a single category (or at least a manageable small number of categories), there would be little hope of reaching a Master Maxim—unless that Master Maxim were “Lawyers should take whatever action seems best under the circumstances,” which would not simplify things much.

The same assumption—that legal ethics can be reduced to one kind of consideration, or a small handful of them—drives the Standard Conception. Those who defend the Standard Conception want to limit lawyers’ practical

\textsuperscript{32} Id. at 197-98.
\textsuperscript{33} It is easy to find support in moral philosophy for the idea that morality has an intimate connection with propositional claims about what should be done. See, e.g., THOMAS SCANLON, WHAT WE OWE TO EACH OTHER 1 (1998) (“Moral judgments have the form of ordinary declarative sentences.”).
\textsuperscript{34} Fred C. Zacharias, Fitting Lying to the Court into the Central Moral Tradition of Lawyering, 58 CASE W. RES. L. REV. 491, 492 (2008) (praising Robert Lawry because he “resisted the proposition that lawyers’ moral dilemmas can be resolved uniformly by resort to a simple formula, like Lord Brougham’s prescription”).
\textsuperscript{35} See WENDEL, supra note 3, at 18 (referring to “[t]he conception of legal ethics I will defend here”); DARE, supra note 23, at 3-5 (defending the “standard conception”).
reasoning to only the considerations that involve the client’s interests. Partisanship doesn’t just mean treating a client’s goals as important; it means treating them as the only thing that is important.36 In Lord Brougham’s maxim, the lawyer “knows but one person in all the world, and that person is his client.”37 On this understanding, any consideration that is not endorsed by the client should not factor into the lawyer’s decision.

Both the Standard Conception and Simon’s conception limit the kinds of considerations that lawyers should recognize as real reasons for action. Simon thinks lawyers should consider only justice; he is a monist about the values that are at stake in lawyering. The Standard Conception does not assume that there is only one kind of value that matters, but it does assume that lawyers should limit their reasoning to considerations the client takes to be important. The Standard Conception is not monist; clients might want to pursue, or feel constrained by, more than one value, and in such cases lawyers are to take those multiple values as their own. But it is nonetheless reductionist. Where Simon’s conception limits lawyers to one kind of consideration (the kind that falls into the category Simon calls “justice”), the Standard Conception reduces legal ethics to one person’s considerations: those the client endorses. Each approach reduces dramatically the kinds of practical reasons that lawyers are ethically responsible for considering. Reduction of this kind is what makes it possible to distill legal ethics into a Master Maxim.

Once legal ethics has been reduced to a single master value, it is easy to state lawyers’ ethical obligations in terms of that value: “Lawyers should take those actions which best promote the Master Value.”38 Our chances of successfully reducing legal ethics to a maxim will grow in direct proportion to our ability to reduce the number of considerations lawyers must consider. If we reduce those considerations to one, as Simon does, we may be able to state lawyers’ ethical obligations in a single maxim. The more intrinsic values we think lawyers should consider, the more complex our maxims will have to be.

Writers who do not think legal ethics can be reduced to a single kind of consideration tend not to offer Master Maxims, even if it may sometimes look as if that is what they are doing. For example, David Luban in *Lawyers and Justice*

---

36. DARE, supra note 23, at 5 (the principle of partisanship “specifies that the lawyer’s sole allegiance is to the client. Within, but all the way up to, the limits of the law, the lawyer is committed to the aggressive and single-minded pursuit of the client’s objectives.” (emphasis added)).
37. Id. at 6, quoting LORD HENRY BROUGHAM, 2 THE TRIAL OF QUEEN CAROLINE 8 (1820-1821).
38. The word “promote” here assumes away some interesting questions; there will be room to debate exactly what lawyers should do with respect to the master value. Promoting a thing is only one way of valuing it. A Master Maxim might claim instead that “Lawyers should take whatever action best respects the master value,” or—at the risk of sounding redundant—“whatever action best values the master value.” (This issue will be taken up in Part Three, below.) A Master Maxim might also include an epistemic claim—that is, a claim about how lawyers should make judgments about what will best promote or respect the master value. Simon’s maxim claims that lawyers should make those assessments on the basis of the circumstances, case-by-case.
proposed a four-step analysis to determine whether lawyers’ role in the adversary system justifies acts that seem morally troubling. The four-step analysis required lawyers to justify the institution of the adversary system, the role they play in it, the obligations that flow from that role, and each individual act. This four-step analysis might sound like a candidate to replace the Standard Conception—a four-part Master Maxim—but that’s not what it is.

_Lawyers and Justice_ carefully denies that its four-step analysis captures everything of moral importance in the practice of lawyering. It is not intended as a propositional distillation of lawyers’ ethical responsibilities. Rather, it is designed to evaluate a specific kind of claim about the things lawyers should consider in deciding what to do: the claim—that Luban calls the “Adversary System Excuse”—that the lawyer’s role justifies otherwise-troubling actions. The four-step analysis is thus an analysis of one specific consideration or claim that might factor in lawyers’ reasoning, not a distillation of legal ethics in general.

Luban couldn’t offer a maxim that purported to tell lawyers in general what to do, because he didn’t claim that lawyers should ignore any significant class of practical reasons. Rather than reducing the complexity of lawyers’ practical reasoning, _Lawyers and Justice_ insists on it. Its analysis requires lawyers to decide both what their role demands and what “common moral obligation” requires, and Luban doesn’t offer a way to limit either of these categories of reasons. Because he didn’t want to reduce the kinds of considerations lawyers consider when deciding what to do, he couldn’t distill lawyers’ obligations into a maxim.

Luban was right in _Lawyers and Justice_ not to adopt the ambition to distill

---


40. _Luban_, supra note 39, at 131-32. In a later article, Luban modified this analysis, supplementing it with a “defeasible presumption” in favor of acts that are consistent with the lawyer’s role. See _Luban, Mid-Course Corrections, supra note 39, at 434-35._

41. Luban emphasizes that he is not claiming that an institutional excuse is always appropriate when the four prongs are satisfied. _Luban, supra note 39, at 132_. Rather, Luban says that an institutional excuse is just one possible way out of moral dilemmas involving professional roles. _Id._

42. If the institutional excuse fails, Luban argued, we have to fall back on whatever our “common moral obligation” is, and whatever moral beliefs support it, to decide what we should do. _Id._ at 155. Luban did not try to distill those “common moral obligations” into maxims. He argued that lawyers are usually subject to the same moral standards that apply to non-lawyers. _Id._ at 155. But he did not aim to create a systematic theory of what those standards are or how they apply.

Nor does Luban’s Fourfold Root provide a set of instructions for how to decide whether a particular action is justified. On the contrary, it _adds_ to the number of things that must be justified before a lawyer can engage in certain kinds of actions. Luban argues that lawyers should justify not only the act, but the institution, social role, and role-obligation that seem to require the act. Far from being an effort to distill lawyers’ ethical responsibilities into a single formula, the Fourfold Root multiplies by four the number of things lawyers will have to analyze before they can decide whether to undertake a facially troubling role-act.
legal ethics into a set of maxims, because the belief on which that project
depends—the belief that legal ethics can be reduced to one kind of consider-
ation—is wrong.43

II. THERE’S NO SUCH THING AS A THEORY OF LEGAL ETHICS (AND IT’S A
GOOD THING TOO)44

Part I argued that it is possible to create comprehensive practical maxims
that can guide lawyers’ decision-making only if legal ethics can be reduced to a
small number of values.45 In other words, comprehensive practical maxims are
available only to reductionists. But reductionism, this Part explains, is hard to
defend. And it has led some writers to misunderstand what their theories are
theories of.

The problem with accounts that ask lawyers to limit their reasoning to one kind
of consideration is that there are many values—many kinds of considerations—
that make plausible claims on lawyers’ attention. As mentioned earlier, legal
ethicists have identified a variety of putatively central intrinsic values in legal
ethics: justice,46 human dignity,47 constitutional rights,48 the legitimacy of our
government or our justice system,49 the law itself,50 the autonomy of lawyers’
clients,51 and the relationship between lawyers and their clients.52 It is difficult to
deny that each of these is a genuinely significant value. Nor is it easy to deny that

43. I use the past tense to describe the position Luban took in Lawyers and Justice because some of Luban’s
more recent work seems to step in the direction of offering a Master Maxim. A later essay offers two hypotheses:
“First, that what makes the practice of law worthwhile is upholding human dignity; second, that adversarial
excesses are wrong precisely when they assault human dignity instead of upholding it.” LUBAN, supra note 10,
at 66. Luban argues that human dignity is different from autonomy, id. at 76, but he does not discuss how it
relates to any other values.

If it is possible, in Luban’s view, for human dignity to conflict with justice (for example, in a case where it is
necessary to violate someone’s human dignity to prevent a great injustice), then Luban’s maxim doesn’t tell us
what to do, and it is not a Master Maxim. If, on the other hand, justice can be understood as a function of human
dignity, and the same is true of all other values, then Luban’s maxim can provide guidance in all lawyering
situations. Luban’s maxim will provide general guidance for lawyers only if all of the values at stake in
lawyering can be reduced to human dignity.

44. Cf. STANLEY FISH, THERE’S NO SUCH THING AS FREE SPEECH; AND IT’S A GOOD THING TOO (1994).

45. The Standard Conception, as discussed above, does not claim that lawyers should limit their reasoning to
one intrinsic value. Instead, it claims that lawyers should limit their reasoning to one kind of consideration—the
considerations that are endorsed by the client. But the Standard Conception is not itself a theory of legal ethics;
the writers who defend it typically justify it with reference to some other reductionist account. Thus Dare, as
discussed above, defends the Standard Conception by arguing that lawyers should limit their reasoning to a
certain kind of political value. See DARE, supra note 23.

46. SIMON, supra note 9, at 9.

47. LUBAN, supra note 10, at 66; Freedman, supra note 10, at 2.

48. FREEDMAN & SMITH, supra note 11, at 8.

49. MARKOVITS, supra note 12, at 12; Guerrero, supra note 12.

50. WENDEL, supra note 3, at 88-89.

51. Pepper, supra note 14, at 617.

52. Shaffer, supra note 15, at 161-63; Fried, supra note 15.
each of these values is sometimes at stake in lawyering situations. This presents a challenge for reductionists who want lawyers to limit their thinking to just one value.

Reductionist accounts try to defend their claim that lawyers should limit their reasoning in two ways: (1) by arguing that successful promotion of one value requires the exclusion of other values; and (2) by arguing that the other values at stake are merely contingent.53 This Part argues that neither strategy is effective. It focuses on the work of Bradley Wendel, who emphasizes the way lawyers’ work protects one intrinsic value, the legitimacy of our legal system. Wendel’s theory illustrates both the importance and usefulness of claims about intrinsic value and the difficulty of deriving comprehensive practical maxims from those claims.

Part II.A will explore the specific intrinsic value on which Wendel’s theory focuses, and his interest in distilling his claims about that value into a comprehensive practical maxim. Parts II.B and II.C will criticize the way Wendel justifies his claim that political legitimacy usually trumps other intrinsic values. Part II.D will argue that when Wendel acknowledges that other values may sometimes trump the value on which he focuses, he makes clear that he is not really a reductionist. And because he is not really a reductionist, he can’t offer the kind of Master Maxim he aims for. Wendel’s admirable refusal to fully embrace reductionism is the reason he ultimately cannot settle on any particular maxim as the distillation of his theory.

Since Wendel cannot defend a Master Maxim—a practical maxim that purports to give lawyers comprehensive guidance about the ethical choices they should make—his theory should not be understood as a theory or conception of legal ethics. Rather, it is a theory of one of the things lawyers should consider as they make practical decisions. As such, it doesn’t deserve to be called a theory of legal ethics—but that’s a good thing. No good theory could deserve to be called a theory of legal ethics.

A. A MAXIM THAT WON’T HOLD STILL

Wendel argues that the key value in legal ethics is political legitimacy—not just the value of government institutions being perceived by the public as legitimate, but the value of government institutions deserving to be perceived as legitimate.54 Political legitimacy, Wendel argues, depends on lawyers’ willingness to help clients claim the things to which they are entitled under the law. The institutions that make up the legal system will be illegitimate if citizens are unable to claim their legal entitlements. To make sure that clients can claim their legal entitlements, lawyers must focus their practical reasoning on the clients’

53. For examples, see infra Parts III.B and III.C.
54. WENDEL, supra note 3, at 2.
legal entitlements, not on any other consideration. Wendel uses the phrase “fidelity to law” to describe the attitudes and actions of lawyers who focus their practical reasoning on legal entitlements. When lawyers act with fidelity to law, he argues, they promote the legitimacy of the legal system.

So Wendel’s theory begins with a claim about intrinsic value—the intrinsic value of political legitimacy. From his account of intrinsic value, Wendel derives what sounds like a comprehensive maxim: “lawyers should act to protect the legal entitlements of clients, not advance [clients’] interests.” His maxim follows from his claim about intrinsic value, in what amounts to a three-step argument: (1) political legitimacy is the intrinsic value that matters; (2) lawyers can best promote legitimacy by protecting the legal entitlements of clients; (3) therefore, lawyers should protect the legal entitlements of clients.

But Wendel’s theory begins to come apart when he tries to explain how lawyers should deal with intrinsic values other than political legitimacy. Wendel recognizes that political legitimacy is not the only thing that has intrinsic value. And he does not claim that the intrinsic value of political legitimacy always trumps any other intrinsic value. So any maxim he offers will need to do more than simply direct lawyers to protect clients’ entitlements; it will need to help determine when, if ever, some other value should trump that one.

To this end, Wendel offers several versions of his maxim, each of which seems to be designed to deal with conflicts between political legitimacy and other intrinsic values. But each version seems to have different implications about how often the importance of promoting political legitimacy might be trumped by the importance of promoting some other value. In various places in his book, Wendel asserts:

- That lawyers have “very weighty reasons [for fidelity to law], which should be overridden only in very extraordinary circumstances”;  
- That lawyers have “either an exclusionary reason . . . or . . . a very weighty reason” for fidelity to law;

55. Id. at 89.
56. Id. at 61-63, 89.
57. Id. at 89. Political legitimacy is itself justified in terms of other values; Wendel argues that lawyers should treat political legitimacy as intrinsically valuable because doing so promotes the values of dignity and equality.
58. Id. at 6 (emphasis in original). He states this maxim a bit differently elsewhere: “[t]he ethical permissibility of actions taken by lawyers . . . is a function of whether the client has a legal entitlement to take that action.” Id. at 77.
59. Id. at 10 (“Legality is not the only good.”). Wendel sometimes refers to his central intrinsic value as “legality,” because the kind of legitimacy that interests him most is the legitimacy of laws (because they represent successful compromises on moral issues that would otherwise divide society).
60. WENDEL, supra note 3, at 113.
61. Id. at 86. The term exclusionary reason refers to a reason to keep certain considerations out of one’s thinking about a given problem. For example, a judge’s law clerk has good reasons to exclude from her thinking her own view of a case, and to draft the decision the way the judge envisions it. And the judge has good reasons
That fidelity to law is “a prima facie obligation or something stronger, like a presumptive obligation”;62 and
That fidelity to law is “a near-absolute obligation.”63

There are at least five different possibilities here: a very weighty reason; an exclusionary reason; a prima facie obligation; a presumptive obligation; and a near-absolute obligation. Some of these may mean the same thing; an exclusionary reason, for example, may be the same thing as an obligation of some sort. But they can’t all mean the same thing; a prima facie obligation, for example, surely isn’t “near-absolute.”

In a later article, Wendel offers two more formulations. At first, he specifically denies that the obligation of fidelity to law is merely “weighty” or presumptive. He writes that the process by which law serves its ultimate purpose might not succeed if lawyers see their reasons for fidelity to law as “not truly exclusionary but . . . only presumptive or weighty.”64 This sounds like a claim that lawyers must always exclude from their reasoning all considerations except fidelity to law—a truly absolute obligation.

But later in the same article Wendel re-opens the possibility that fidelity to law might be trumped in some situations. He acknowledges that there are cases of “injustice that anyone would recognize as such,”65 and writes that his book was not intended to deal with such cases: “Rather than try to design a system of legal ethics around those extreme cases, however, I wrote this book to account for the nature of the good that lawyers do—most of the time.”66 So other values might trump legitimacy in “extreme cases.” But how often will lawyers encounter extreme cases? “Extreme” is not the same as “rare.” Extreme weather is common in Antarctica, and it is possible that some professions are moral Antarciticas.

All of the formulations Wendel offers seem designed to say something about how often fidelity to law should trump other considerations. But it is impossible to distill any consistent claim from the various formulations Wendel offers. That’s because Wendel does not offer an account of any of the values that might compete with fidelity to law. His theory is a theory of how lawyers affect political legitimacy, not how they affect justice or freedom or any other value. Because his theory provides no basis for a claim about when legitimacy trumps other values, it provides no reason for settling on any one formulation of a maxim.

Although Wendel never settles on any specific formulation of his maxim, it is

---
62. WENDEL, supra note 3, at 116.
63. Id. at 122.
65. Id. at 733-34.
66. Id. at 733-34.
clear that all of his formulations imply that fidelity to law often or usually trumps other values. Wendel offers two kinds of arguments in support of this generalization, but neither argument supports any particular conclusion about how often fidelity to law trumps other values. First, he argues that lawyers must exclude all other values from their reasoning, because otherwise they will be unable to successfully promote political legitimacy. Second, he argues that the values that may conflict with legitimacy are merely contingent. The next two sub-sections explore each argument.

B. EXCLUDING OTHER VALUES

One way to claim that a specific value trumps other values is to argue that the successful promotion of that value requires the exclusion of other considerations from lawyers’ thoughts. This is a fairly common strategy in legal ethics theory. Wendel argues that lawyers can promote political legitimacy effectively only if they exclude other kinds of moral considerations from their practical reasoning. He makes a direct argument for keeping other intrinsic values out of lawyers’ thoughts: the promotion of one value requires the exclusion of others. Wendel claims that the intrinsic value of political legitimacy gives lawyers not just an ordinary reason for fidelity to law, but an exclusionary reason—a reason to exclude other reasons.

This kind of argument is vulnerable to a counterargument of the same form. Consider a situation in which the need to protect political legitimacy appears to conflict with the need to promote justice. Wendel claims that political legitimacy requires the exclusion from lawyers’ thinking of values like justice. A theorist who thought justice was primary, however, might argue that the promotion of justice requires that lawyers disregard—that is, exclude—concerns about political legitimacy. The justice-theorist might claim that the only way lawyers will be able to promote justice effectively is if they blind themselves to the impact of their work on political legitimacy. Injustice is often a black mark on the government’s legitimacy. Lawyers will do a terrible job of exposing injustice if they worry about propping up the government. There is nothing wrong with the

67. See infra Part II.B.
68. See infra Part II.C.
69. See Wendel, supra note 3, at 116 (because “law can perform its function as a distinctive mode of governance precisely because of its independence from contested moral considerations,” the “value of legality can best be achieved by directing lawyers . . . not to act directly on what they perceive to be the requirements of morality and justice, because what morality and justice require[] is contested, in good faith, in most interesting cases”).
70. See Raz, supra note 62, at 35.
71. Political legitimacy is precisely the value rejected by Lord Brougham in his famous statement that a good lawyer “knows but one person in all the world”; that statement was fact a defense of a specific act of advocacy in which Brougham, defending the Queen of England against charges of adultery, threatened to expose the unfaithfulness of the King—which, Brougham believed, would have brought down the unpopular King and
form of this argument. To show that it is substantively wrong, Wendel would have to explain why political legitimacy is more important than justice, and then do the same thing with every other value that could be said to give rise to an exclusionary reason. It is difficult to see how this could be done.

Even if Wendel is right that political legitimacy gives rise to exclusionary reasons, exclusionary reasons don’t always trump non-exclusionary reasons. A very weak exclusionary reason can be beaten by a very strong non-exclusionary reason. (Soldiers have exclusionary reasons to ignore their qualms about following orders, but when the orders are to commit war crimes, those exclusionary reasons are overridden.) And Wendel seems to recognize this. He acknowledges that political legitimacy is not the only consideration that makes a claim on lawyers, and holds that citizens have an obligation to obey the law as long as it doesn’t exceed “some limit of injustice.” So legitimacy is not the only value: justice also matters.

Wendel makes clear that other values sometimes trump fidelity to law when he discusses the famous case of Spaulding v. Zimmerman. In Spaulding, a personal-injury case, the defendants hired an independent medical examiner, who examined the plaintiff and noticed a life-threatening aneurysm that the plaintiff’s own doctors had missed. The defendants’ lawyers decided not to tell the plaintiff about the aneurysm; they negotiated a settlement of the case without mentioning it. Wendel says he would have disclosed the aneurysm: “For my own part, I find the possibility of non-disclosure intolerable for moral reasons—so I would disclose and run the risk of professional discipline.” Although potentially led to civil war. When Brougham said that a lawyer “must not regard the alarm, the torments, the destruction which he may bring upon others . . . though it should be his unhappy lot to involve his country in confusion,” he was arguing precisely that the pursuit of fidelity to clients requires the exclusion of consideration of political legitimacy. See also Dare, supra note 23, at 5-6; Monroe H. Freedman, *Henry Lord Brougham, Written By Himself*, 19 GEO. J. LEGAL ETHICS 1213, 1215-17 (2006); Fred C. Zacharias & Bruce A. Green, “Anything Rather Than a Deliberate and Well-Considered Opinion”—Henry Lord Brougham, Written By Himself, 19 GEO. J. LEGAL ETHICS 1221 (2006).

72. Raz says that exclusionary reasons always prevail over (non-exclusionary) reasons, but he qualifies this by saying that exclusionary reasons have a “scope.” See Raz, supra note 62, at 46. His example is a soldier who is ordered by a superior officer to commandeer a vehicle—something the soldier thinks is, overall, wrong. The order is an exclusionary reason; it gives the soldier a reason not to act on the soldier’s own views about what reasons there are. But of course the order does not exclude all reasons. If the soldier was ordered to commit a war crime, the soldier would still have an exclusionary reason (the order) to ignore his own views about what is right. But that wouldn’t matter. It would be wrong to follow the order. It doesn’t seem very important whether we say, as Raz does, that the order provides an exclusionary reason whose scope is limited—in that it does not exclude first-order reasons that are as strong as the reason not to commit war crimes—or simply that a first-order reason sometimes defeats an exclusionary reason.

73. Wendel, supra note 3, at 115.


76. Spaulding, 263 Minn. at 349-50.

77. Wendel, supra note 3, at 75.
Wendel appears in a later article to change his mind about *Spaulding*,78 it was reasonable of him in *Lawyers and Fidelity to Law* to shy away from the strong claim that legal entitlements are the only thing lawyers should care about. In his book, he acknowledges that “moral reasons” may sometimes trump lawyers’ reasons for being faithful to the law. He writes, “there may be circumstances in which an injustice is so patent, and the result mandated by the regular functioning of the legal system so intolerable, that no person could, in good conscience, believe that exhibiting fidelity to law is the right thing to do, all things considered.”79 Even though there is, according to Wendel’s theory, an exclusionary reason to keep silent—the client has a legal entitlement to the lawyer’s silence—the other value wins. In other words, sometimes there is such a powerful reason to do something that we ignore the exclusionary reasons against it.80 This discussion makes clear that Wendel’s book does not fully embrace a reductionist position. He stops short of claiming that legal ethics can be completely reduced to considerations that relate to political legitimacy.81

78. Wendel appears to take a different position on *Spaulding* in *Three Concepts of Roles*, 48 SAN DIEGO L. REV. 547, 571 (2011). There, he writes,

In a case like *Spaulding*, many legal ethics theorists would permit recourse back to ordinary morality . . . . The claim here, by contrast, is that opting out of the role is permitted only when there has been a failure of the law to provide a basis for cooperating in the face of disagreement.

Id. at 573. He goes on: “The confidentiality rule and its exceptions represent a legitimate resolution of normative controversy, and, as such, should be respected by lawyers and citizens.” Id. at 574. This discussion illustrates another problem with Wendel’s analysis: he assumes that breaking the rules of confidentiality amounts to “opting out of the role.” But it seems equally plausible to say that the lawyer who breaks confidentiality rules is *reinterpreting* the role. Roles, as many social scientists recognize, are not just things imposed on us; roles involve a constant negotiation between the role-occupant and always-changing social norms. See Karen Dana Lynch, *Modeling Role Enactment: Linking Role Theory and Social Cognition*, 37 J. THEORY OF SOC. BEHAVIOUR 379, 383-85 (2007) (articulating an “interactionist” conception of roles). A lawyer who disclosed the aneurysm in *Spaulding* could be seen not as “opting out of the role,” but as rejecting the interpretation of the role codified in the positive law and insisting on an alternative interpretation, under which lawyers, whatever other values they serve, have an obligation not to let people die in order to save their client money. For a powerful defense of the idea that role-holders should interpret their roles consistently with justice, even when others interpret the roles differently, see Rob Atkinson, *How the Butler Was Made to Do It: The Perverted Professionalism of the Remains of the Day*, 105 YALE L.J. 177 (1995).

79. WENDEL, supra note 3, at 121.

80. David Luban observes that when Wendel acknowledges that other considerations may trump fidelity to law, he renders his presumption essentially useless. David Luban, *Misplaced Fidelity*, 90 Tex. L. REV. 673, 687 (2012) (“How can a person know whether the tough choice she now faces falls under the exclusionary presumption or counts as one of the exceptional cases when she should engage in first-order moral deliberation? The only way she can decide is by engaging in first-order moral deliberation.”).

81. In a more recent article, Wendel seems to come closer to embracing a fully reductionist position, writing that “disagreement with the moral content of the law cannot be a basis for opting out of the requirements of the lawyer’s role.” W. Bradley Wendel, *Three Concepts of Roles*, 48 SAN DIEGO L. REV. 547, 571 (2011). He goes on to write that:

If a conception of roles permitted a lawyer to opt out when something approaching the substantive injustice of slavery were involved, then people on both sides of all these debates [over abortion, school prayer, assisted suicide, the death penalty, or same-sex marriage] would seek to appeal to this
Although Wendel doesn’t fully embrace reductionism, he doesn’t give any indication of how lawyers are supposed to know whether some other value trumps political legitimacy, other than his claim that political legitimacy is a very weighty or exclusionary value.

The problem is that other reasons might also be very weighty. If political legitimacy is a weighty or presumptive reason for action, then surely the protection of human life is also a weighty or presumptive reason for action. But the same might be said about justice; promoting justice is a weighty reason for action. The same is true of human dignity; and many of the other intrinsic values that theorists have emphasized. It may be true that legitimacy is weighty, but if lawyers often encounter other weighty values, then even a value as weighty as legitimacy might be outweighed with some frequency. It might even be true that each of these values is entitled to presumptive weight in lawyers’ practical reasoning. If so, presumptions will at some point collide.

The claim that one value is important or exclusionary, then, cannot support the claim that lawyers should presumptively prioritize that value unless something can be said about the other values that factor in lawyering. The reductionist has reason to look for a way to dismiss those other values. As the next section explains, many reductionists try to dismiss other values as merely contingent. But this is not a promising strategy.

C. MERE CONTINGENCY

As suggested earlier, there are two ways to justify a claim that lawyers should limit their practical reasoning to a single intrinsic value. One strategy is to show that one intrinsic value is especially weighty. But this strategy won’t work if other values might also be weighty. The other possibility is to show that the other values—the potential competitors—are not very weighty.

Legal ethicists sometimes argue that certain considerations cannot be important in legal ethics because they are contingent, meaning that they are not necessarily present in every lawyering situation.\footnote{Daniel Markovits, for example, argues that legal ethics theory should attend only to what is “essential” in lawyering, and not what is contingent. Markovits, supra note 12, at 26. Markovits thinks it is an essential feature of lawyering that lawyers have to express views with which they disagree, and promote causes that the lawyers.} Along these lines, Wendel...
writes, “Lawyers contingently may be friends or counselors in addition to serving as expert legal advisors, but those additional roles are optional from the standpoint of the political justification of the lawyer’s role.”

From this he infers that “[l]awyers are not best understood as friends or wise counselors to their clients, but as quasi-political actors, who in their professional capacity deal with the coercive force of the state.”

It may be true that lawyers, in general, are not best understood as friends of their clients. But that has no bearing on what an individual lawyer should do when she faces a conflict between friendship and other intrinsic values. The fact that a certain value is only contingently present in lawyering situations is no guarantee that it should be given second priority when it does appear.

Wendel’s dismissal of contingent reasons appears to be motivated by his assumption that the social role of lawyers must be understood in terms of a single function. Criticizing Simon’s account, for example, he writes, “We need not take for granted . . . that the ends of the legal system and the role of the lawyer are justice.” Rather, “the legal system, and therefore the lawyer’s role, are aimed at maintaining a scheme of legal entitlements that allow citizens to structure their dealings with each other and with the state, with reference to norms that have been established collectively in the name of society as a whole.” Wendel seems here to assume that lawyers’ social role can have only one function. But this is a very implausible assumption. Lawyering is a complex social practice, which serves different purposes for different people at different times. Even if there is one function that is essential or fundamental, other functions—contingent functions—may be equally important in any given situation. Only by viewing the legal system at the highest possible level of generality could we conclude that lawyering serves only one function. From the perspective of any individual lawyer, or client, there will always be more than one function for lawyers to serve.

One value that is certainly non-essential and non-fundamental in lawyering is friendship with clients. Charles Fried famously argued in The Lawyer as Friend that a lawyer/client relationship, like a relationship between friends, is intrinsically valuable, apart from whatever consequences it has. Among the many

83. Wendel, supra note 3, at 11.
84. Id.
85. Wendel, supra note 82, at 570.
86. Id.
87. Fried, supra note 15.
criticisms of this argument (the thought of a friend who charges by the hour seems to better explain what people hate about lawyers than what they admire about them) was a criticism based on contingency. William Simon observed that the relationship Fried describes is utterly unlike many real-world lawyer-client relationships.88 Lawyer-client relationships are often brief, transactional, and impersonal. And they are often relationships with organizations, not people.89 Few clients see the lawyer-client relationship as intrinsically valuable. More often, they see it as instrumentally valuable; they enter into it only to achieve some further end.90 In many cases, the lawyer-client relationship is not really a personal one at all.91 The analogy to friendship thus seems to focus on a highly contingent feature of the lawyer/client relationship.

Simon’s critique is a devastating rebuttal of Fried insofar as Fried intended to offer a comprehensive theory of lawyering, one that gave lawyers a reason for acting in all situations. But Simon’s critique gives us no reason to deny that lawyer-client relationships have intrinsic value in some situations.

Thomas Shaffer, like Fried, emphasizes the value of friendship-like relationships between lawyer and client. Shaffer argues that lawyers can sometimes form a particular kind of morally significant friendship with their clients, and that when they do, the relationship is intrinsically valuable.92 Shaffer doesn’t argue that lawyers are friends; he argues that they can be friends. This claim is not weakened by the observation that such relationships are sometimes impossible.

Say that a lawyer and a client have become friends over many years of working together. The client asks to sleep in the lawyer’s guest room for a few weeks while some trouble blows over, invoking their many years of shared experience and good will. It would be nonsensical for the lawyer to reply, “Sorry, no—friendship with clients is merely a contingent fact about my social role.”93

The question here might be framed as a question about whether the lawyer who happens to be a friend should act like a friend or a lawyer. The fact that a consideration is contingent on particular situations (here, the happenstance that a friendship bloomed between lawyer and client) does not make it irrelevant to a lawyer’s ethical decision-making. From the perspective of an individual moral agent facing an ethically challenging situation, there is no reason why the fact

88. Simon is concerned to rebut claims that there are values other than justice that should factor in lawyers’ reasons. See Simon, supra note 9, at 19–20.
89. Id. at 19.
90. Id.
91. Id. at 20.
93. The lawyer may, of course, invoke reasons related to the role in denying the request to sleep over. “When you’re in my business, a lot of your clients get in trouble, and once you start crossing lines, it’s hard to go back.” This latter reason is an exclusionary reason that counts against letting considerations of friendship inform the decision. But it is completely unrelated to whether or not the client’s friendship is contingent or essential to the role.
that something is contingent should undermine a claim that it has value. Much of what matters in our lives is contingent.94

Arguments from contingency have also been deployed against the account of legal ethics offered by Stephen Pepper, who emphasizes the role that lawyers play in promoting the value of individual autonomy or freedom.95 Pepper argues that lawyers protect their clients’ freedom to exercise their rights and to make their own choices. The image he uses to illustrate the value of autonomy is “that of the individual facing and needing to use a very large and very complicated machine (with lots of whirring gears and spinning data tapes) that he can’t get to work.”96 The machine is the law; the lawyer is the technician who will operate it for the intimidated individual. Without the technician, the citizen will be unable to act with the full range of freedom to which he is entitled under the law.

In some cases, Pepper’s image is compelling, particularly in cases where the lawyer represents a person who is disadvantaged in some way—an asylum-seeker who lacks familiarity with United States judicial institutions, or a person with a disability that prevents her from fully comprehending the legal process, or anyone who finds themselves on the wrong end of a large bureaucracy whose workings are opaque. But in some situations Pepper’s analogy fits very badly. Some clients are not intimidated by the law’s machinery; some of them are expert manipulators of the machine who use it to exploit others. In fact, some clients are themselves the large bureaucracy that constrains the freedom of those who must deal with it.97 Autonomy is only contingently a reason for acting like a partisan: sometimes partisan lawyers do things that have no particular effect on anyone’s autonomy, and sometimes lawyers do more to undermine autonomy than to advance it.

Autonomy is only contingently a reason for partisanship. But what follows from that? It may not be necessarily good for lawyers to increase or defend a particular person’s autonomy, but defending a person’s autonomy can be extremely valuable in some situations. It may be difficult to say exactly when freedom has value,98 but it is clear that there are many situations in which protecting a client’s autonomy is a valuable thing to do. In such situations, the intrinsic value of autonomy gives lawyers powerful reasons for action, regardless of whether those reasons are contingently or necessarily at stake in the practice of lawyering. The fact that a particular value is only contingently present in lawyering situations is perfectly irrelevant to the question of how strongly we

---

95. See generally Pepper, supra note 14.
96. Id. at 623.
97. As for Pepper’s claim that clients’ autonomy has intrinsic value, Simon has a ready answer: non-clients too have an interest in autonomy, and the lawyer can’t coherently invoke the client’s autonomy as a justification for trampling a non-client’s autonomy. Simon, supra note 9, at 30.
98. See Joseph A. Raz, The Morality of Freedom 19 (1986) (“Freedom [is] a distinct value, but one which is intimately intertwined with others, and cannot exist by itself.”).
should weigh its value in situations where it is at stake. So there is little to be said for the mere-contingency approach to minimizing the importance of values that might conflict with a putative Master Value.

D. FROM “THEORIES OF LEGAL ETHICS” TO THEORIES OF SPECIFIC VALUES

The real meat of Wendel’s theory is in his claim that political legitimacy is an intrinsic value and that lawyers should promote it through fidelity.99 His claims about the presumptive or exclusionary weight of lawyers’ reasons for fidelity are not very useful, because his theory offers no account of the other values that might conflict with political legitimacy.

Wendel refers to his account as a “theory of legal ethics”100 or a “conception” of legal ethics,101 but if “theory of legal ethics” means what it sounds like—a theory that is relatively comprehensive and general, giving guidance to lawyers in all or most of the practical situations they might encounter—then Wendel’s theory is not a theory of legal ethics, because it does not include an account of any of the values that are at stake in lawyers’ practice other than the value of political legitimacy. It would be more accurate to call Wendel’s theory an account of one of the intrinsic values at stake in legal ethics, rather than a theory of legal ethics in general.

Wendel offers one formulation of his maxim that seems consistent with this more limited understanding of what the theory aims at. At one point in his book, he writes that lawyers should be faithful to the law—that is, offer the client or the court the best available interpretation of the law—unless they are “prepared to offer a justification for deviating from the ideal.”102 In other words, lawyers have reasons for fidelity to law, and if they are to deviate from fidelity to law, they should have a reason (a justification) for doing so.

This formulation of Wendel’s maxim is very different from the others. It does not imply any claims about how often fidelity to law trumps other values. It reflects an accurate understanding of the significance of Wendel’s account: it is an account of one of the factors—one of the intrinsic values—that can be important in legal ethics. When that factor is relevant to a given lawyering situation, it gives lawyers a reason to promote or respect it. But knowing this tells us nothing about what kind of other reasons lawyers might have for promoting other values. It tells us nothing about how lawyers are to deal with conflicts between the reasons that derive from political legitimacy and the reasons that might derive from other values.

---

99. In particular, Chapters 2 and 3 of *Lawyers and Fidelity to Law* develop Wendel’s account of the role lawyers play in promoting political legitimacy. See generally Wendel, supra note 3 at 49-121.
100. Id. at 2 (referring to “the theory of legal ethics I will set out”).
101. See id. at 6 n*.
102. Id. at 66.
Once it is clear that theories like Wendel’s are really theories of individual intrinsic values, rather than theories of legal ethics in general, it is easier to see why they have difficulty offering practical guidance, particularly in situations where values conflict.

Imagine we knew that a certain lawyer accepted Wendel’s claim that lawyers are presumptively obligated to show fidelity to law. Could we predict how often this lawyer would show fidelity to law? Not without more information. We would need to know how often the presumption would be overcome. To predict how often a presumption will be overcome, we need to know the strength of the forces—the reasons—that will try to overcome it.

In criminal law, we know that defendants enjoy a presumption of innocence. But that doesn’t let us predict how often the presumption of innocence will be overcome—that is, how often defendants will be found guilty. To predict whether a defendant will be convicted, we need to know how strong the evidence of guilt is. To know how often a presumption will be overcome, we need to understand not only the strength of the presumption but also the strength of whatever opposes it. So knowing that a lawyer believes she has a duty to promote an intrinsic value like political legitimacy does not, without more, allow us to predict how she will resolve a conflict between legitimacy and some other value.

The hardest problems in legal ethics do not involve decisions about whether something really matters—the kind of question addressed by theories like Wendel’s. Identifying intrinsic values is usually easier than deciding what to do when they conflict. It is easy to say that political legitimacy matters, at least to some extent; but it is not easy to say what we should be prepared to sacrifice for it. As Sarah Broadie writes, to say that something is “worth pursuing” always means “worth pursuing given the cost.”103 But practical maxims that are derived from just one intrinsic value are no help when we have to decide what we are willing to give up in the name of that value.

A good practical maxim would be most useful when lawyers face a conflict of values. If lawyers are struggling with a choice, it’s because there is more than one weighty consideration involved. If it’s true that maxims can’t tell us what to do in such conflicts, then practical maxims fail us when we need them most.

### III. VALUING THINGS WELL: THE CONCEPT OF A VIRTUE

The question with which this article began was how to connect claims about abstract intrinsic values to lawyers’ daily practice. The argument so far has evaluated one conceptual tool that legal ethicists often use to connect intrinsic values to practical reasoning. That tool—practical maxims that aim to tell lawyers what to do in all or most of the situations they face—proved defective in

several respects. Although it is important to connect our understanding of 
intrinsic value to lawyers’ practice, practical maxims are an unpromising way to 
do that.

The challenge, then, is to find other ways of connecting claims about intrinsic 
values to lawyers’ daily practice, with particular attention to situations where 
values conflict. What should legal ethics theory be doing with the abstract 
intrinsic values it identifies, if not trying to derive maxims from them? What can 
be said, if anything, that will be practically useful to lawyers facing conflicts 
between intrinsic values?

The rest of the article will argue that it is possible to make useful gen-
eralizations about conflicts of value in lawyering without the use of practical 
maxims. It will explore the possibility of making this connection with another 
conceptual tool: the concept of virtues. The following sections explore the use of 
this conceptual tool, and the context from which it is taken, in more detail.

Part III.A explains that moral philosophers who work in the area known as 
“virtue theory” have, for the most part, rejected the use of comprehensive 
practical maxims, and have therefore been forced to look for other ways of 
producing practical ethical guidance. Part III.B offers a definition of virtue. 
Part III.C notes that many ideas commonly associated with virtue theory are not 
relevant to the claims made in this article. Part III.D focuses on one claim moral 
philosophers have made about virtues: the claim that there is a close connection 
between virtues and certain practical skills.

A. MORAL PHILOSOPHY WITHOUT MAXIMS

To find a way of connecting intrinsic values to practice without practical 
maxims, it may be useful to look to moral philosophy. Some moral philosophers 
are skeptical about practical maxims, and this skepticism has led them to look 
for other ways of understanding the connection between intrinsic values and 
practice.

Someone who is skeptical about generalizations is known in philosophy as a 
particularist. Because there are different kinds of generalizations, there are 
different kinds of particularists. One can be a particularist about different things, 
depending on what kind of generalizations one is skeptical of. The most common 
kind of particularism in ethics is particularism about principles and rules, a view 
that holds that principles and rules are in some way misleading or undesirable.

104. See generally Margaret Olivia Little, Moral Generalities Revisited, in MORAL PARTICULARISM 276, 278 
(Brad Hooker & Margaret Little eds., 2000).
The best-known contemporary proponent of particularism about moral principles and rules is Jonathan Dancy, 
whose version of particularism is in fact fairly limited; he acknowledges that there may be general truths about 
morality, but claims that morality does not necessarily involve any such principles. See JONATHAN DANCY, 
ETHICS WITHOUT PRINCIPLES 5 (2004). In other words, Dancy thinks we can’t know whether morality contains
There are subdivisions of this kind of particularism. Some particularists claim that there simply are no true ethical principles. Some particularists claim that even if there are some true ethical principles, they cannot be sufficient to capture the whole truth, because our ethical responsibilities are more nuanced, and more variable, than any general principle or rule. Particularism in moral philosophy is often opposed to principle ethics or principlism, the view that there are general truths about ethics or that we should guide our conduct according to rules or principles. According to principle ethics, ethical judgment is “the process of bringing particular, concrete contexts under abstract, general principles, and then acting or judging as the principle recommends.”

The argument offered in Parts I and II of this article is particularist only in a narrow sense. It does not deny that useful generalizations can be made about ethics. On the contrary, generalizations about intrinsic values are important and fundamental in legal ethics theory. Nor did the argument deny that generalizations should play an important role in lawyers’ practical decision-making. Indeed, the rest of this article will itself make general claims about lawyers’ practical decision-making. Rather than rejecting generalizations about legal ethics altogether, the article so far has rejected only the idea that Master Maxims can help lawyers resolve practical conflicts between intrinsic values.

So the broader forms of particularism are not directly relevant to the claims made here. What is relevant about moral particularism is that philosophers who accept it find themselves facing the same problem that legal ethicists (according to this article) face. Particularists reject the use of practical maxims, so they have no choice but to look for other ways to tie intrinsic values to practice. This article turns to philosophers who embrace particularism, not for their particularism as such, but to see what kinds of constructive approaches to ethics they offer. The hope is that particularists have found conceptual tools other than Master Maxims that can connect intrinsic values to practice.

Among the philosophers who have been interested in moral particularism are some who work in the area known as “virtue ethics” or “virtue theory.”

principles until we figure out what morality in fact requires. He claims only that ethics without principles is possible.

106. McKeever and Ridge call this “principle eliminativism,” one of five versions of particularism they identify. McKeever & Ridge, supra note 106, at 87-89.

107. Id. at 87 (calling this view “principled particularism”).

108. Soran Reader, Principle Ethics, Particularism, and Another Possibility, 72 Phil. 269, 270 (1997).

109. Id.

110. Unless they want to give up the project of understanding intrinsic value, or the project of offering ethical guidance, which they generally don’t.

111. On the association between virtue theory and particularism, see McKeever & Ridge, supra note 106, at 83 n.1 (noting that virtue theory is sometimes—though not always—associated with particularism). Major accounts of virtues and virtue theory include Hursthouse, supra note 1; Christine Swanton, Virtue Ethics: A Pluralistic View (2003); Julia Annas, Intelligent Virtue (2011); Robert Merrihew Adams, A Theory of
Loosely speaking, virtue theory is a group of approaches to ethics in which the concept of virtues plays a central role.\textsuperscript{112} Many virtue theorists accept a limited kind of particularism: They recognize that rules exist and play an important role in morality, but they also think rules are not the whole story.\textsuperscript{113} Much of what needs to be said about ethics, they claim, cannot be said in terms of rules or rule-like generalizations. Rules may be useful, but no rule or practical maxim could ever fully capture our ethical responsibilities. Ethical rules and guidelines are not determinants of correctness; they are mere heuristics.\textsuperscript{114}

Virtue theorists tend to doubt that moral propositions or maxims can capture the complex moral knowledge that is often required to make practical choices. Rosalind Hursthouse writes that there are no “moral whiz-kids,” the way there are some mathematical whiz-kids, because moral knowledge is different from knowledge of math.\textsuperscript{115} A significant component of moral knowledge cannot be distilled into propositions. There are, no doubt, some true generalizations about morality, like this one: people should do the right thing. (Plainly true, if wholly uninteresting.) But as John McDowell writes, there is no reason to assume that the admirable person’s knowledge can all be distilled into propositional form.\textsuperscript{116}

Many people assume that moral knowledge works by the application of some sort of practical syllogism: a piece of universal knowledge about ethics that forms the major premise, a piece of knowledge about one’s particular situation that forms the minor premise, and from these premises a derivable conclusion about what’s to be done.\textsuperscript{117} But, McDowell writes, it’s “implausible that any reasonably

\textit{VIRTUE: EXCELLENCE IN BEING FOR THE GOOD} (2006); \textit{JAMES D. WALLACE, VIRTUES AND VICES} (1978). Most of the sources relied on here are from what might be called the second wave of virtue theory: writers like Hursthouse, Swanton, Adams, and (in her recent book) Annas, who, in the last ten to twenty years, have focused on developing affirmative accounts of virtue and the virtues. Writers in the first wave of virtue theory sometimes attempted to develop constructive accounts of virtue, see, e.g., \textit{PHILIPPA FOOT, VIRTUES AND VICES, IN VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 1} (1978), but first-wave writers tended to focus less on affirmative accounts of virtue and more on metaethical and epistemological questions, criticism of traditional moral theory, and the reconstruction of ancient philosophers’ accounts of virtue. See G.E.M. Anscombe, \textit{Modern Moral Philosophy, in VIRTUE ETHICS 26} (Roger Crisp & Michael Slote eds., 1997); \textit{JOHN MCDOWELL, VIRTUE AND REASON, IN MIND, VALUE AND REALITY 50} (1998); see also \textit{HOW SHOULD ONE LIVE? ESSAYS ON THE VIRTUES} (Roger Crisp ed., 1996); \textit{MIDWEST STUDIES IN PHILOSOPHY VOL. XIII: ETHICAL THEORY; CHARACTER AND VIRTUE} (Peter A. French, Theodore E. Uehling, Jr., & Howard K. Wettstein eds., 1988). Another central first-wave text is Alisdair Maclntyre’s \textit{AFTER VIRTUE} (2d ed. 1984), which, although it contains constructive claims about virtue, is best known for its attack on modern ethical approaches.

\textsuperscript{112} The complexities involved in referring to any approach as “virtue-ethical” or “virtue-theoretical” are often underestimated in legal theory. For a discussion that gives a good sense of how difficult it is to say precisely what role virtues play in virtue ethics, see Eric R. Claeys, \textit{Virtue and Rights in American Property Law}, 94 CORNELL L. REV. 889, 901-909 (2009).

\textsuperscript{113} See, e.g., \textit{HURSTHOUSE, supra} note 1, at 39, 41.

\textsuperscript{114} \textit{NUSSBAUM, supra} note 94, at 299-304.

\textsuperscript{115} \textit{HURSTHOUSE, supra} note 1, at 30.

\textsuperscript{116} \textit{MCDOWELL, supra} note 112, at 147.

\textsuperscript{117} \textit{Id.} at 147.
adult moral outlook admits of such codification.”118 Any attempt to distill our moral knowledge into propositional or syllogistic form invariably ends in vague generalities that have little promise as action-guiding practical maxims. If we try to capture an ethical outlook in rules or propositions, McDowell writes, we are quickly reduced to giving examples and saying “and so on.”119

Similarly, Hursthouse writes that any attempt to explain when one should be truthful has to end with phrases like “and that sort of thing.”120 We should tell the truth in situations where people are depending on us, and in situations where social convention says people have a right to expect that the truth, and in situations where the truth won’t cause anyone to come to unnecessary harm . . . and so on. This is the closest we can get to an accurate maxim about truth-telling; we can’t specify just what we mean in usefully concise propositional terms. It may be true to say, “people should generally tell the truth,” but the word “generally” stands in for a vast body of moral knowledge that can’t be easily distilled. Vague generalities are the closest we can get to comprehensive practical maxims, because any comprehensive practical maxim that was true would be uselessly vague. A maxim can be useful, or it can be comprehensive—but it can’t be both.

Although many virtue theorists are skeptical about the usefulness of certain kinds of generalizations about ethics, the connection between virtue theory and particularism is often overstated. It is perfectly possible to theorize about virtue without being a particularist.121 And few virtue theorists reject moral rules and principles entirely. Most of them acknowledge that rules and principles play an important role both in philosophical theories of ethics and in everyday ethical reasoning.122 Alasdair MacIntyre, for example, writes that rule-following is an essential constituent of virtues like trustworthiness, which involves sticking to one’s commitments even when there are reasons to do otherwise.123 Similarly, James Wallace writes that although he began studying virtues because he hoped to avoid the philosophical problems associated with moral rules, this hope proved fruitless, because certain virtues—including fairness, and “being a person of one’s word”—are “essentially attitudes toward moral requirements or rules.”124

To be sure, there are virtues that probably can’t be explained in terms of

118. Id. at 148.
119. Id. at 156.
120. HURSTHOUSE, supra note 1, at 61.
121. See Frederick Schauer, Must Virtue Be Particular?, in LAW, VIRTUE & JUSTICE (A. Amaya & H. L. Ho eds., forthcoming, Oxford, Hart Publishing, 2012). In its broadest sense, the phrase “virtue theory” could include representatives of every major approach to moral philosophy, because every major moral theory says something about virtues. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 382 (1999) (defining moral virtues as “strong and normally effective desires to act on the basic principles of right”).
124. WALLACE, supra note 112, at 9-10.
rule-following, like kindness or the virtues of self-government (like courage and self-restraint). But a complete understanding of virtues is not possible without an understanding of moral rules. As one virtue theorist writes, “virtues are compatible with rules—nay, entail rules.” Martha Nussbaum, who is sometimes identified as a particularist and a virtue theorist—although she might not accept either characterization—observes that most virtue ethicists do not reject the guidance of rules; they recognize that rules are “frequently valuable in the agent’s deliberations,” although they think that rules cannot be exhaustive guides to practice. Nussbaum writes that virtue theory—because it is concerned with the dispositions of real human beings, who are inconstant, temperamental, and biased—will encourage the use of rules in many situations; we need them to keep ourselves in line. According to Nussbaum, even an ideally virtuous agent—one who lacks ordinary human weaknesses and blindesses—would develop and use “many ongoing guidelines for action, [which serve as] pointers as to what to look for in a particular situation.”

Although virtue theorists generally accept that rules play a role in ethical reasoning, critics of virtue theory argue that virtue theorists’ aversion to rules and maxims prevents them from offering useful practical guidance. They point out that virtue theory’s claims about practical reasoning sometimes seem hopelessly vague. For example, Aristotle, who is generally seen as the progenitor of contemporary virtue theory, said famously that the virtuous person does things “to the right person, in the right amount, at the right time, for the right end, and in the right way.” If this is supposed to be a maxim to guide our conduct, it must be one of the worst maxims ever offered. Similarly, Rosalind Hursthouse, a contemporary virtue theorist, writes that “[a]n action is right [if and only if] it is what a virtuous agent would characteristically (i.e. acting in character) do under the circumstances.” Again, it seems unlikely that this will give clear answers to pressing ethical questions.

---

125. Id. at 10.
126. Robert C. Roberts, Virtues and Rules, 51 Phil. and Phenomenological Res. 325, 325 (1991). Roberts has an expansive understanding of what “rules” include, but that understanding is incompatible with the strong particularist claim that there are no true moral generalizations about ethics.
127. See, e.g., Dare, supra note 23, at 102 (using Nussbaum as an example of a particularist working in virtue ethics). Nussbaum at one point denied that virtue ethics is in fact a coherent philosophical category. See Martha Nussbaum, Virtue Ethics: A Misleading Category?, 3 J. Ethics 163, 178 (1999). Later, she acknowledged that there is such a thing as virtue ethics, but continued to deny that it forms a third family of ethical approaches comparable to the Kantian and consequentialist families. Martha Nussbaum, Feminism, Virtue, and Objectification, in Sex and Ethics: Essays on Sexuality, Virtue and the Good Life 49, 52-53 (Raja Halwani ed., 2007).
129. See Nussbaum, supra note 94, at 304-305.
130. Id. at 306.
131. See, e.g., Louden, Some Vices of Virtue Ethics, in Virtue Ethics, supra note 112, at 201, 204-205.
133. Hursthouse, supra note 1, at 28.
Virtue theorists respond by demanding to know which alternative tradition has produced a maxim that will do better: it is not clear that we find any meaningful action guidance in the maxims offered by other ethical traditional. A utilitarian who simply instructed us to follow the maxim “maximize utility” would not be doing much to help us navigate ethical quandaries. (To be fair, utilitarians have long recognized this.134) Nor does the Kantian injunction to treat humanity as an end in itself have much potential as a practical Master Maxim (as Kantians have also recognized).135

For many virtue theorists, the Aristotelian failure to offer practical maxims is an advantage of their approach, not a weakness, because ethical practice cannot or should not be codified in the way that other ethical traditions seem to expect.136 Virtue theorists tend to reject the idea that it is possible to produce a “decision procedure” for ethical reasoning—a set of maxims or principles that will, when applied to specific situations, produce answers about how we should act or respond.137 There may be moral rules—as discussed above, many virtue ethicists accept that there are—but those rules can’t be distilled into the kind of comprehensive practical maxims that will guide us through difficult ethical situations. Even if there are moral rules, they are the kind of rules that can’t be stated concisely. Or they are the kind of rules that, when they are stated concisely, are too vague to be practically useful.

As mentioned earlier, virtue theorists’ skepticism about codification is not itself what makes them relevant to this article. What makes them relevant is the search they must embark on once they have rejected the possibility of codification. Ethical philosophy is practical philosophy; one of its major purposes is to help people understand their practical situation better and make better choices about what to do and how to live. Once virtue theorists reject the possibility of comprehensive maxims, they have little choice but to look for ways to give practical guidance that do not involve practical maxims. So virtue theorists are in the same pickle that legal ethicists (according to the arguments

134. See, e.g., Scott Woodcock, When Will Your Consequentialist Friend Abandon You for the Greater Good, 4 J. ETHICS & SOC. PHIL. 1 (2010) (discussing the messy ways in which an admirable consequentialist might approach practical questions). Utilitarians have long distinguished between the question of what overarching principle makes acts morally right (e.g., the principle “agents should maximize utility”) and the question of how agents should make everyday ethical decisions (e.g., what Master Maxim, if any, they should follow) because it seems clear to most utilitarians that there might be very bad results if all agents tried to follow the Master Maxim “maximize utility”). See HENRY SIDGWICK, THE METHODS OF ETHICS 413 (7th ed. 1906, reprt. 1981) (recognizing that although utilitarianism says agents should maximize happiness, it need not claim that this should be everyone’s conscious aim).

135. See Allen Wood, Humanity as an End in Itself, in 2 Parfit, supra note 8, at 59-60 (Kantians reject the idea of an overarching principle from which specific instructions for action can be deduced).

136. See ANNAS, supra note 111, at 50; see also Rosalind Hursthouse, Normative Virtue Ethics, in HOW SHOULD ONE LIVE?, supra note 111, at 31.

137. Hursthouse, supra note 1, at 30-31; Annas, supra note 111, at 32-33. For a discussion of this claim’s relevance to legal theory, see Lawrence B. Solum, Natural Justice, 51 AM. J. JURIS. 65, 73-75 (2006).
above) are in: They need to look for a way of connecting abstract claims about what has value to practical life and practical decisions. They are forced by their particularism to look for ways of offering practical guidance that do not involve maxims. This leads them to explore the use of various conceptual tools. Among them is the concept of virtues.

B. A DEFINITION OF VIRTUE

Moral philosophers have not reached agreement—to put it mildly—on the meaning of the word “virtue.” It is best to begin, then, with a minimal definition made up of elements that most virtue theorists would accept. Synthesizing the most basic and widely accepted elements of the definition of a virtue, we can say that a virtue is a disposition to value something ‘appropriately and well.’

There are three elements of this definition, each of which needs to be explained. First, what is the “something” that is being valued? Second, what does it mean “to value something ‘appropriately and well’”? Third, the word “disposition” is a sort of red flag to some philosophers and legal theorists; it will require some explanation.

The first element of the definition of virtue is the “something” that is being valued. This “something” is generally an intrinsic value or something that has intrinsic value. Martha Nussbaum explains that “each of the virtues is an organized way of cherishing a particular end that has intrinsic value.” Each virtue relates, in ways that will be explored below, to a value of some kind.

---

138. Admittedly, one sometimes encounters even more minimal definitions than the one given here. For example, one article states, “Most thinly, we can characterize a virtue as any admirable or advantageous trait.” Heidi Li Feldman, Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?, 69 S. CAL. L. REV. 885, 909 (1996). On this definition, we would have to count as virtues traits like punctuality, sexual attractiveness, and the ability to tie cherry stems in knots with one’s tongue. Few contemporary virtue theorists would accept traits like these as virtues, although some other philosophers might. See, e.g., David Hume, A Treatise of Human Nature 303 (Book III, Pt. 1, § 2) (Norton & Norton eds., 2000) (“An action, or sentiment, or character is virtuous or vicious; why? because its view causes a pleasure or uneasiness of a particular kind.”).

139. The discussion that follows identifies, with specific citations, the sources from which each of the elements of this definition is taken. The phrase “appropriately and well” is from a passage in Toni Morrison’s Beloved: “There was nothing to disturb them in their work. So they did it appropriately and well.” Toni Morrison, Beloved 99-100 (1987, reprt. 1998). I am indebted to Eamon Grennan for pointing it out. “ Appropriately and well” captures both the idea that virtue is somehow appropriate to an object (as discussed below, the objects of virtue are things that have intrinsic value) and the idea that it involves something admirable about the virtuous person’s activity (“well”).

140. If it weren’t so awkward, we could say a virtue is a disposition to value (appropriately and well) something that has intrinsic value. This would sound objectionably circular, but (as the discussion below will try to show) it isn’t.

141. Nussbaum, supra note 127, at 183.

142. See Annas, supra note 111, at 6 (“A virtue requires a commitment to value”); see also Swanton, supra note 111, at 19 (“A virtue is a good quality of character, more specifically a disposition to respond to, or acknowledge, items within its field or fields in an excellent or good enough way.”). Swanton’s theory is broad enough to include the possibility that virtues can be ways of relating to things that do not have intrinsic value. This seems plausible, but I won’t pursue it further here.
example, the virtue of truthfulness relates to the intrinsic value of truth; the virtue of kindness or benevolence relates to the intrinsic value of other people’s well-being; and so on.143

Unless there is only one intrinsic value, there will be more than one virtue. In this sense, virtue theory is naturally friendly to value-pluralism—the claim that there is more than one intrinsic value. This aligns with Part II’s claim that lawyering implicates a plurality of values.144

How do virtues relate to values? The second element of the definition—valuing something appropriately and well—involves the use of the word “value” as a verb.145 “Valuing” encompasses a wide variety of actions and attitudes. We value things when we take actions that promote or protect them, but also when we simply respect or appreciate them.146 For example, we can value art without making it or buying it. So virtues are not just dispositions to act in certain ways; they also involve attitudes, emotions, and beliefs. Virtues always involve more than just a belief that something has value. A virtue is more than a belief or set of

143. There is a complication here. While it is true that many virtues relate in obvious and direct ways to intrinsic values, this is not clearly true of virtues like courage and temperance, which seem more involved with resisting certain kinds of emotions or desires than with pursuing any affirmative goal or value. At least three responses to this objection are possible. First, we might say there is no real difference: the various kinds of courage involve appropriately valuing various kinds of harm to oneself—that is, taking them just as seriously as they deserve to be taken, and no more. Physical courage, on this reading, would involve giving physical harm no more weight in one’s practical reasoning than it deserves. Temperance, similarly, would involve giving pleasures no more weight in one’s practical reasoning than they deserve. In this sense, courage and temperance could be said to involve valuing certain things appropriately and well; the only difference is that where other virtues involve objects or targets of high value like truth, love, and justice, courage and temperance involve objects or targets of low value (fear and trivial pleasures).

Second, we might acknowledge the difference, and simply accept that there are some virtues that are best understood not in terms of valuing something appropriately and well, but rather in terms of resisting certain threats to practical reasoning. See WALLACE, supra note 111, at 89.

Third, we might deny that courage and temperance are discrete virtues. On this understanding, we might say that civil rights protesters who risked physical harm were not exhibiting some general commitment to courage or courageous activity; rather, they were exhibiting a passionate commitment to justice, and it would be a mistake to lump their justice-oriented courage together with the ambition-oriented courage of someone who risks harm to further a career.

144. This is what Eduardo Peñalver finds promising in his account of what virtue theory might add to property values; while welfarist theories of property limit themselves to only one value (welfare), virtue theory offers a way to acknowledge the many values that cannot be translated into welfarist terms. Eduardo M. Peñalver, Land Virtues, 94 CORNELL L. REV. 821, 867-69 (2009). Indeed, it sometimes seems that Peñalver is interested not so much in virtue theory as in pluralism; one need not be a virtue theorist to be a pluralist, and one need not be a pluralist to be a virtue theorist. Similarly, when Chapin Cimino writes about the potential relevance of virtue theory to contract law, what appears to attract him is the idea that virtue theory can accommodate both the value of economic efficiency and the value of the “social aspects” of contract. Chapin F. Cimino, Virtue and Contract Law, 88 OR. L. REV. 703, 731-736 (2009). But one need not be a virtue theorist to accept pluralism about the values that contract law promotes. (And, for that matter, a virtue theorist could claim that a virtuous judge would see contracts purely in terms of one value or the other.)

145. See Value Definition, OXFORD ENGLISH DICTIONARY ONLINE, http://www.oed.com/view/Entry/221254 (last visited Sept. 21, 2012) ("5. . . . To consider of worth or importance; to rate highly; to esteem; to set store by.").

146. SWANTON, supra note 111, at 21.
beliefs about intrinsically valuable things; it is a disposition to have all sorts of reactions—some external, like actions that promote or protect the valuable thing, and some internal, like beliefs, perceptions, emotions, and so on.

The third element of the definition is the term “disposition.” There is not room in this article to address, or even list, all of the questions that philosophers have raised about what kinds of dispositions are involved in having virtues. Some philosophers use social psychology studies to attack the concept of virtues by arguing that people do not predictably act in support of the things they value—rather, people are inconsistent in their truthfulness, compassion, and so on, in ways that cast doubt on whether it is inner moral qualities, as opposed to external “situational” pressures, that lead us to promote the things we value. There is a large body of work devoted to showing that these “situationist” philosophers have overstated their case. One common response to the situationists is to point out that virtues involve appropriate responses, not consistent responses. Saying that people lack virtues because they act inconsistently is like saying that Miles Davis was not a good trumpet player because he sounded different on different evenings.

To discuss the situationist challenge to virtue ethics much further would involve too long a detour. But there is room to point out that many situationists are plainly mistaken on one point: they seem to think they are attacking virtue theory, when in fact they are making an important contribution to it. If people’s virtues are generally fragile, inconsistent, and vulnerable to harmful influences, this is an important fact about virtues—one which virtue theory needs to incorporate—not a reason to stop talking about virtues altogether. But this question will have to be taken up in future work. For purposes of this article, the word “disposition” should be taken to leave open questions of just how consistent and reliable a disposition must be to qualify as a virtue.

C. VIRTUE’S BAGGAGE

In exploring the concept of a virtue, I hope to avoid associating myself with a number of claims that are sometimes seen as central to virtue ethics. It is worth noting quickly what these claims are. Readers who are unfamiliar with virtue ethics, and have no preconceptions about what it involves, may wish to skip to Part III.D.

149. Julia Annas, for example, argues that virtues do not involve reactions that are always the same, but rather a response that is appropriate to the situation. See Annas, supra note 111, at 15.
150. For an example of a “local account of character traits”—an account of virtues in which each virtue is defined in relation to specific situations, rather than in broad terms like “courage” and “compassion,” see Candace L. Upton, The Structure of Character, 13 J. Ethics 13 (2009).
One common claim about virtue ethics is that “[v]irtue ethics urges . . . a focus on the character of the actor rather than the quality of the action.”\textsuperscript{151} This is unfair to deontology and consequentialism, the two families of ethical theory that are often identified as alternatives to virtue ethics; each of them has produced sophisticated accounts of character and virtue.\textsuperscript{152} It is also, as Hursthouse observes, a misleading generalization about virtue ethics.\textsuperscript{153} Virtue ethicists are just as interested as other philosophers in the ethical significance of actions. The difference is that virtue ethicists think the best way to understand the ethical significance of an action is by reference to the virtues expressed or manifested in it.\textsuperscript{154} But actions matter to everyone.

There is another danger in saying that virtue ethics urges a focus on the character of the actor. It suggests that virtue ethicists want people to make judgments about other people’s moral character whenever they engage in ethical reasoning. One writer, for example, worries that virtue ethics requires us to treat disagreements as character flaws: “Rather than listening to your case, I shall be inspecting, and impugning, your character.”\textsuperscript{155} But leaping to conclusions about other people’s character is hardly consistent with virtues like humility, patience, and charity; a virtue ethicist should have no trouble saying that it is arrogant and obnoxious to judge someone’s character instead of listening to their substantive ethical views. At best, it is a waste of time, as one virtue ethicist explains by citing a story about Confucius, who, when he heard that a teacher named Zigong was giving people Zigong’s assessment of their character, said, “What a worthy man that Zigong must be! As for me, I hardly have the time for such activities.”\textsuperscript{156}

Another view sometimes associated with virtue ethics is moral naturalism, the view that truths about ethics can be inferred from facts about human nature.\textsuperscript{157} It is true that some virtue theorists are naturalists,\textsuperscript{158} but others are not. Martha Nussbaum, for example, thinks that “there are so many problems” with naturalist virtue ethics “that it seems odd that it has been seriously defended” by competent

\begin{footnotes}
\item[151] Paul R. Tremblay, The New Casuistry, 12 GEO. J. LEGAL ETHICS 489, 509 (1999); see also Paul J. Saguil, A Virtuous Profession: Re-Conceptualizing Legal Ethics from a Virtue-Based Moral Philosophy, 22 WINDSOR REV. LEGAL & SOC. ISSUES 1, 26 (2006) (“Rather than focusing on whether certain acts are good or bad because of their consequences or because they do or do not conform to a duty, ethical valuation should be directed toward the moral agent.”).
\item[152] As noted in Karen Stohr, Contemporary Virtue Ethics, 1 PHIL. COMPASS 22, 22 (2006).
\item[153] HURSTHOUSE, supra note 1, at 26.
\item[154] See id. ch.1-6; see also WALLACE, supra note 111, at 41 (noting that virtues are “bound up conceptually both with good actions and with good agents”).
\item[155] KWAME ANTHONY APPIAH, EXPERIMENTS IN ETHICS 65 (2010).
\item[156] Edward Slingerland, Virtue Ethics, the Analects, and the Problem of Commensurability, 29 J. RELIGIOUS ETHICS 97, 114 (2001).
\item[157] See, e.g., Solum, supra note 137, at 69–70 (stating that virtue ethics—or, at least, neo-Aristotelian virtue ethics—is one of the family of views that comprise moral naturalism).
\item[158] See, e.g., PHILIPPA FOOT, NATURAL GOODNESS (2003); HURSTHOUSE, supra note 1, ch. 9-10.
\end{footnotes}
philosophers. This article takes no position on naturalism.

A related claim sometimes associated with virtue ethics is the claim that virtue should be understood in terms of human flourishing or *eudaimonia*. Eduardo Peñalver, for example, claims that “virtue ethicists typically derive the content of their accounts of the virtues from an objective conception of what it means to live well or flourish in a distinctively human way.” Actually, many virtue ethicists would say that it is a mistake to try to derive an understanding of virtues from an understanding of *eudaimonia*. The word *eudaimonia* as it appears in Aristotle means, roughly, virtues in action; human flourishing refers not to economic prosperity or subjective happiness but to virtuous activity itself. We can’t use the concept of flourishing to explain why qualities like justice should count as human virtues, because the concept of flourishing is basically the same concept as virtue. As one virtue theorist notes, “Virtues are the way to understand *eudaimonia*; *eudaimonia* is not the way to understand the virtues.” The claims that follow in this article do not rely in any way on *eudaimonia* or flourishing.

Another concept from virtue ethics that does not appear in this article is the concept of practical wisdom. This concept is fundamental in Aristotle, and

159. See Nussbaum, supra note 127, at 57-59; see also John McDowell, *Eudaimonism and Realism in Aristotle’s Ethics*, in *ARISTOTLE AND MORAL REALISM* 201 (Robert A. Heinaman ed. 1998) (arguing against certain forms of naturalism). An idea closely related to naturalism is the idea that ethical insight can be gained from inquiry into the function or purpose of human beings, or—if we are doing legal ethics—the purpose or function of lawyers. See, e.g., Feldman, supra note 138, at 910. But it is not obvious what it could mean to say that human beings have a purpose or function, unless it is given by a divinity or a Spirit of History. And virtue theorists like John McDowell have forcefully rejected the idea that claims about the ‘function’ of human beings can help us understand virtue. See McDowell, supra note 159, at 207-208. Also, there are reasons to doubt that a complex social practice like lawyering could be usefully said to have any one function or purpose. But this article will present no occasion for picking sides on these questions.

160. Peñalver, supra note 144, at 864.

161. James Wallace observes that human flourishing involves the creation of communities and culture; it is therefore impossible to understand human flourishing in the same way we understand what it means for a sea anemone or a plant to flourish. Wallace, supra note 111, at 32-33.

162. Broadie, supra note 104, at 41. David Wiggins writes that the word *eudaimonia* means *doing* well, not *faring* well. David A. Wiggins, *Eudaimonism and realism in Aristotle’s ethics: a reply to John McDowell*, in *ARISTOTLE AND MORAL REALISM* 227, supra note 160. Writers who treat human flourishing as equivalent to objective well-being are in fact taking a consequentialist position: virtues are good insofar as they promote the good consequence of objective well-being.

163. P. Simpson, *Contemporary Virtue Ethics and Aristotle*, in *VIRTUE ETHICS: A CRITICAL READER* 245, 257 n.11 (Daniel Statman ed., 1997). Peñalver attempts to identify the various virtues that relate to the use of land by first identifying the ways in which land contributes to human flourishing. Peñalver, supra note 144, at 876-86. But this method will seem deeply problematic for a virtue ethicist who believes that “human flourishing” means simply a life lived in accordance with the virtues, rather than a life that involves economic prosperity or physical health and pleasure. See, e.g., Annas, supra note 111, at 129 (distinguishing the circumstances of a life—including material prosperity and pleasure—from the virtues and vices that are brought to bear in living the life).

plays an important role in many theories of virtue. But it seems unwise to talk about practical wisdom until one has something to say about it beyond the obvious truth that lawyers need good judgment. The rest of this article will attempt to specify some features of lawyers’ good judgment, and thereby contribute to an understanding of what practical wisdom means in lawyers, but the concept of practical wisdom itself will play no direct role in the arguments that follow.

Virtue ethics has also taken on some specific meanings in disciplines that share borders with legal ethics theory. In political philosophy, there is a group of theories, including theories sometimes called communitarian or republican, which are sometimes associated with virtue ethics, and which claim that government should aim to promote human flourishing, rather than staying neutral between competing visions of the good that are held within a society; or that government should aim to promote its citizens’ virtue. These claims have no relevance to this article. Another group of writers have applied concepts from virtue ethics to jurisprudence, another discipline that borders on legal ethics. Any views the reader may have about this work on “virtue jurisprudence” can be safely left aside for the time being; this article will neither bolster nor trouble them.

One more piece of unwanted baggage: virtues are sometimes described as the basis for, or the focus of, a third major moral tradition in Western philosophy, one that stands alongside the more familiar consequentialist and deontological traditions. Legal theory articles sometimes describe themselves as offering a

165. See, e.g., Broadie, supra note 103, at 179-181.
166. See, e.g., Linda R. Hirshman, Nobody In Here But Us Chickens: Legal Education and the Virtues of the Ruler, 45 STAN. L. REV. 1905 (1993). Peñalver, for example, seems to take it for granted that a virtue-based theory of property would support the idea of “overrid[ing] private decisions and command[ing] owners to act in accordance with virtue” and the goal of teaching nonvirtuous owners to act virtuously. Peñalver, supra note 144, at 871. It is eminently possible to embrace virtue ethics while rejecting such a program. For that matter, it is possible to accept such a program while rejecting virtue ethics. A consequentialist who rejected virtue ethics, for example, might say that government should aim to cultivate the virtue of its citizens because doing so will have good consequences. See also Kyron Huigens, Virtue and Inculpation, 108 HARV. L. REV. 1423 (1995) (using Aristotelian theory to argue that judgments about culpability in criminal law are best understood in terms of judgments about the defendant’s character).
168. See Lee J. Strang, Originalism and the Aristotelian Tradition: Virtue’s Home in Originalism, 80 FORDHAM L. REV. 1997, 2017 (2012) (“Virtue ethics is one of the three prominent ethical traditions in the West.”); see also HURSTHOUSE, supra note 1, at 1-3. One problem with thinking of virtue theory as a third genus of ethical theory is that many virtue theorists reject the idea of an ethical theory, at least in one sense. Traditional theories in the consequentialist or deontological traditions—according to many virtue theorists—seek to articulate abstract principles from which solutions to moral problems can be deduced. Many virtue theorists deny that ethical theory should seek to articulate such principles. See Stanley G. Clarke & Evan Simpson, Introduction: The Primacy of Moral Practice, in ANTI-THEORY IN ETHICS AND MORAL CONSERVATISM 2-3 (Stanley G. Clarke & Evan Simpson ed. 1989). For these virtue theorists, legal theorists who try to apply virtue
“virtue-ethical” or “aretaic” approach to various substantive areas of legal theory.\textsuperscript{169} This seems risky. Virtue ethics involves a large number of claims, on which virtue ethicists themselves often disagree. Rather than announcing the launch of a “virtue-ethical” approach to a given subject, it seems more prudent to specify which claims or concepts from virtue ethics are of interest. So this article does not claim to offer a “virtue-centered” or “aretaic” approach to legal ethics. My interest is not in “virtue ethics” but in the concept of virtue itself. The idea is to investigate the conceptual tools available to legal ethicists, and lawyers, one concept at a time. There will be plenty of occasions, later, to run up the flag of whatever philosophical navy impresses us.

D. VIRTUES REQUIRE SKILLS

The aim of this article is to better understand the relationship between intrinsic values and lawyers’ practice. The reason for introducing the concept of virtues is that virtues can be understood as the practical aspect of intrinsic values: they are dispositions to respect and promote intrinsic values appropriately and well. There are various aspects of the concept of a virtue that might illuminate the connection between intrinsic values and practice. The remainder of this article will focus on one aspect of virtues: their connection to practical skills. Part V will identify a particular set of skills that are deeply important for lawyers—skills that are difficult to understand if one takes a reductionist approach to legal ethics. First, this section explains why a focus on virtues leads to thinking about practical skills.

Virtues, as philosophers understand the term, are different from skills—at least, from ordinary skills—in several important ways. The most important difference is that virtues are essentially connected to intrinsic values, while skills need not be.\textsuperscript{170} The virtue of compassion, for example, is conceptually linked to the intrinsic value of other people’s well-being.\textsuperscript{171} A person has the virtue of compassion if she cares about, and promotes, others’ well-being.\textsuperscript{172}

\textsuperscript{169} See, e.g., Colin Farrelly & Lawrence B. Solum, Introduction, in VIRTUE JURISPRUDENCE, supra note 167, at 1-4.


\textsuperscript{171} See WALLACE, supra note 111, at 128, 144.

\textsuperscript{172} Different claims could be made about exactly which intrinsic value is connected to compassion—maybe it’s human dignity, or something else—but this is, for now, beside the point.
Unlike virtues, ordinary skills have no essential link to intrinsic value. It is possible to be a skilled creator of utterly useless items. It is also possible to be skilled at something that is morally repulsive or intrinsically bad: one can be a skilled con artist, a skilled composer of advertising jingles, or a skilled teller of racist jokes.\textsuperscript{173}

It is important to understand that “virtue,” as used here, is a term of art with a specific meaning. It is a translation of the Greek word \textit{aretē}, which some philosophers prefer to translate as “excellence.”\textsuperscript{174} In ordinary conversation, the word “virtue” might refer to any admirable quality, including habits, like good hygiene, or personality traits, like being open and trusting.\textsuperscript{175} In virtue theory, “virtues” are different from mere habits or personality traits. The words “habit” and “personality trait” imply no value judgment about the behavior and attitudes to which a person is prone. In certain contexts, saying a person is very truthful means only that that she has the habit of telling the truth.\textsuperscript{176} In this sense, the word “truthful” can be value-neutral.\textsuperscript{177} The word “virtue,” however, is not just a description of how people act and react; it implies a value judgment about the appropriateness of the actions they are disposed to take and the attitudes they tend to have.\textsuperscript{178} Virtues are dispositions to act and react \textit{in the right ways, for the right reasons, and at the right times}.\textsuperscript{179} The virtue of courage, for example, involves risking one’s well-being when there is good reason to do so. Someone who habitually takes risks because she simply doesn’t care about her own safety is reckless, not courageous. Virtues are dispositions to promote intrinsic values \textit{well}; we can’t say that someone has a virtue without making a value judgment about the things they do, feel, and believe.

Unlike “virtue,” the word “skill” does not imply a judgment about someone’s motivation or reasons for acting. It is sometimes morally wrong to act skillfully. But it is, by definition, never morally wrong to act virtuously. If you display what looks like compassion on an inappropriate occasion—for example, if you try, with great sympathy and concern, to force your waiter into a deep conversation whether he is satisfied with his job—you are not displaying the \textit{virtue} of

\begin{itemize}
\item \textsuperscript{173} See \textit{Wallace}, supra note 111, at 43 (noting that some skills are not worth having, while virtues are necessarily worth having).
\item \textsuperscript{174} See, e.g., \textit{Nussbaum}, supra note 94, at n.6.
\item \textsuperscript{176} Cf. \textit{Annas}, supra note 122, at 50 (discussing the view that virtues are merely capacities or habits, and that they therefore have little moral significance).
\item \textsuperscript{177} If one is in the business of espionage, for example, an all-around tendency to be truthful might be an outright handicap.
\item \textsuperscript{178} See \textit{Annas}, supra note 122, at 66 (“The virtuous person has a disposition to make the right judgment as to what he should do.”).
\item \textsuperscript{179} This point is often missed in psychology research that focuses on virtues. See, e.g., \textit{Christopher Peterson & Martin E.P. Seligman, Character Strengths and Virtues: A Handbook and Classification} 87 (2004) (“the typical definition of a virtue in effect identifies it as a personality trait”).
\end{itemize}
compassion. You may be displaying a personality trait that is related to the virtue of compassion, but you are not displaying a virtue. A virtue is, by definition, a disposition to do the right thing. So virtues, unlike skills, can’t be deployed inappropriately. It is sometimes morally wrong to do a job skillfully.180 It’s never wicked to do a job virtuously.

Virtue, like skill, is a matter of degree. Nobody is perfectly compassionate; in fact, nobody fully lives up to any of the ideals represented by the virtues. Recognizing this, many virtue theorists have a “threshold” conception of virtue; they consider it appropriate to call someone compassionate, or courageous, or just, if the person has some measure of that virtue.181 Since nobody is perfect, and since each virtue represents a spectrum—we can have more or less compassion, more or less courage—it would make little sense to use the word “virtue” only for qualities that represent complete perfection.

Although virtues and ordinary skills are different in many respects, there is an important connection between them: Virtues depend on skills. Skills make it possible for a person with virtuous motivation to be effective in action.182 The virtue of compassion, for example, can’t be manifested without certain social skills, like the skill of knowing what to say to a bereaved friend.183 The admirable motivation that goes with the virtue of compassion will not do much good if we never actually manage to comfort or help other people.

Without good listening skills, someone might be motivated to give comfort to a bereaved friend, and this is an admirable motivation. But if the person is not a good listener, her efforts to give comfort may go horribly wrong. Her admirable motivation may lead her to discourse at length on the wonderful qualities of the person for whom her friend is grieving—something which, at another time, might have been perfectly appropriate—without realizing that her friend wants to be distracted, not to focus on the loss, and that she is causing the friend great pain. The connection between virtues and skills is fundamental to understanding the ethical implications of either.

It could be said that virtues are a matter of motivation, while skills are a matter of effectiveness in acting out those motivations.184 In the ordinary English meaning of the word “virtue,” that usage is probably appropriate; a virtuous person is simply someone who means well. But virtue, as a term of art, means more than just having the right motivation on a given day. Virtues are deep commitments. Someone who has a virtue—a deep commitment to something of intrinsic value—tends to manifest that commitment over time by doing things that develop the ability to promote the intrinsic value effectively.

180. Broadie, supra note 103, at 209.
182. Zagzebski, supra note 170, at 113.
183. Id.
184. Id. at 115.
Virtues, like skills, are acquired by habituation—that is, by repeatedly performing actions that are consistent with the virtue. Importantly, habituation is not the same as habit. As Julia Annas writes, virtues are similar to skills like piano-playing: True skill is not a matter of repeating some performance. Simply copying a master’s playing is not mastery; true skill consists of understanding what is called for on any occasion; eventually “you have to stop just following the teacher and play, skate, dance, speak in Italian, for yourself.” Virtues, like skills, involve an ability to improvise. Because the ideally virtuous person is not just imitating the actions of others, but applying a deep understanding of the intrinsic value she promotes, she is able to act well in an unfamiliar situation. An ideally just person is able to act justly under challenging new circumstances. People acquire virtues over time—not by simply adopting a belief about what has intrinsic value, but by learning to take actions that promote and respect intrinsic values, and growing better over time at making these actions effective.

People who have virtues are inclined to do what is necessary to develop the relevant skills. Virtues necessarily imply commitments, and we can often tell what commitments a person has by noticing what skills she has invested her energies in developing. So there is a sense in which skills can be a better gauge of virtue than the choices a person makes in any one situation.

Of course, some people lack skills through no fault of their own. It may be unusually difficult for a given person to develop listening skills, for example, because of a disability, or a past trauma, or some fact about the culture in which the person lives. It may seem harsh to judge these well-intentioned people as lacking in virtue, but remember that the word “virtue” translates a word that also means “excellence.” It would be wrong to say that a person who lacks listening skills acts excellently, or manifests excellence in compassion.

The fact that virtues are acquired over time, through a long series of actions, is part of what is praiseworthy about them. Virtues are present in people only as the result of a series of admirable choices: choices to act consistently with the virtue, choices to develop the skills that make the virtue effective, and choices to learn from mistakes. Virtues, like skills, come with a history. When we praise someone for having a skill, or for having a virtue, we are praising them for many choices, not just one. The same action can be more or less admirable, depending on whether it is one part of a larger life-project or just a one-time good choice.

185. For Aristotle, one acquires a virtue by exercising it; dispositions arise out of performing similar actions over time. Broadie, supra note 130, at 104. See Zagzebski, supra note 170, at 116-25.
186. Annas, supra note 111, at 54.
187. Id. at 17.
188. Id. at 18.
189. Skills are not entirely the result of commitments; they are also the result of aptitude and one’s environment. One can be committed to developing a skill and still fail to develop it. So it would be wrong to say virtues necessarily produce skills.
Virtues, like skills, are projects. By speaking in terms of virtues, we can take ethical account not just of what people do on specific occasions, but of what they choose to make of their lives—the deep commitments they make to things they understand to matter.

All of these claims about the connections between virtues and skills are claims about the connection between intrinsic values and ethical practice. Each claim about virtues could be translated into a longer claim about intrinsic values and practice. For example, to say that *virtues, like skills, are acquired over time* is to say that *when we promote an intrinsic value appropriately and well, it is because we have developed that disposition and capacity over time*. The concept of a virtue functions as a convenient shorthand for the concept of effectively or admirably promoting intrinsic values. Similarly, to say that *virtues depend on the skills that make them effective* is to say that *we cannot promote intrinsic values without acquiring certain skills*. The next section takes up this claim.

### IV. VIRTUES IN CONFLICTS

So far, this article has claimed (1) that legal ethicists should be skeptical about comprehensive maxims; (2) that we should look for alternative ways of explaining how abstract intrinsic values like autonomy and political legitimacy relate to lawyers’ daily practice; and (3) that the concept of a virtue is promising in this regard, because virtues represent the practical side of intrinsic values. Part III began to explore whether the concept of a virtue can lead to interesting claims about the practical side of intrinsic values, by exploring the close connection between virtues and practical skills. As virtue theorists have explained, being good at promoting and respecting an intrinsic value like autonomy or political legitimacy requires a commitment to developing certain practical skills. One question that might be asked by a legal ethicist with an interest in virtues is: for each of the intrinsic values at stake in law practice, what skills are required to promote it?

What follows is a specific argument about the virtues and skills that lawyers need. It is intended as a case study in the use of virtues as a conceptual tool for understanding legal ethics. I suggested above that practical Master Maxims are not very useful in understanding how lawyers should act when intrinsic values conflict. The discussion below aims to show that although a focus on lawyers’ virtues may not lead to an answer to any particular dilemma, it will nonetheless support useful insights, or at least useful disagreements, about what advice might be given to a lawyer facing an ethically significant choice. This argument has four parts.

Part IV.A argues that in order to promote the intrinsic values at stake in law practice, lawyers need the skills involved in *integrating values*: finding ways to accommodate multiple conflicting values, rather than simply choosing one over the others. Part IV.B discusses an example of a lawyering situation that calls for
the integration of conflicting values. Part IV.C looks at some of the skills involved in integrating values. Part IV.D claims that underlying the various skills involved in integrating values is a fundamental capacity to tolerate ethical tension. This capacity can’t be adequately explained by accounts that reduce legal ethics to practical maxims.

A. THE INTEGRATION OF VALUES

Part II of this article argued that practical maxims are not a good way to deal with conflicts of values, and that conflicts are central in legal ethics. Conflicts between values also play an important role in virtue theory. Most virtue theorists are pluralists about intrinsic value. They believe that there are multiple intrinsic values in the world, and that these values can’t be reduced to any one super-value like human dignity or well-being or utility. Pluralists tend to accept the inevitability of conflict: If there is more than one kind of intrinsic value in the world, then it’s natural to think that agents will sometimes face choices in which intrinsic values are opposed to each other.

Virtue theorists typically claim that it’s possible to act admirably in situations where intrinsic values conflict.\(^{190}\) To understand what amounts to acting admirably in a conflict, we first have to understand how practical reasoning works.

Agents who face conflicts have to choose between several possible courses of action. The first step in practical reasoning is to identify those different courses of action—to generate choices. The second step is to evaluate the available choices. In a dilemma or conflict of values, there is something unsatisfactory about all of the available choices. What does the virtuous agent do in such a situation?

In Christine Swanton’s virtue-theoretical account, practical conflicts are best understood in terms of constraints.\(^{191}\) A constraint is a reason why we cannot or should not choose one or more of the options we’ve identified. If a possible course of action violates one of our constraints, that course of action is inadequate in some way.\(^{192}\)

Values are one kind of constraint. If you have promised to meet someone for dinner, that promise—and the intrinsic value of promise-keeping—becomes a constraint on your evening. You are constrained not to break the promise.

Another kind of constraint is a practical limitation on what is possible, like the fact that you have been in a car accident and are now in the emergency room. Your accident constrains your ability to keep your promise. Practical limitations, like values, can constrain our ability to pursue any goal.\(^{193}\)

What makes a dilemma difficult is that all of the available options seem to

---

190. Swanton, supra note 111, at 247.
191. Id. at 254.
192. Id.
193. Id.
violate a constraint. It appears that the agent has no choice but to violate at least one constraint. But Swanton argues, is to integrate the constraints that apply to it.\textsuperscript{194} The process of integration is ideally “not a process of choosing to ignore certain constraints while focusing on others; of choosing one horn of a supposed dilemma over another.”\textsuperscript{195} Instead, admirable practical reasoning aims at “the transformation of the problem”—that is, “a process of progressively specifying and re-specifying” its “constraint structure.”\textsuperscript{196} Rather than simply generating options and then choosing, the virtuous person returns to the first step and continues struggling to generate new options or to see the possibilities differently.

Swanton offers the example of a person who has promised to take his children to the beach, when a lifelong friend turns up from Australia with only limited time for a visit.\textsuperscript{197} The example could be seen as a classic moral conflict between two obligations: the duty to keep promises, and the duty of hospitality to friends.\textsuperscript{198} But Swanton argues that before deciding that the situation presents a stark conflict of values, we should try to modify our interpretation of the constraints in a way that preserves their basic point.\textsuperscript{199} We should try to reinterpret the constraints in ways that make it possible to promote or respect both of the values in conflict.

The way to transform the problem here is to stop thinking of it, if we can, as a conflict between the promise to take the kids to the beach and the duty to be hospitable to friends. Instead, we should try to reinterpret the problem. We might say, moving to a higher level of generality, that our constraints here are the need to be a good parent and the need to be a good friend. Re-describing the constraints in these more general terms allows us to ask whether there is any course of action that would satisfy the new constraints.

In practical terms, this reinterpretation might suggest a possibility that would probably be obvious to most people: inviting our visiting friend to join our family for a trip to the beach. Treating the situation as a conflict between two major moral principles, and glumly forcing oneself to choose one over the other, would be among the least admirable ways of acting in this situation.

The practice of law frequently gives rise to apparent dilemmas. Many writers see these dilemmas as conflicts of value that require stark choices between intrinsic values. For example, Monroe Freedman and Abbe Smith tell the story of a friend (of Freedman’s) who had to decide whether to lie about his views on the

\begin{footnotes}
\item 194. Id.
\item 195. Id.
\item 196. Id. at 255.
\item 197. Id. (citing R.M. Hare, \textit{Moral Conflicts}, in \textit{1 Tanner Lecture on Human Values} 169–93, 171 (Sterling M. McMurrin ed., 1980)). In Swanton’s example, it’s “the river.” Perhaps because of my American dialect, I find the idea of “taking one’s children to the river” vaguely ominous; since Swanton appears to be thinking of some sort of recreational activity, I’ve substituted the beach.
\item 198. SWANTON, supra note 111, at 255.
\item 199. Id.
\end{footnotes}
death penalty so that he could sit on a jury.\textsuperscript{200} The friend opposed the death penalty, but was uncomfortable lying on the jury questionnaire, even though that might allow him to serve on a jury and prevent some defendant from being executed.\textsuperscript{201} Freedman’s advice was: “[Y]ou cannot have it both ways. Either telling the truth is more important than saving life, or saving life is more important than telling the truth.”\textsuperscript{202} In some situations—this may be one of them—it is impossible to avoid a stark choice. But notice how generally Freedman framed his advice; he seems to have wanted his friend to decide whether truth-telling or saving life was more important \textit{in general}. Swanton’s account would suggest that asking whether truth-telling or saving life takes priority, in the abstract, is not a good way to approach this situation. Instead, the friend should have tried to look at what light the specific context might shed on his commitments to truth-telling and saving life, and what alternative courses of action might serve the deeper purposes of these commitments. He might have started by asking \textit{why} he believes truth-telling is intrinsically valuable. It might have to do with respect for the people to whom he speaks; if so, the listener here—the state—might not be entitled to the same respect as other listeners, because it is gearing up to execute someone. On the other hand, if the friend is a lawyer, then the value of truth-telling may have to do with specific commitments to the justice system entailed by the lawyer’s role. In that case, he may have no choice but to tell the truth. Alternatively, in a Wendellian mode, he might have asked whether his respect for the views of his fellow citizens, who elected the government that stands ready to impose the death penalty, requires him to defer to the views that have been legitimately codified in the law. These and other lines of thinking might lead to a conclusion that a seemingly intractable conflict is not so stark as it first appeared. Of course sometimes there is no way to avoid acting against one of our commitments. But in many situations, the worst possible response to a dilemma is to simply choose.

One needn’t be a virtue ethicists to endorse Swanton’s claim that we should try to integrate constraints when values conflict. Philosophers in other traditions have developed similar models. Henry Richardson, for example, offers a similar account, basing it in the philosophical tradition known as pragmatism.\textsuperscript{203} He notes that there are two conventional models of ethical reasoning: the deductive model, in which ethical rules or principles are applied to the facts of specific cases; and the balancing model, in which the considerations on either side of a question are weighed intuitively.\textsuperscript{204} Richardson offers, as an alternative to these,
a “specification” model, in which “one is urged not merely to reflect and change one’s mind in a way that resolves a conflict in an acceptable way, but to revise one’s normative commitments so as to make at least one of them more specific.” The goal, for Richardson and for Swanton, is to accommodate both of the considerations that press on us in a dilemma, rather than just throwing one overboard.

So it would be wrong to say that the constraint-integration approach is “what a virtue theorist would say” about ethical reasoning; this is one reason I have avoided referring to this article as “taking a virtue-ethical approach to legal ethics.” Still, virtue theory is very hospitable to the constraint-integration claim, because of the close connection between virtue and skill. Where other approaches might ask which of two choices is the right one, a virtue-based approach encourages us to ask what skills might help reconcile the conflict, and constraint-integration skills are the beginning of an answer to this question.

Does the constraint-integration approach merely lead us to a new practical maxim? The discussion so far might seem to lead to the conclusion that lawyers should always follow the maxim, “Aim to integrate the values that conflict in a given situation.” But this maxim oversimplifies. There are cases in which the pursuit of constraint integration amounts to a simple failure to face the facts. Admirable agents should always prefer constraint integration to simply promoting one intrinsic value at the expense of another. But there are some dilemmas in which there is simply no way to protect all of the intrinsic values at stake. When a lawyer realizes he has misrepresented an important fact to the court—as in Milton Regan’s account of John Gellene, who eventually went to prison for failing to disclose a possible conflict of interest to a bankruptcy court—it is time to face facts and correct the misstatement, whatever the consequences; dithering will only make the situation worse.

So we should adopt a nuanced version of Swanton’s position. It is not always admirable to pursue compromise and integration; sometimes that is a waste of time. But we should always prefer to integrate constraints, even as we must be prepared to accept defeat under certain circumstances.

In what circumstances should we accept that integration isn’t possible? Perhaps there is a better answer than “the right circumstances”—a way to instruct agents, in general terms, when to aim at constraint integration and when to give up. But it is difficult to imagine what that answer would be. And if we are suspicious of practical maxims, for the reasons discussed above, we will have little enthusiasm for the pursuit of a maxim about when we should aim to integrate constraints.

Instead of pursuing a maxim about when lawyers should aim at constraint

205. Id. at 283.
integration, the remainder of this article will try to develop an account of the virtues involved in handling practical conflicts between intrinsic values. If it is generally or usually admirable to aim at constraint-integration, the question becomes: what skills or capacities do lawyers need to be good at integrating constraints?

Constraint integration is not one skill, but many. And not all of these skills are practical, in the ordinary sense; some have more to do with theoretical reasoning. One of the skills involved in constraint integration is theoretical reasoning about intrinsic values. Before integrating values, one has to understand them. This requires insight about what really matters. In the day-at-the-beach dilemma, we should ask why we are keeping our promise to our children, and why we feel obligated to entertain our old friends. Hopefully, this process of interrogating our values will help us see other practical possibilities—ways of acting that were not, at first, apparent.

To assess the point of a constraint—that is, to understand what really matters—requires theoretical understanding, but it is a theoretical understanding firmly grounded in the specifics of our situations: “one must go beyond abstract discussion of principle, and try to understand what that constraint seeks to preserve in the particular context in which it is held to be relevant.” A lawyer’s promise to her client is different from a parent’s promise to her children. The obligation to entertain visiting friends is different from a diplomat’s duty to entertain a visiting ambassador. The proposed solution (everyone going to the beach together) will work only if certain things are true. For example, when we promised our children a trip to the beach, maybe it was because the children were feeling they needed more attention from their parents—in which case the friend joining up might ruin the whole thing.

Our ability to integrate values depends on the way the values manifest themselves in our particular situation. But without a deeper understanding of the values—the kind of understanding that theory aims to provide—we’d be unable to know even which options represent an improvement on the current dilemma. We need an understanding of abstract values to judge how far we can go in re-interpreting values. Our theoretical understanding of intrinsic value is what we use to judge whether a proposed compromise manages to respect both of the values in conflict. The integration, if it succeeds, is a practical success, a creative process of coming up with a course of action that respects all of the values at stake. But to judge whether a proposed course of action respects those values, we need a theoretically defensible understanding of the values. Theory and practice go together here.

Because value-integration requires a kind of theoretical understanding, there is

207. SWANTON, supra note 111, at 171.
208. Id. at 256.
room in the constraint-integration account for theoretical approaches like Wendel’s, which aim to understand the intrinsic values at stake in lawyering. In fact, a constraint-integration approach depends on accounts of this kind, because integrating values requires a deep understanding of the values we aim to integrate. That understanding is what we deploy to decide whether possible courses of action are consistent with the values at stake in a given situation. To illustrate the ways in which constraint-integration requires both practical skills and theoretical understanding, I’ll move to an example that involves lawyering under particularly grim circumstances.

B. ALTON LOGAN

On January 11, 1982, two men robbed a McDonald’s on the South Side of Chicago.209 The men killed one security guard and wounded another.210 A month later, a man named Edgar Hope was arrested carrying a weapon that turned out to have been used in the McDonald’s shooting.211 A few days after Hope’s arrest, the police arrested Alton Logan, whom they accused of being Hope’s accomplice.212

Later, the police arrested a man named Andrew Wilson in an unrelated incident. Firearms tests linked his shotgun to the McDonald’s shooting. But the police, having already accused two people of being the two perpetrators in the McDonald’s shooting, never pursued Wilson’s connection to it.213

In March 1982, the lawyer who represented Hope (the first of the alleged killers) approached the attorney for the other alleged killer, Alton Logan. Hope had ordered his lawyer to tell Logan’s attorney that Logan was innocent; it was Andrew Wilson, not Logan, who helped rob the McDonald’s.214 But Hope wouldn’t testify to that effect, because his position in court was that he hadn’t been involved in the robbery at all.215

Hope’s lawyer also shared what he knew with the lawyers who represented Wilson, assistant public defenders Dale Coventry and Jamie Kunz.216 Coventry and Kunz approached their client to ask whether he was the second person in the McDonald’s shooting. Kunz later recalled that Wilson “nodded, grinned, and said, ‘That was me.’”217 Coventry remembered that Wilson “kind of chuckled over the fact that someone else was charged with something he did.”218 Kunz

209. Maurice Possley, Inmate’s freedom may hinge on secret kept for 26 years, CHI. TRIB., Jan. 19, 2008.
210. Id.
211. Id.
212. Id.
213. Id.
215. Id.
216. Id.
217. Possley, supra note 209.
218. Id.
says, “He was tickled pink.”

Wilson would not let them disclose the truth. But he did agree that they could disclose it in the event of his death.

Meanwhile, prosecutors were seeking the death penalty against Logan, whom Coventry and Kunz knew to be innocent. “We were freaked out,” Coventry remembers. They researched the rules on attorney-client privilege, and concluded they had no choice but to keep the secret. Kunz explained later, “I could not figure out a way and still cannot figure out a way how we could have done anything to help Alton Logan that would not have put Andrew Wilson in jeopardy of another capital case.”

All the lawyers could think to do was to prepare for the day—however far away it might be—when Wilson’s death would allow them to disclose the truth. They drew up an affidavit. “[W]e wanted to make a time-stamped declaration against a subsequent claim that ‘you guys are just making it up now.’” Coventry and Kunz signed the affidavit, and so did Hope’s lawyer. It said: “I have obtained information through privileged sources that a man named Alton Logan who was charged with the fatal shooting of Lloyd Wickliffe at on or about 11 Jan. 82 is in fact not responsible for that shooting that in fact another person was responsible.” They found trusted colleagues to witness and notarize the affidavit. Then they put it away in a metal box.

The lawyers say that if Logan had been sentenced to die, they would have broken confidentiality, whatever the disciplinary penalties—they wouldn’t have let an innocent man be executed. But Logan was—perhaps unfortunately!—not sentenced to death. His sentence was life in prison.

Many years later, in 2007, Andrew Wilson died in prison of natural causes. Coventry still had the metal box. The lawyers opened it, and brought the affidavit to Logan’s lawyer, who brought it to the court. A new trial was ordered, and on September 24, 2008, the Illinois Attorney General moved to dismiss the

219. Stefano Esposito, He didn’t do it—and they knew: Attorneys say they didn’t reveal their client’s murder confession 26 years ago as Alton Logan served prison term, CHI. SUN-TIMES, Mar. 11, 2008.
220. Id.
221. Possley, supra note 209.
222. 60 Minutes (CBS television broadcast Mar. 9, 2008), available at http://www.cbsnews.com/stories/2008/03/06/60minutes/main3914719.shtml (transcript available on Westlaw at 2008 WLNR 4709259).
223. Id.
224. Miner, supra note 214.
225. Possley, supra note 209.
226. Id.
227. Id.
228. Id.
229. Miner, supra note 214.
230. Possley, supra note 209.
231. Miner, supra note 214.
232. Possley, supra note 209.
Logan was finally free, at the age of 54, after 26 years in prison. It also presents difficult ethical questions about whether it is right to let an innocent man stay in jail for half his life. But maxims don’t help answer those ethical questions.

Some of the many people who have commented on the case see it as a simple dilemma, a choice between two exclusive, alternative ways of seeing things. One commentator accused Coventry and Kunz of basing their decision “on the premise that the attorney-client privilege must be defended at all costs.” Instead, he argued, we should “start with a different premise: [I]mprisoning an innocent man is categorically wrong, and maintaining silence when you could correct that evil is wrong.”

According to the lawyers, they were not defending the attorney-client privilege itself; they were protecting their client’s life. As Kunz said, helping Alton Logan would have meant putting their own client “in jeopardy of another capital case.” Protecting someone’s life—even the life of a criminal—is, many people would agree, intrinsically valuable. In fact, it could be argued that the intrinsic value of human life justifies a weighty presumption that attorneys should not risk sending their clients to death row.

This argument illustrates that before we can evaluate the practical choices Coventry and Kunz made, we need a solid theoretical understanding of the intrinsic values that are at stake, including the value of saving life. But we need more than just a categorical claim that saving life is valuable. We need to know whether there are exceptions to this general principle, and what to do with it in conflict.

We could try to address these questions applying a practical maxim. Wendel’s presumption, for example, would tell us that Wilson had a legal entitlement to the lawyers’ silence, an entitlement that should be respected except in extraordinary circumstances. But this wouldn’t help much. Clearly these are extraordinary circumstances. Without some way to measure extraordinariness, we’ve just

---

234. Id; see also 60 Minutes, supra note 222.
235. For a discussion of whether disclosure is allowed under the Model Rules, see James E. Moliterno, Rectifying Wrongful Convictions: May a Lawyer Reveal Her Client’s Confidences to Rectify the Wrongful Conviction of Another?, 38 Hastings Const. L.Q. 811, 811-12 (2011).
236. Miner, supra note 214.
237. Id. This is not, strictly speaking, accurate: the lawyers say they would have broken their silence if Logan had been sentenced to death, so they would not have defended the privilege “at all costs.” On the other hand, the lawyers clearly would have let Logan die in prison if not for the happenstance that Wilson died first.
238. 60 Minutes, supra note 222.
239. They may not be “extraordinary” in the sense of “unusual.” But statistical frequency can’t have much to do with moral justification.
restated the problem. The legal entitlements here are plain; on the other side of the scales, Wendel’s theory can acknowledge that there are powerful reasons to disclose the secret—but it can’t help us understand what those reasons are.

We could try Simon’s maxim: Lawyers should take whatever action, under the circumstances, seems most likely to promote justice. But it’s difficult to know what would ultimately promote justice here. Of course the injustice of Logan’s imprisonment is among the greatest we can imagine. But sending one’s own client to death row is also, arguably, a great injustice.

These practical maxims land us back in the middle of a dilemma, but that doesn’t mean the theories supporting them are useless. On the contrary, those theories make it possible to see what values are at stake in the dilemma. But it is their accounts of intrinsic value, not their practical maxims, which help. Practical maxims can’t help us understand the extent to which the skills that Wilson’s lawyers had, and the kind of reasoning they were motivated to engage in, matters too. The theories behind those maxims make important contributions to our understanding of the intrinsic values that lawyers’ virtues promote, but they can’t help us account for the practical side of virtue.

C. SKILL BETWEEN THE HORNS OF A DILEMMA

There are times when one should not try to integrate the values that seem to be in conflict. Sometimes it is more admirable to simply choose one, and sacrifice the other. In the case of Alton Logan, an argument can be made that the lawyers should have simply gone public with what they knew when they first learned it. It is not clear that this would have saved Logan; there is no guarantee that a trial court would have deemed admissible—or, for that matter, believed—testimony from a lawyer about a confession made by his client.240 But it is at least possible that Logan would have been freed if Wilson’s lawyers had gone public, whether through judicial proceedings or some other process, like executive clemency or a prosecutor’s exercise of discretion.

The discussion that follows will assume that the lawyers were reasonable in

240. In a parallel case, a lawyer in North Carolina reported that his recently deceased client, who had been convicted of participation in killings for which a man named Lee Wayne Hunt was now serving a life sentence, had confessed to him that Hunt was not involved. The trial court judge ruled the testimony inadmissible. See Adam Liptak, When Law Prevents Righting a Wrong, N.Y. TIMES, May 4, 2008. The judge in Hunt’s case also invoked the law of professional responsibility and warned the lawyer that he was committing an act of misconduct by reporting his now-dead client’s confession, but the North Carolina Bar Grievance Committee eventually determined (after receiving affidavits from several legal ethics scholars) that there was not probable cause to believe that the lawyer violated the Rules of Professional Conduct. Hunt is still in prison. For a detailed discussion of Hunt’s case, see Robert P. Mosteller, The Special Threat of Informants to the Innocent Who Are Not Innocents: Producing ‘First Drafts,’ Recording Incentives, and Taking a Fresh Look at the Evidence, 6 OHIO ST. J. CRIM. L. 519, 536-44 (2009). On the rules of professional responsibility that apply here, see Colin Miller, Ordeal by Innocence: Why There Should Be A Wrongful Incarceration/Execution Exception To Attorney-Client Confidentiality, 102 NW. U. L. REV. COLLOQUIY 391, 393-94 (2008).
seeing themselves as constrained not to disclose. It will assume, in other words, that they were right to believe that there were genuine intrinsic values pressing in opposite directions. Note that everything depends on this. If no intrinsic value supported keeping quiet, the lawyers made a terrible mistake. And if no intrinsic value was offended when Logan was falsely imprisoned, then the lawyers’ lost sleep was unnecessary and they struggled for no reason; a bad understanding of intrinsic value can make it impossible to act well in an apparent conflict.

One of the ways a theory can stop lawyers from acting admirably is by encouraging them to see their situation in terms of a maxim. Theories that use maxims tend to present dilemmas like this one as binary choices. They assume that our ethical responsibility is to choose one course of action over another. Maxims are guidelines for choices. They are designed for one kind of ethical problem: the problem in which the agent must make a choice. Maxims push lawyers to choose; they assume that it is necessary to promote one value and reject the values that conflict with it. But choosing, in this sense, will be the wrong thing to do in many situations.

The questions that maxims implicitly answer are leading questions. A theory that offers the maxim “give presumptive weight to the client’s legal entitlements” implicitly answers the question “Which values should we choose, and which values should we reject?” To say there is a presumption that a particular value should prevail is to assume that all possible outcomes involve only one value prevailing. But in many cases, we should not reject either value. We should fight the hypothetical. We shouldn’t give up on finding a way to promote or respect both of the values that conflict. While maxims implicitly suggest that the lawyer’s ethical responsibility is to choose one of the options presented in a dilemma, the constraint-integration account suggests that ethically troubling situations can demand much more than just a choice.

Wilson’s lawyers did not simply choose disclosure or silence. They ruled out one of the options, disclosure. But this was the beginning of their ethical reasoning process, not the end of it. They tried to integrate the conflicting values at stake, in several ways. First, they asked Wilson if they could disclose. It is difficult to tell, from the reports, how hard they tried to persuade him to confess or to let them disclose. We can debate how hard they should have tried. But it was right to ask.

Second, they asked Wilson if they could disclose in the event of his death. At

241. Allen Wood writes of another dilemma that “[a]ny moral principle that dictated a single, unambiguous answer to the question what [the agent] should do would be unacceptable simply because it did so.” Wood, supra note 135, at 73 n.23.

242. It might seem that the maxim “try to integrate constraints” would have suggested the kinds of actions Wilson’s lawyers took. As discussed above, however, it is sometimes inappropriate to try to integrate constraints. Anyone who thinks Wilson’s lawyers should have simply gone public, for example, would find the maxim “try to integrate constraints” hopelessly misleading here.
the time, that request may have seemed pathetically inadequate, and in a sense it was. But Alton Logan is now free only because it occurred to them. An inmate in North Carolina named Lee Wayne Hunt remains in prison—if a lawyer’s testimony is to be believed—because another man’s lawyer did not think to make a similar request. Like Wilson’s lawyers, the lawyer in the Hunt case learned from his client, who had been involved in the killings for which Hunt was convicted, that Hunt had not been involved. When the client died, the lawyer tried to disclose Hunt’s innocence to the trial court, but the trial court refused to admit the testimony, holding that the attorney/client evidentiary privilege barred it. Hunt remains in prison.243

The third way in which Wilson’s lawyers tried to integrate the conflicting values at stake was by creating the affidavit. It is not clear that this made any real difference, and it is not clear that the affidavit would have been specific enough to exonerate Logan in the event that the lawyers who signed it died before Wilson did. But the effort was admirable because it shows creativity, and a determination to anticipate every possible scenario in which Coventry and Kunz could make Logan’s acquittal possible.

These efforts to integrate values reflect several ethically significant skills. One is the skill of having a difficult conversation with a client. Wilson’s lawyers asked their client to confess, and to allow disclosure in the event of his death; these can’t have been easy conversations. Another is the skill of interpreting the ethical rules correctly and responsibly. Legal reasoning skills, here, were ethically crucial. It would have been a tragedy of the first order—the kind one finds not in Shakespeare but in a psychotically nihilist black comedy—if the lawyers had misread the rules and kept Logan in prison for 26 years because of a mistake about their obligations.

Wilson’s lawyers also showed a kind of skill in thinking creatively about future possibilities. I doubt it would have occurred to every lawyer to create the affidavit, or to ask Wilson’s permission to disclose in the event of his death. Kunz says, now:

There may be other attorneys who have similar secrets that they’re keeping. I don’t want to be too defensive about this, but what makes this case so different is that Dale and I came forward, and that Dale had the good sense to talk to Wilson before his death and said—and get his permission: if you die, can we talk? Without that, we wouldn’t be here today.244

Again, whether they were right or wrong to keep the secret while Wilson was alive, Kunz is clearly right about this.

The lawyers tried in several different ways to reconcile the conflict of values they faced: They tried to find leeway in the law of lawyering; they tried to

243. See supra note 240.
244. 60 Minutes, supra note 222.
persuade Wilson to confess; and they did several things to ensure that the truth could come out upon Wilson’s death. All of these were attempts at value-integration: Wilson’s lawyers were constrained by the necessity of keeping confidences, but also by the urgency of freeing the innocent man. They did not find a way to satisfy both constraints—at least, not at the time. But it is admirable that they tried.

Earlier, I said that integrating constraints first requires understanding them deeply, so that the constraints can be reinterpreted in ways that make integration possible. Did Wilson’s lawyers do any reinterpreting? We can’t know without knowing how they interpreted the relevant values before the Logan case presented itself. But their actions do seem to represent a sophisticated and nuanced understanding of their duties to clients—certainly not the simple application of a maxim. Contrary to Brougham’s maxim, which states that lawyers know only one person in all the world, they appear to have acknowledged their responsibility to everyone their actions affected. Their obligations to their client prevented them from sending him to the electric chair, but they could ask him to put himself there—a very un-Broughamian request. Whatever the lawyers’ actual reasoning process was like, it seems that their struggle with the dilemma involved a search for an interpretation of the conflicting constraints that went beyond what any maxim could capture.

We might criticize the lawyers for not showing more creativity, either at the level of interpretation or at the level of practical skill. Maybe there are other actions they didn’t think of taking, or maybe they could have been more persuasive in their conversations with Wilson without violating the trust of the attorney/client relationship, or maybe they should have interpreted their obligations under the lawyering law differently. To criticize them on any of these grounds would reinforce the underlying point: It is not just their choices that mattered, ethically speaking, but also their skills.

A theory that can’t see the importance of the skills that freed Logan is missing something big. Wendel’s theory aims to give lawyers the correct interpretation of the one real constraint it acknowledges, the constraint to show fidelity to the law. But law practice isn’t just an application of one big theory; it’s sometimes a struggle to understand the values that are at stake, and to struggle to find an interpretation of them we can live with.

D. LIVING WITH CONFLICT

Along with the interpretive and practical skills discussed so far, the Alton Logan case illustrates the existence of a more fundamental competence: the ability to tolerate ethical tension.

The lawyers who knew Wilson’s secret didn’t just make a decision and move on. They agonized. Hope’s lawyer said in 2008, “It’s still a very thought-
provoking, stomach-churning matter for me.” He still has trouble sleeping.245 Kunz now says: “How often did I think about it? Probably, 250 times a year. I mean, I thought about it regularly.”246

But the thought of disclosure was also stomach-churning. “If I had come forward while Wilson was still alive, I would have been inviting the indictment of Andrew Wilson on a capital case—that would have made me feel guilty,” Kunz says, “That, I can’t stand to do; it violates the marrow of my being.”247 He also says, “there are a lot of clients I’ve subsequently represented who’d be sorry if I didn’t represent them. So I’m glad I kept my license.”248

They did not succeed in integrating the constraints they were under—not until many years had gone by. But it seems that they never stopped thinking about it. Wilson’s lawyers recognized that Logan’s freedom and Wilson’s life were both intrinsically valuable. This recognition wasn’t just intellectual; it wasn’t just a matter of endorsing a proposition or theory about intrinsic value. Their recognition of the values on either side of their dilemma came with a deep motivation that drove them to keep looking for creative solutions to their apparently insoluble dilemma.

Maybe they should have concluded, ultimately, that betraying their client was the right choice; or maybe they were right to stay silent. But whatever they chose, the choice should not have been easy. It would have been ethically blameworthy for Coventry and Kunz to say to themselves, simply, “you cannot have it both ways.” A choice like this should be difficult, and it should be preceded by a sincere attempt to have it both ways.

The ability to tolerate tension may be one of the most important capacities a lawyer can have. It is tempting, in a situation where fundamental values conflict, to simplify one’s choices, to say “you cannot have it both ways,” and to make a choice and move on. If Wilson’s lawyers had done so, Logan would still be in prison. Instead, they tolerated the tension. They continued to experience the pressure of both conflicting values throughout the time Logan was wrongly imprisoned. They were persistent in looking for ways to reconcile the constraints on them. This kind of persistence is not possible without the capacity to accept one’s situation as a conflict, and to live with this acceptance as long as the conflict endures.

Is this capacity to endure tension a virtue, or a skill? The difference between virtues and skills, remember, is that manifesting a virtue is necessarily admirable, while skills can be exercised at the wrong time or for the wrong reasons. The capacity to tolerate tension is not always something we should exercise. Sometimes values simply can’t be integrated in any meaningful respect, and it is

245. Miner, supra note 214.
246. 60 Minutes, supra note 222.
248. Miner, supra note 214.
necessary—and admirable—to stop agonizing and make a definitive choice. Because the capacity to tolerate ethical tension can be deployed at the wrong time, it is a skill, not a virtue. The virtue that relates to this skill is not the capacity to tolerate tension, but the disposition to do so at the right times.

When is it admirable to choose, rather than trying to have it both ways? As the earlier parts of this article suggest, there are reasons to doubt that we will be able to offer practical maxims that summarize this distinction. It may not be possible to offer lawyers specific guidance about when to tolerate tension.

For one thing, any maxim we tried to construct would downplay the significance of the differences between individual lawyers. Different people should be willing to tolerate tension to different extents, depending on their dispositions and their situations. Different lawyers have different capacities. For some lawyers, struggling on the horns of a dilemma may lead to nothing more than unproductive guilt and self-berating. Also, lawyers’ situations differ. Some lawyers, given their careers, may face agonizing dilemmas more often than others; perhaps criminal defense lawyers need to be hardened somewhat to ethical conflict, while some other lawyers may not. There may be no useful generalization we can make about how willing lawyers should be to tolerate tension.

But that doesn’t mean there’s nothing to be said. The skill itself, and the virtue that depends on it, can be the subject of theory and of practical advice. If lawyers need a certain skill, legal ethics theory can offer useful guidance not by telling lawyers precisely when to deploy it but by helping understand how it works and what is necessary to develop it. By paying attention to stories like Alton Logan’s, we can understand the demands on lawyers and the skills needed to respond to those demands.

The case of Alton Logan presents an extreme case of conflict between intrinsic values, a legal-ethics cousin to the “trolley problems” that moral philosophers sometimes deploy, and are sometimes criticized for deploying. Critics of the use of extreme dilemmas sometimes argue that agonizing dilemmas are not representative of real moral problems, because they lack the complexity of real events—in which complexity the solutions to apparently insoluble problems can often be found. That criticism cannot be made here: Alton Logan’s case really happened, and it illustrates an exhaustive search for alternatives that ultimately revealed no good options. It is not an artificially difficult hypothetical.

249. These values could be characterized in different ways. Keeping an innocent man out of jail promotes or expresses the value of justice, or the value of avoiding undeserved suffering, or the value of ensuring that the justice system reaches correct results, or all of these values. The value of keeping one’s own client off death row could similarly be described in terms of a number of abstract values.

250. For the original trolley problem, see Foot, supra note 111, at 23. See also Judith Jarvis Thomson, The Trolley Problem, 94 YALE L.J. 1395, 1401 (1985).

251. See, e.g., Wood, supra note 135, at 69-74; see also Edmund Pincoffs, Quandary Ethics, 80 MIND 552, 562 (1971).
Instead, the question that arises about Alton Logan’s case is whether it is too extraordinary to teach us much about legal ethics in general. Most lawyers never face a dilemma as agonizing as this one. Coventry and Kunz themselves had never faced a dilemma like this before.

What is relevant about the Alton Logan case, however, is its structure, not its intensity. It is offered here as an example of a case in which it was admirable for lawyers to struggle to integrate the ethical constraints they faced, rather than simply choosing one and sacrificing the other. Their particular situation was unusual, but situations with this structure—the structure of a dilemma, in which genuine values pull in different directions—is common in the practice of law.

A lawyer representing a defendant in civil discovery, for example, is obligated both to facilitate discovery in good faith and to protect the interests of her client. Discovery, in this sense, is one long ethical dilemma. At the very least, it is fair to say that throughout the discovery process there are constraints that are in tension with each other. Similarly, any lawyer who advocates for a client is pressed both to make the arguments that are in the client’s interest and to be candid with the court. Sometimes these pressures push against each other.

There is not room here to argue at length that the situations of lawyers making arguments or conducting discovery are best understood as situations of conflict. But that is, in a way, the point: It is admirable to be open to the possibility that there are conflicting values in any given situation—because only if we acknowledge this possibility will we be able to see opportunities to integrate the constraints. Only someone who is ready to see conflict can be ready for the struggle to resolve it.

Being ready for this struggle is a virtue. It is a virtue to know when to keep struggling toward integration of values that conflict. Sometimes the best way to promote or respect the intrinsic values at stake in the practice of law is to refuse to make the sacrifice that maxims assume is inevitable. It is sometimes an exercise of virtue to refuse to apply any maxim.

If lawyers face ethical tension on a regular basis, then this virtue—I can’t find a catchier name for it than “appropriate toleration of ethical tension”—will be fundamentally important for lawyers. They need this virtue to act well in many situations where values conflict. Rather than apply some existing theory of what matters in lawyering, it is sometimes admirable to struggle to refine one’s understanding of what matters. Rather than ending the struggle prematurely by making a choice and moving on, it is sometimes admirable to continue racking one’s brain in an attempt to find a practical solution. It is characteristic of admirable ethical reasoning that it acknowledges the real cost of valuable things, and that it appreciates the need to struggle, on a practical and theoretical level, to find new ways of reducing that cost. This struggle is admirable even when it is painful—even when it is a matter of twenty-six years of lost sleep.
CONCLUSION: VALUES AND THE COMMITMENTS THEY IMPLY

Can the concept of virtues help connect claims about intrinsic value with lawyers’ daily practice? Parts III explained that virtues are the practical aspect of intrinsic values, and that they are essentially connected to skills. Part IV explored one specific claim about lawyers’ virtues: the claim that lawyers need an ability to tolerate ethical tension, to continue struggling with a dilemma even when it appears hopeless. This claim was offered partly for its own sake and partly as an illustration of the kind of claims about practice that become possible when we begin to focus on virtues, rather than practical maxims.

Can virtues, as a conceptual tool, form part of a useful methodology for understanding the ethical decisions lawyers make? As Katherine Bartlett writes, “A question becomes a method when it is regularly asked.”252 There are at least two questions that would regularly be asked by a lawyer, or a legal ethicist, whose method of ethical reasoning incorporated the concept of virtues. A virtue is a disposition to promote and appreciate intrinsic values, so the first question would be, “What intrinsic values are at stake in this situation?” A virtue is also a disposition to promote those values appropriately and well, so a second question would be, “What is required, in this situation, to promote the relevant values appropriately and well?”253

These two questions represent two aspects of virtue, a conceptual aspect and a practical one. Virtues’ practical aspect includes the skills that support the virtues. Virtues’ theoretical aspect includes the intellectual understanding of abstract values to which legal ethics theory aspires.

The two sides of virtue should be understood together, not separately. Without a sound understanding of the intrinsic values we are promoting or respecting, it is not possible to integrate them. But without an understanding of the practical skills required to promote values effectively in difficult situations, we won’t be able to understand what those values mean in practice. We don’t understand what political legitimacy, for example, is really worth until we see what it takes to promote it and protect it in practice.

Thinking about virtues does not help us offer practical maxims that will tell lawyers what to do in situations where values conflict. The practical advice offered by a virtue-based account is very different from the kind of practical advice we might derive from a maxim. It does not attempt to tell lawyers what to do. Instead, by identifying the intrinsic values at stake in a situation, it tells lawyers what to aim at. And instead of telling them which of two options is best to choose, it tells them what kind of skills will be required to act admirably in the conflict—and what commitments will help them prepare for conflicts like these.

253. Again, the use of “promote” here is shorthand for a variety of actions and attitudes, including promotion, respect, appreciation, and so on.
Skills are more than choices; they are commitments, made over time. If we want to understand the values that matter to lawyers, we have to understand what commitments it will take to promote them effectively in practice. What is most promising about the concept of virtues is that it encourages us to think about intrinsic values in terms of the commitments they demand. It is worth asking what skills and commitments are implied by values like justice, autonomy, and the other values identified in legal ethics theory. The lesson of Alton Logan’s case is that lawyers who care about promoting justice should make a commitment to developing a certain kind of skill, the skill of tolerating ethical tension and struggling against it even when the struggle seems hopeless.

It is a mistake to try to understand abstract values like justice and freedom separately from the practical situations and experiences in which agents must promote them. Conventional theories of legal ethics proceed by developing a theoretical account of intrinsic value and then evaluating agents on the basis of how well they live up to standards derived from the theory. This approach fails to capture the complexity and practicality of intrinsic value. We shouldn’t just evaluate agents on the basis of their compliance with standards derived from abstract theory; we should also evaluate theoretical accounts of abstract values on the basis of how close they come to capturing the kind of fine-grained, historically formed commitments and skills that a morally admirable agent develops.

Theory can help us understand the deeper nature of the values we promote in particular situations. But abstract theories can never tell more than part of the story. No maxim can capture the complexity of the commitments that allow us to value—appropriately and well—the things that really matter. Reductionist maxims can’t do justice to the richness and the complexity of the lawyer’s perspective. We should pursue other ways of accounting for the relationship between abstract intrinsic values and lawyers’ ethical practice. The concept of virtues is a promising place to start.