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Uneasy Burden: What it Really Means to Learn to Think like a Lawyer

by Peter R. Teachout*

If you think you can think about a thing that is hitched to other things without thinking about the things that it is hitched to, then you have [learned to think like a lawyer].

Thomas Reed Powell¹

It imposes the uneasy burden and occasional joy of a complex double vision, a fluid, ambivalent response to men and events which represents, at its finest, a profoundly civilized adjustment to the cost of being human in this modern world.

Ralph Ellison²

I.

I first met Jim Elkins in the summer of 1979 when we were fellows together in a Law and Humanities program under the direction of Professor James White at the University of Chicago. Together with eight other law professors from around the country, we spent six weeks reading and discussing the great classics of Western literature: Homer's *Iliad*, Thucydides' *History of the Peloponnesian War*, Plato's *Gorgias*, Gibbon's *Decline and Fall of the Roman Empire*, Swift's *Tale of a Tub*, Burke's *Reflections*, and Austen's *Emma*. I do not think I am speaking

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1. Letter from T. Powell to R. Schuyler (Sept. 22, p. 1.). On file in Thomas Reed Powell papers in Harvard Law School Manuscripts Division. The actual quote reads: "If you think you can think about a thing that is hitched to other things without thinking about the things that it is hitched to, then you have a legal mind."

2. RALPH ELLISON, *SHADOW AND ACT* 137 (The New American Library 1964) (1953).

out of turn when I say that, not just for me, but for all of us, it was one of the most profound educational experiences of our lives.

Often after our daily discussion sessions, Jim and I would go out for a run along the shore of Lake Michigan. I remember one afternoon in particular when we ran for miles along the lakefront. It was one of those picture-perfect Chicago summer days: families with picnic blankets spread out on the grass, kids flying brightly colored kites, dogs chasing frisbees, the smell of barbecued chicken in the air, a gentle cooling breeze blowing in off the lake, sunlight glittering on the water. In our session that morning, we had just finished Thucydides' *History* and tomorrow we were starting into Plato's *Gorgias*. As we were running along, I confided to Jim that I had always had difficulty reading the Platonic dialogues. I had never been able to understand what it was that people found so attractive about Socrates. The Socrates who appeared in the dialogues struck me as something of an intellectual bully. Moreover, there was something about the quality of argument in the dialogues that I found deeply dissatisfying. It proceeded at such a level of abstraction that it often seemed to me to be either platitudinous or circular. How could anyone disagree with the proposition that the good is better than the bad?

In response, Jim told me about a book he had read that had a profound impact on his life, a book he had come back to again and again in the early days of his own law teaching: Robert Pirsig's *Zen and Art of Motorcycle Maintenance*.³ The book was about teaching and rhetoric and living one's life, but it was also, he told me, about reading Plato. The narrator of Pirsig's novel too, apparently, had been put off by Plato's Socrates, by his ruthlessly dissecting intelligence. In part, the book was about his coming to terms with that, about defining his own relationship to whatever it was that Socrates represented. Sensing that Pirsig's book might strike a responsive chord in me as well, Jim urged me to read it.

* * *

Due to the press of other readings, I did not get to Pirsig's book that summer. Indeed, it was several years before I finally had a chance to read it. By that time, ironically, I had come around completely in my attitude toward the Platonic dialogues. In the intervening years, Plato had become a teacher and a friend. The nature of that change is something about which I will have more to say later; suffice it to say here that by the time I got around to reading Pirsig's book, I had a

3. R. PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE* (William Morrow & Co., 1974).

completely different perspective on Plato and the dialogues than I had when Jim first suggested the book to me on our run that summer day in Chicago back in 1979.

Zen and the Art of Motorcycle Maintenance is, at the surface level, the story of a motorcycle trip taken by the narrator and his eleven year old son from their home in Minnesota to California. In the course of that journey, the narrator reflects upon his own life, interweaving his reflections with descriptions of the current journey. Something happened somewhere in the past—a kind of breakdown—and he is trying to come to terms with it. Whatever happened, it is clear that it had its roots in something that went wrong with the culture itself a long time ago. The “art of motorcycle maintenance” is a metaphor the narrator develops for coming to terms with that breakdown. It is a way of putting a world that has disintegrated back together again, of achieving “an inner piece of mind.”⁴

For me, the book had a special personal resonance. When I was in law school, I owned a Triumph Bonneville 650cc. Of all the bikes I ever owned, it was my favorite, and I rode it whenever I could. Among other places, I rode it down across the South when I went to Louisiana to do civil rights work in the summer of 1964. My body can still feel the divider splits—crickety crack, crickety crack, crickety crack—in the rolling concrete highway that runs through the red dirt hills of Mississippi. It was a beautiful machine, and it drew people to it almost magically whenever I stopped, providing an opener for conversations with local inhabitants along the way which otherwise I never would have had. That particular journey was especially memorable, but there were other journeys, and other machines, as well. So even if there had been nothing more to Pirsig’s book, the evocative descriptions in it of motorcycling through the Western mountains would have triggered in me an immediate sympathetic response.

But there *was* more to the book. *Zen and the Art of Motorcycle Maintenance* is, at bottom, a deeply serious effort by Pirsig to come to terms with what he perceives to be the destructive fragmentation and compartmentalization of human consciousness in the modern world. The great enemy, as he portrays it, is western civilization itself. It is the enemy because it superimposes upon us a set of rigid categories for thinking about experience—dualistic categories like art versus science, romanticism versus classicism, eastern thought versus western thought—that radically limit our perception and understanding. The entire thrust and pressure of western civilization, as Pirsig sees it, has

4. See *id.* at 73-75, 294-97.

been to subvert and destroy what was at some earlier point in human development a capacity for seeing and experiencing life whole. His great effort in *Art of Motorcycle Maintenance* is to find a way to bust through the limitations of those inherited categories in order to recover that earlier consciousness.

As his story unfolds, Pirsig's unnamed narrator recalls a mysterious figure, an apparent manifestation of his earlier self, a character named Phaedrus, whose animistic symbol is the wolf. Phaedrus represents a precivilized figure, a consciousness from the world before compartmentalization. Like a detective, the narrator seeks to discover what happened to Phaedrus, following the trail back ultimately to his graduate school days at the University of Chicago and to his experiences in a course on the classics of Greek philosophy.

Phaedrus' teacher in the course, known to the reader only as the anonymous "Professor of Philosophy," represents the destructive forces of civilization. He is a master of the dialectical method (as Phaedrus understands that method), using it to cut his students off from their former beliefs and understandings, to isolate them and expose their views to ridicule, to humiliate them and force them into a kind of submission.⁵ The intellectual games he plays with his students seem aimed at one thing only: to superimpose upon them, finally and irreversibly, the destructive compartmentalizing sensibility embodied in the classics of western civilization. Phaedrus, "the wolf," finds himself trapped in a deadly game of survival with this ominous figure. He is like a wild creature who is being carefully and ruthlessly stalked. The interchanges between the two, between the Professor of Philosophy and the wolf creature, represent a struggle between two great forces: the one representing the entire weight and body of western civilization, the denial of self and fullness of self, the compartmentalizing, dissecting intelligence; the other, the resisting, still-unbroken, precivilized self, the sensibility still capable of seeing the world whole.

The climactic moment comes when Phaedrus discovers the critical role played by Aristotle and Plato in establishing a destructive compartmentalizing consciousness. At first, Phaedrus is certain that Aristotle must have been responsible. In that philosopher's great tireless organizational performances, where he happily categorizes and subcategorizes the entire universe, Phaedrus thinks he has discovered the source of the departmentalizing and fragmenting tendencies of mind that have

5. See *id.* at 361-81. When the Professor of Philosophy stops showing up for class due to a mysterious illness, he is replaced by an equally anonymous "Chairman of the Committee," who represents, in a somewhat different manifestation, the same destructive civilizing forces. See *id.* at 382-93.

destroyed our ability to see experience whole. Yet there is something missing in that explanation, so he pursues the trail back even further, to Plato.

Until now, Phaedrus has always regarded Plato as a sympathetic figure. Unlike Aristotle, Plato's central effort, after all, was to find the unity in things. When Phaedrus reads the *Gorgias*, however, he realizes suddenly that he has been wrong. It was Plato, not Aristotle, he discovers, who first turned civilization off on the wrong track.

The key lies in understanding the significance of Plato's attack on the rhetoricians in the *Gorgias*. Who were the rhetoricians? Phaedrus wants to know. And what did they stand for?

The rhetoricians of ancient Greece were the first teachers in the history of the Western world. Plato vilified them in all his works to grind an axe of his own and since what we know about them is almost entirely from Plato they're unique in that they've stood condemned throughout history without ever having their side of the story told.⁶

What was it about the rhetoricians, or Sophists, as they were called, that made Plato feel a need to vilify them? What was it that they taught that he so feared or resented?

What they taught, Phaedrus discovers, was that all truths are "relative"—relative, that is, to particular human experience:

They were teachers, but what they sought to teach was not principles, but beliefs of men. Their object was not any single absolute truth, but the improvement of men. All principles, all truths, are relative, they said. "Man is the measure of all things." These were the famous teachers of "wisdom," the Sophists of ancient Greece.⁷

Plato attacks the Sophists, then, because their relativistic view of the world threatened the successful establishment of the emerging and still fragile idea that there is a single absolute Truth,⁸ and a single absolute Good. The Sophists's relativistic teachings threatened, in short, the establishment of the Platonic idea of "virtue": "Virtue, if it implies anything at all, implies an ethical absolute. A person whose idea of what is proper varies from day to day can be admired for his broadmindedness, but not for his *virtue*. Not, at least, as Phaedrus understands the word."⁹ But, if not virtue, what was it that the Sophists held out as the highest goal of human striving? What was it that they sought to

6. *Id.* at 172.

7. *Id.* at 373.

8. *Id.* at 373-74.

9. *Id.* at 374-75 (emphasis added).

embody in their own performances? What was it, in short, that Plato had to destroy in order to establish his notion of virtue as an absolute Good?

After intense searching, Phaedrus discovers the answer finally in Kitto's *The Greeks*, in the discussion there of the Greek concept of *arete*: "What moves the Greek warrior to deeds of heroism," he reads in Kitto, "is not a sense of duty as we understand it—duty towards others; it is rather duty towards himself. He strives after that which we translate 'virtue' but is in Greek *arete*, 'excellence' . . . we shall have much to say about *arete*. It runs through Greek life."¹⁰ But, what exactly is *arete*? What does it mean? Phaedrus returns to Kitto:

When we meet *arete* in Plato, . . . we translate it "virtue" and consequently miss all the flavour of it. "Virtue," at least in modern English, is almost entirely a moral word; *arete*, on the other hand, is used indifferently in all the categories, and simply means excellence.

Thus the hero of the *Odyssey* is a great fighter, a wily schemer, a ready speaker, a man of stout heart and broad wisdom who knows that he must endure without too much complaining what the gods send; and he can both build and sail a boat, drive a furrow as straight as anyone, beat a young braggart at throwing the discus, challenge the Phaeacian youth at boxing, wrestling or running; flay, skin, cut up and cook an ox, and be moved to tears by a song. He is in fact an excellent all-rounder; he has surpassing *arete*.¹¹

Then he finds the key: "*Arete* implies a respect for the wholeness or oneness of life, and a consequent dislike of specialization. It implies a contempt for efficiency—or rather a much higher idea of efficiency, an efficiency which exists not in one department of life but in life itself." "*Arete* implies a respect for the wholeness or oneness of life . . ."¹² Here at last was the answer Phaedrus has been looking for. This is what the Sophists represented that Plato felt a need to destroy. They represented a respect for the wholeness or oneness of life and the concomitant rejection of specialization of thought and understanding.

Against the Sophists' embrace of the wholeness or oneness of life, Plato deployed the full force of his dialectic. The dialectical question and answer method was perfectly suited to the task, moreover, because by its very nature it served to break down wholeness of understanding and response. It served to break down and isolate and expose to ridicule¹³—and by doing so directly contributed to fragmentation of

10. *Id.* at 376 (quoting from KITTO'S, *THE GREEKS*).

11. *Id.* at 377 (quoting from KITTO'S, *THE GREEKS*).

12. *Id.* (quoting from KITTO'S, *THE GREEKS*).

13. *Id.* at 391.

consciousness. That is why Aristotle too embraced dialectic, Phaedrus realizes, and why he claimed that "dialectic comes before everything else."¹⁴

Phaedrus now sees it all clearly. This is where it all began: with Plato's attacks on the rhetoricians in the *Gorgias*, and with his assertion there of the superiority of dialectic over rhetoric.

There is more to Pirsig's argument than I have covered here, but this, in a nutshell, is the vision that lies at the heart of *Zen and the Art of Motorcycle Maintenance*. At its core are three fundamental interlocking beliefs: first, that the rise of western civilization has brought about the destructive fragmentation of human consciousness; second, that Aristotle and Plato are primarily responsible for this development; and third, that the chief weapon employed by these two, and by their disciples, in destroying our capacity for responding to the wholeness of life was, and has continued to be, "the Socratic method."

* * *

One does not have to be a greatly perceptive reader to be able to discern the traces of Pirsig's influence in the paper that Jim Elkins has submitted here. In the first place, notice that Elkins' central preoccupation in this paper is the same as Pirsig's in *Zen and the Art of Motorcycle Maintenance*. In both cases, the core problem is the destructive compartmentalization and fragmentation of human consciousness. The difference is that in Elkins' paper the focus has shifted to the way a *legal* education—to the way "learning to think like a lawyer"—can destroy our capacity to see and respond to experience as whole persons.¹⁵

Second, Elkins' paradigmatic law teacher—his fictitiously-named "Professor Lawson"—goes to work on his law students in much the same way that, in Pirsig's *Zen*, the ominous Professor of Philosophy goes to work on his graduate students. Both are portrayed as representatives of the ruthlessly dissecting intelligence. Like Pirsig's Professor of Philosophy, Elkins' Professor Lawson seems to regard his primary mission in life as that of separating his students from their former, as it were, their "amateur," selves.¹⁶ Everything he says and does seems aimed at forcing a radical separation of their professional from their personal responses to experience.

14. *Id.* at 390 (quoting Aristotle) (emphasis in original deleted).

15. See James R. Elkins, *Thinking Like a Lawyer: Second Thoughts* 47 *MERCER L. REV.* 511, 536-38 (1996).

16. See discussion in Elkins, *supra* note 15, at 517-18.

Third, Elkins' law students regard their legal education in terms that are strikingly similar to those in which Pirsig's narrator regarded his graduate education in philosophy at the University of Chicago. For both, education is, at bottom, a pathological, self-denying, soul-destroying process. To be educated, at least in the graduate school context, means to undergo a process of dialectical inquisition, the chief aim of which is to disable one permanently from ever again responding to experience as a human being.¹⁷

Finally, following Pirsig, Elkins is deeply critical of the so-called "Socratic method" (at least as he sees it being employed in the law school context).¹⁸ Like Pirsig, he regards the Socratic method as a weapon of dissection and fragmentation. It is not just that it makes students feel uncomfortable, it is that it is used—Pirsig would say, consciously—to break down the student's integrity of self. The fact that the Socratic method is the primary pedagogical method used in law school is further evidence of legal education's destructive potential.

To Elkins, in short, legal education represents a particularly acute and pernicious manifestation of what education in western cultural traditions represents more generally to Pirsig. Elkins' paper on the hazards of learning to think like a lawyer can be seen, in this sense, as an effort to apply to legal education the basic teachings and insights of *Zen and the Art of Motorcycle Maintenance*.

* * *

Reduced to its essence, Elkins' indictment of traditional legal education rests upon two core, Pirsig-inspired, claims. First, that legal education is morally incapacitating because it teaches us to keep radically separate that which is moral from that which is legal and, furthermore, to be concerned only with that which is legal. Second, that legal education is destructive of the self because it teaches us to deny every aspect of our response to experience except that which is purely and technically legal. Learning to think like a lawyer, under this view, is doubly disabling: not only does it prevent us from seeing and dealing intelligently with moral issues, it renders us incapable of responding to experience as human beings. But are these claims valid? Are these in fact the necessary consequences of "learning to think like a lawyer"? Is Elkins' indictment, in short, a fair one?

17. See discussion in Elkins, *supra* note 15, at 526-28.

18. See, e.g., Elkins, *supra* note 15, at 524, 526. Professor Elkins draws a distinction, however, between what is practiced in law schools today and what Socrates himself performed and espoused. *Id.* at 524.

My own view, which I elaborate below, is that, carried along by Pirsig's influence, Elkins ends up getting things exactly backwards. I know that there are radical positivists who insist that law ought to be kept entirely separate from morality, and I also know that there are bad law teachers—there are “Professor Lawsons” out there—and to that extent Elkins has a point. But the mainstream tradition of legal education in this country, it seems to me, has always emphasized the key role played by morality in the development and understanding of the law; it has always taught that we proceed at our hazard if we ignore the close and intimate interrelationship between the two. Indeed, I would go beyond mere rebuttal. Not only is a legal education not morally incapacitating as Elkins claims; if anything, I would argue, it offers those who take it seriously a *more* complex understanding of the moral dimensions of experience.

Turning to Elkins' second complaint, his concern with the general dehumanizing impact of an education in the law, my response is much the same. I recognize that making connections between what we know specially as lawyers and everything else we know is not always easy, indeed, that to do it right often requires a certain art; and I also recognize that there will always be some students and practitioners who are not very good at it. I disagree strongly, however, with Elkins' claim that learning to think like a lawyer somehow requires us to deny important aspects of the self, or to forego self-expression, or otherwise to abandon our basic humanity. A legal education may discourage “fuzzy thinking,” it may come down hard on sentimentalism in all its various other forms, but it does not do the things that Elkins charges it with. Indeed, I would argue that, here again, for those who are willing to take it seriously, an education in the law opens up a whole new range of possibilities for self-expression and self-realization.

In this Article, I propose putting these claims to the test by examining actual examples of the legal mind at work. What better way to understand what it means to learn to think like a lawyer than to watch the legally trained sensibility in actual performance? The first example is Justice Robert Jackson's opening statement as Chief United States Prosecutor at Nuremburg.¹⁹ I have chosen Jackson's statement because I cannot think of a better example of a performance inspired by the traditions of the common law. The second example is an examination question—the famous “injured motorcyclist” question—from the Legal Process course at Harvard Law School.²⁰ I do not think anybody would contest that the Legal Process school reflects the mainstream tradition

19. See *infra* text accompanying notes 21-35.

20. See *infra* text accompanying notes 40-52.

of legal education in this country. The first of these examples, it will be noted, is drawn from the "real world" of practice; the second, from the world of legal education. If these do not reflect what it means to think like a lawyer, it is difficult to imagine what would.

For purposes of making the points I wish to make I could have chosen selections from more recent legal writings, but I deliberately decided against doing so because I wanted to avoid having to deal with the complicating claim that whatever morality or other humanizing influence has crept into legal education has done so only as the result of recent enlightened reforms. I chose the examples I did precisely because they are such classic performances of the traditional understanding of what it means to think like a lawyer.

As we examine these performances, we should ask of them directly and critically the questions that Elkins raises in his paper: Here is a legal mind in performance. Do we see evidence of the radical separation of law and morality? Do we see a narrow "legalistic" mind at work? Do we see a denial of self? If we do find evidence of these sorts of pathological pressures at work, then maybe Elkins is right. But if those pressures are not reflected, that raises serious questions, it seems to me, about the basic validity of his thesis. Maybe the problem is not learning to think like a lawyer after all; maybe it is something else. But if so, then what is that "something else"? And what does learning to think like a lawyer really mean?

II.

When Justice Jackson was first asked to serve as Chief United States Prosecutor at Nuremberg, he had to deal with two threshold problems the resolution of which would vitally effect the course of subsequent proceedings.²¹ The first was whether there ought to be a trial in the first place—what might be called the due process problem. The second was whether waging an aggressive war ought to be considered a crime at international law. As Jackson set about framing his approach to these problems, his training as a lawyer played a deeply influential role. With respect to the first question, Jackson concluded that there ought to be a trial and, furthermore, that the defendants ought to be provided with counsel and with all available means to defend themselves. He responded as he did in large part because he brought to the question a sensibility forged in the due process traditions of Anglo-American jurisprudence. With respect to the second question, Jackson concluded

21. For an excellent brief description of Jackson's performance at Nuremberg, see Telford Taylor, *The Nuremberg Trials*, 55 COLUM. L. REV. 488 (1955).

that waging an aggressive war should be considered a crime at international law. In arriving at this view, and in subsequently successfully advocating its adoption, Jackson turned again to his legal education, finding inspiration and support in this instance in the fundamental traditions of the common law. In both instances, Jackson would not have responded as he did if he had not learned to think like a lawyer. His Nuremberg performance offers a nice measure in this sense of what learning to think like a lawyer really means.

* * *

After the end of World War II, there was considerable sentiment, both in this country and abroad, in favor of summary execution of the defeated Nazi leaders. Those who favored this "political" disposition argued that a judicial trial would serve no legitimate purpose. What the Nazi leaders had done was so obviously and so hideously culpable that it was inconceivable that they should escape punishment. Since the outcome of a trial was a foregone conclusion, and since a trial with a predetermined outcome would be a travesty of justice, the Nazi leadership should be executed without trial by virtue of a political decision.²²

Jackson strongly objected to this proposal, arguing that the Nazi leaders should be afforded a trial at which they would be given full, fair opportunity to defend themselves consistent with basic notions of due process. They should have the benefit of the presumption of innocence; they should be provided with assistance of counsel; and they should be given full opportunity to present their defense. Although Jackson ultimately prevailed, there was still considerable skepticism about the value of holding a trial. One of the first challenges he faced in his opening statement, then, was explaining to the world why providing these defendants with a fair trial was important.

In reading the following excerpts from Jackson's opening statement, the thing to pay attention to, for our purposes, is not so much the substantive argument he makes, although that is not irrelevant, as the "quality of mind" that is reflected. Notice how effectively and forcefully Jackson interweaves the language of morality and the language of law. He achieves here what might be called the full expression of the ethically integrated sensibility. He does so, moreover, as we shall see, not despite, but in large part *because of*, his legal education and training. Jackson's performance represents in this respect, I would

22. *The Nuremberg Trials*, *supra* note 21, at 511.

argue, a clear refutation of Elkins' view of the destructive consequences of a legal education.

Jackson began as follows:

The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.²³

Jackson then turned to describe the defendants and the "wrongs" they had done:

In the prisoners' dock sit twenty-odd broken men. Reproached by the humiliation of those they have led almost as bitterly as by the desolation of those they have attacked, their personal capacity for evil is forever past Merely as individuals their fate is of little consequence to the world.

What makes this inquest significant is that these prisoners represent sinister influences that will lurk in the world long after their bodies have returned to dust. [They are] living symbols of racial hatreds, of terrorism and violence, and of the arrogance and cruelty of power. They are symbols of fierce nationalisms and of militarism, of intrigue and war-making which have embroiled Europe generation after generation, crushing its manhood, destroying its homes, and impoverishing its life. They have so identified themselves with the philosophies they conceived and with the forces they directed that any tenderness to them is a victory and an encouragement to all the evils which are attached to their names. Civilization can afford no compromise with the social forces which would gain renewed strength if we deal ambiguously or indecisively with the men in whom those forces now precariously survive.²⁴

Yet, no matter how heinous their conduct, the defendants should still be given a fair trial:

The former high station of these defendants, the notoriety of their acts, and the adaptability of their conduct to provoke retaliation make it hard to distinguish between the demand for a just and measured retribution, and the unthinking cry for vengeance which arises from

23. TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 98-99 (1947) [hereinafter TRIAL OF THE MAJOR WAR CRIMINALS].

24. *Id.* at 99.

the anguish of war. It is our task, so far as humanly possible, to draw the line between the two. We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice

These defendants may be hard pressed but they are not ill-used

. . . .
If these men are the first war leaders of a defeated nation to be prosecuted in the name of the law, they are also the first to be given a chance to plead for their lives in the name of the law. Realistically, the Charter of this Tribunal, which gives them a hearing, is also the source of their only hope. It may be that these men of troubled conscience, whose only wish is that the world forget them, do not regard a trial as a favor. But they do have a fair opportunity to defend themselves—a favor which these men, when in power, rarely extended to their fellow countrymen. Despite the fact that public opinion already condemns their acts, we agree that here they must be given a presumption of innocence, and we accept the burden of proving criminal acts and the responsibility of these defendants for their commission.²⁵

Jackson next addressed the defendants' contention that it was unfair to charge them with the crime of waging an aggressive war since at the time they acted that particular offense had not been clearly defined as a crime in positive international legislation. In responding to this contention, Jackson turned for inspiration and support to the common law. To adopt defendants' position, he argued, would be to leave international law "helpless" to deal with this and similar situations. But it did not have to be so paralyzed. "International law," he observed:

is not capable of development by the normal process of legislation, for there is no continuing international legislative authority. It grows, as did the common law, through decisions reached from time to time in adopting settled principles to new situations. The fact is that when the law evolves by the case method, as did the common law and as international law must do if it is to advance at all, it advances at the expense of those who wrongly guessed the law and learned too late their error. The law, so far as international law can be decreed, has been clearly pronounced when these acts took place.²⁶

25. *Id.* at 101-02.

26. *Id.* at 147.

The common law had evolved through the application of underlying principles to new situations. International law should develop in that same way. The civilized world had already recognized in various treaties and other documents the notion that waging an aggressive war was no longer considered acceptable behavior by the international community. The principles underlying those treaties and other documents already existed. All that remained was to apply them, in the manner of the common law, to the actions of the defendants.

Nothing less was at stake, Jackson observed, than "civilization" itself:

The real complaining party at your bar is Civilization. In all our countries it is still a struggling and imperfect thing. It does not plead that the United States, or any other country, has been blameless of the conditions which made the German people easy victims to the blandishments and intimidations of the Nazi conspirators.

But it points to the dreadful sequence of aggressions and crimes I have recited, it points to the weariness of flesh, the exhaustion of resources, and the destructions of all that was beautiful or useful in so much of the world, and to greater potentialities for destruction in the days to come. It is not necessary among the ruins of this ancient and beautiful city, with untold members of its civilian inhabitants still buried in its rubble, to argue the proposition that to start or wage an aggressive war has the moral qualities of the worst of crimes. The refuge of the defendants can be only their hope that international law will lag so far behind the moral sense of mankind that conduct which is a crime in the moral sense must be regarded as innocent at law.

Civilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance. It does not expect that you can make war impossible. It does expect that your judicial action will put the forces of international law, its precepts, its prohibitions, and most of all its sanctions, on the side of peace, so that men and women of good will, in all countries, may have "leave to live by no man's leave, underneath the law."²⁷

Jackson's performance at Nuremberg, it seems to me, offers a powerful rebuttal of Elkins' claims about the destructive consequences of learning to think like a lawyer. Elkins claims that learning to think like a lawyer means learning to keep radically separate law and morality. But Jackson clearly had learned to think like a lawyer and there is no evidence of that kind of radical separation here. Indeed, just the opposite, his indictment of the defendants turns upon an appreciation of the close and intimate relationship that exists between law and morality. It is true that the morality Jackson asserts is not his own personal

27. *Id.* at 155.

morality but rather the morality of the civilized world, but it is a deep, substantive morality nonetheless.

"[T]o start or wage an aggressive war," Jackson insists at one point in telling language, "has *the moral qualities of the worst of crimes*."²⁸ At another point, he argues in a similar vein that it would be wrong under these circumstances to treat "conduct which is *a crime in the moral sense*" as "*innocent in law*."²⁹ Throughout his opening statement, considerations of law and morality are so inextricably intertwined that if one were to try to separate out the morally relevant from the legally relevant statements, the entire performance would be rendered meaningless. It is not just that connections of some sort can be made between law and morality. In the world that Jackson describes here, law is the embodiment in enforceable legal standards of "the moral sense of mankind."

Jackson's performance also challenges the popular notion that learning to think like a lawyer means learning to think and speak in "narrow legalistic terms." Listen to this voice:

In the prisoner's dock sit twenty-odd broken men. Reproached by the humiliation of those they have led almost as bitterly as by the desolation of those they have attacked, their personal capacity for evil is forever past Merely as individuals their fate is of little consequence to the world.

What makes this inquest significant is that these prisoners represent sinister influences that will lurk in the world long after their bodies have returned to dust

The real complaining party at your bar is Civilization It does not plead that the United States, or any other country, has been blameless

But it points to the dreadful sequence of aggressions and crimes I have recited, it points to the weariness of flesh, the exhaustion of resources, and the destructions of all that was beautiful or useful in so much of the world It is not necessary among the ruins of this ancient and beautiful city with untold members of its civilian inhabitants still buried in its rubble, to argue the proposition that to start or wage an aggressive war has the moral qualities of the worst of crimes.³⁰

To be able to see in the prisoner's dock "twenty-odd broken men," to speak of the "sinister influences" they represent, influences that will "lurk in the world long after their bodies have returned to dust," to

28. *Id.* (emphasis added).

29. *Id.*

30. *Id.* at 99, 155.

summon up the "dreadful" consequences of what they have done, not just the terrible human crimes, but "the weariness of flesh, the exhaustion of resources, and the destructions of all that was beautiful or useful . . ."—to think and talk this way, it seems to me, is to think and talk as a whole person. It is to address others as whole persons as well. Whatever else Jackson may have learned in learning to think like a lawyer, he clearly has not learned to think in narrow legalistic terms. Whatever he may have given up, he has not given up his capacity for responding to experience as a human being—indeed, for responding to it in a deeply poetic way.

It is true that learning to think like a lawyer does require a kind of denial of the self. Jackson is quite explicit about that here: The horrendous things that the defendants have done, he admits, "make it hard to distinguish between the demand for a just and measured retribution, and the unthinking cry for vengeance which arises from the anguish of war."³¹ Nonetheless, it is something that we must strive to do. "We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice."³² Like Pirsig's Phaedrus, Jackson recognizes that there is a difference between the spontaneous human response and the response called for by the civilized traditions of our culture. Unlike Phaedrus, however, Jackson comes down in favor of the civilized response. The deeply felt personal response—the "unthinking cry for vengeance which arises from the anguish of war"—ought to be repressed in this instance, he argues, in favor of the "detached" response. It ought to be repressed, not out of sympathy for the defendants, but because our sense of who we are as a people depends upon it. If we were to vent our anguish by summarily executing these defendants, it might satisfy our immediate personal feelings, but it would ultimately come back to haunt us. "To pass these defendants a poisoned chalice is to put it to our own lips as well."³³

In the world of Jackson's opening statement, there is no radical separation of law and morality. There is no loss of capacity for human response. There is no denial of the self—except for those primitive aspects that ought to be denied. The legally trained sensibility we see reflected here is clearly capable of responding to experience in a fully integrated way. If Jackson's performance at Nuremberg were an anomaly in this respect, if it were the sort of performance that most lawyers and law professors would regard with surprise and dismay, it

31. *Id.* at 101.

32. *Id.*

33. *Id.*

would be one thing. But it clearly is not. Most lawyers and law professors would hold it up, I think, as I do here, as an example of the legal mind at its best.

But it is not just that learning to think like a lawyer does not have the negative consequences that Elkins claims it does; it is that it can actually serve to expand the range of our moral understanding. It potentially offers a *more* complex appreciation of the moral dimensions of experience. That expansion of moral understanding is reflected in Jackson's opening statement in two primary ways. First of all, it is reflected in his insistence upon the importance of due process. When Jackson argues that the defendants ought to be given a fair trial, he is speaking, it is important to see, not in some amateur capacity, but as one who has been trained to think like a lawyer. The sensibility to which he is giving expression has been forged, as it were, in the Anglo-American traditions of due process. It is a deeply moral sensibility. We should provide these defendants with a fair trial, Jackson argues, not because as individuals they are specially deserving, but because the morality of due process requires it. "Despite the fact that public opinion already condemns their acts, we agree that here they must be given a presumption of innocence, and we accept the burden of proving criminal acts and the responsibility of these defendants for their commission."³⁴ We do so because we want this trial to "commend itself to posterity as fulfilling humanity's aspirations to do justice."³⁵ Doing justice means more than just arriving at the right result, it means providing fair process. When we do things the right way, as Fuller once observed, we are more likely to do the right thing.³⁶ It is one of the first lessons that a lawyer learns.

The second respect in which it can be said that Jackson's moral understanding is enhanced by his legal training is reflected in his recognition of the moral underpinnings of the common law. Law has always grown, Jackson insists, through the progressive incorporation of the "moral sense" of the community, and that is the way international law should grow too. This entire section of Jackson's argument—crucial to his argument that waging aggressive war ought to be considered a crime at international law—is carried, as it were, by his understanding of the common law. Here, once again, law and morality intersect in a vital and important way.

34. *Id.* at 102.

35. *Id.* at 101.

36. "If men are compelled to act in the right way, they will generally do the right thing." Lon L. Fuller, *Positivism and Fidelity to Law*, 71 HARV. L. REV. 630 (1958).

In these two crucial respects, then—in the insistence upon the morality of due process, and the recognition of the moral foundations of the common law—Jackson's opening statement at Nuremberg demonstrates that learning to think like a lawyer not only is not morally incapacitating but, just the opposite, offers those who take it seriously a more complex understanding of the moral dimensions of experience.

* * *

In talking this way about Jackson's opening statement, I do not want to minimize in any way the art that went into its composition. It is a masterful performance from any standpoint. Indeed, I would hold it up as an example in the modern legal context of what the ancient Greeks called *arete*. But it is an example of *arete* not as the Sophists understood that term (and as Pirsig would seek to resurrect it)—a performance of technical excellence—but, rather as Plato redefines the term in the *Gorgias*—a performance of excellence *in pursuit of virtue*.

This point needs explaining: One of the problems with *Zen and the Art of Motorcycle Maintenance* is that Pirsig does not understand finally what Plato is up to in the *Gorgias*. He makes the whole book turn on his narrator's reading of that dialogue, but then his narrator fails to get it right. He claims that Plato seeks in the *Gorgias* to replace the inherited Greek notion of *arete* with his idea of "virtue."³⁷ But that is not what Plato seeks to do at all. His entire effort, rather, is to *redefine* the meaning of the term *arete* so that henceforth what it means "to be excellent" at something is "to be excellent in the pursuit of that which is just or good."³⁸ The reason Plato undertakes this effort is that the inherited Greek language of his day was one in which terms of excellence were totally divorced from terms of virtue. Thus, working with that language, the Sophists could maintain that to be a good rhetorician—to achieve *arete* as a rhetorician—one did not have to know anything about justice. All one had to know was how to persuade one's audience, through manipulation of the techniques of rhetoric, to adopt whatever position would serve the interests of one's client. Plato's great effort in the *Gorgias* was to change that way of thinking and talking about excellence and about human activity more generally. It was to transform the inherited language into an ethically integrated language so that when one talked about being good at argument, or at anything else, one meant being good at it in the pursuit of virtue. It is in that

37. See *supra* notes 7-10 and accompanying text.

38. See James B. White, *Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849 (1983).

newly reconstituted, ethically integrated, language that Plato has Socrates speak when toward the end of the dialogue he sums up where he and his interlocutors have come in the course of their inquiry:

[A]mong so many arguments (*logos*), when the others are being refuted, only this argument is stable—that we must avoid doing justice more than suffering it, and above all a man must practice, not seeming good, but being good, in private and public life; if someone becomes evil in some way, he is to be punished, and this is the second good after being just—to become just and pay justice in being punished. All flattery, to ourselves or to others, few or many, we must shun; this is how we should use rhetoric—*always in the direction of justice*—and every other activity.³⁹

Notice that there is no attempt here to replace rhetoric with dialectic, or to discount rhetoric in any other way, as Pirsig would have us believe. The effort, rather, is simply to ensure that when rhetoric is employed, it is employed “always in the direction of justice.” *Arete* has not been replaced with virtue; the term simply has taken on ethical meaning.

It is in that reconstituted sense of the term, in any event, that I would hold up Jackson’s performance as an example of *arete* here. I cannot think of a better example of an instance where excellence in a legal performance means excellence in the pursuit of justice.

* * *

The only complication with using Jackson this way is that, as it turns out, Jackson never went to law school. He acquired his legal education the old fashioned way, by “reading law” in a law office. So while he clearly did learn to think like a lawyer, he did not do so in the law school context. But should that make a difference? Is there something especially corruptive about the law school experience? Is the basic view of law that is taught in law school different from that expressed by Jackson at Nuremberg? Do law school exams somehow skew the perspective?

III.

The best way to answer these questions is to take an actual examination from a law school course—a *traditional* law school course—and see what sort of understanding is reflected there. We should ask of the exam question the same sorts of questions we asked before: What view

39. PLATO, GORGIAS 106 (Terrence Irwin trans., Oxford Univ. Press 1979) (emphasis supplied).

is reflected here of the relationship between law and morality? Is it even a concern? If so, what are students supposed to think about that relationship? That law and morality should be kept radically separate? Or that the two are inextricably intertwined? What view, ultimately, are students supposed to bring away from their legal education? Are they supposed to come away with the sort of view that is expressed by Elkins' "Professor Lawson"? Or with a view closer to that expressed by Jackson in his opening statement at Nuremberg?

For purposes of this essay, I have chosen an examination question from the Legal Process course at Harvard Law School: the famous "injured motorcyclist" question first given in the mid-sixties.⁴⁰ I have chosen this question because it represents, I think, to the extent any particular law school examination can be said to represent, the traditional law school view. By generations of law students, not just at Harvard, but elsewhere, the Legal Process course, based on materials prepared by Henry Hart and Albert Sacks, has been considered the capstone of a law school education.⁴¹ It has been the course that pulls it all together. So careful scrutiny of a final examination question from that course should yield a fairly reliable clue as to what learning to think like a lawyer means in the traditional law school context.

The central issue raised by the injured motorcyclist question is whether the so-called "duty of rescue" doctrine should be adopted in a particular jurisdiction. More particularly, it is whether such a doctrine should be adopted by the courts as opposed to the legislature—and, if so, on what terms. To answer that question, the student is required to draw on everything he or she has learned: about the nature of the common

40. Question II, Final Exam in Legal Process, Professor Albert Sacks, Law School of Harvard University, Examinations for 1967-68, at 37-39 [hereinafter *Legal Process Exam*]. To the extent I have been able to determine, this examination question was given at least four times in the Legal Process course at Harvard Law School: by Professor Sacks in 1964-65; again by Professor Sacks (with initials replacing names) in 1967-68; a third time by Professor Sacks in 1972-73; and a fourth time by visiting Professor Norman Dorsen in 1983-84. The complete question, as it appeared in the 1967-68 exam, is set out *infra* in Appendix A.

For purposes of discussion in this article, I have used the names, instead of initials, as they appeared in 1964-65 exam. Citation references, however, are to the 1967-68 exam because it was the only exam available at this time.

41. HENRY M. HART & ALBERT SACKS, *THE LEGAL PROCESS* (Foundation Press 1994). From 1958 to 1994, the Legal Process materials were available only in a multilith "tentative edition" dated 1958. In 1994, the original 1958 materials were published in hardback by Foundation Press. For a description of the history of the Legal Process course at Harvard and the use of the Hart and Sacks materials, see the introductory essay by Eskridge and Frickey, "An Historical and Critical Introduction to The Legal Process," in *H. Hart & A. Sacks, The Legal Process*, at li-cxxxvi.

law; about the relationship of law to morality; about the way the law evolves over time; about reasoning by analogy; about the relative capacities and limitations of courts and legislatures—in short, about a whole range of things that one learns in the course of a law school education. In reading the question and speculating about what might be considered an acceptable answer, it is interesting to ask, then, what view is implicit about what it means to learn to think like a lawyer.

The question begins with Drake, a specialist in brain surgery, accompanying Tortson, a Torts professor, to a public meeting at which Tortson gives a lecture entitled “Some Public Misconceptions about Law.”⁴² In the course of the lecture, Tortson invokes the traditional refusal of the courts to impose “an affirmative obligation to aid a stranger in distress”⁴³ in support of his general thesis that law and morality are separate things and ought to be kept so. On this larger theme, Tortson had the following to say:

With the humane side of the question courts are not concerned. It is the omission or negligent discharge of legal duties only which comes within the sphere of legal cognizance. For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure.⁴⁴

Walking back together after the meeting, Doctor Drake and Professor Tortson witness an accident in which a motorcyclist skids on an ice patch and collides with a tree. They find the motorcycle driver, Jones, “lying unconscious on the side of the road, bleeding profusely from a deep gash in his thigh.”⁴⁵ Professor Tortson urges the doctor to “do something to stop the bleeding,” but Drake replies that he does not wish “to get involved.”⁴⁶ Thereupon Tortson “immediately telephone[s] the police from a nearby public phone and request[s] that an ambulance be sent.”⁴⁷ Unfortunately, because of inclement weather, the ambulance takes a half an hour to arrive. Jones consequently dies on the way to the hospital because of “loss of blood.”⁴⁸

42. Legal Process Exam, *supra* note 40, at 37.

43. *Id.*

44. *Id.* at 37-38.

45. *Id.* at 38.

46. *Id.*

47. *Id.*

48. *Id.*

The administrator of Jones' estate subsequently files a wrongful death action against Doctor Drake in an Ames state court, alleging that "Drake was under a legal duty as a doctor to provide emergency care, and that if Drake had fashioned and applied a tourniquet to Jones' wound, as he easily could have, the bleeding would have been checked and Jones would have survived."⁴⁹ The trial court dismisses the complaint for failure to state a cause of action. Jones' administrator appeals to the Supreme Court of Ames.

The student is asked to discuss how this appeal should be decided. As an aid to analysis, the student is provided with the following background material:

Lawyers for the litigants have presented the following materials:

(1) Numerous decisions of the state supreme court in accord with the assertion of the Torts professor that there is no duty to come to the aid of a stranger. In a recent application of this principle, the Court absolved an expert swimmer of any liability by reason of his failure to attempt the rescue of a drowning child.

(2) Decisions to the effect that one who undertakes, whether by request or officiously, to assist a person in peril must act with reasonable care and prudence and cannot abandon his efforts if to do so would expose the injured or endangered person to further risk of harm.

(3) Decisions allowing recovery in *quantum meruit* for necessary medical services furnished in an emergency, even where the patient did not specifically request or agree to pay for the services.

(4) A so-called "Good Samaritan" statute of a common type, enacted by the state legislature in 1966, which provides:

A physician or registered nurse who in good faith renders emergency care at the scene of an emergency where a physician-patient or registered nurse-patient relationship did not exist prior to the advent of such emergency, shall not be liable for any civil damages as a result of acts or omissions by the physicians or registered nurse in rendering the emergency care, except acts or omissions amounting to gross negligence or willful and wanton misconduct.

(5) A provision in the Principles of Medical Ethics promulgated by the American Medical Association (a voluntary professional organization, membership in which is not a prerequisite for the practice of medicine):

A physician is free to choose whom he will serve. He should, however, respond to any request for his assistance in an emergency or whenever temperate public opinion expects the service.

(6) A penal provision in the state's Motor Vehicle Code which requires the driver of any vehicle involved in an accident to "render to

49. *Id.*

any person injured in such accident reasonable assistance in securing medical aid or transportation."⁵⁰

After having reviewed this background material, the student is asked to "[s]tate what the decision of the Supreme Court of Ames should be, canvassing all issues."⁵¹

The injured motorcyclist question is an extremely rich question, the various elements of which cover the entire range of issues to which the student has been exposed in the Legal Process course. It would be impossible even to begin to do justice to the full range of issues here. Rather than attempt that, I want to concentrate on just those issues that have particular bearing on the concerns that Elkins raises in his paper. The central issue for our purposes is the one raised directly by Tortson's lecture: What is the correct view of the relationship between law and morality? Is Tortson right when he asserts that "[w]ith the humane side of the question courts are not concerned."⁵²

The first thing to notice is that this *is an issue*. The student is clearly supposed to have developed a view on the matter. This would seem to undercut Elkins' claim that the relationship between law and morality is not a traditional law school concern. But what view is the student supposed to have of this relationship? Is the student supposed to agree with Tortson? For anyone who has worked through the Legal Process materials, the answer would be readily apparent—and the answer is no.

The Legal Process materials, it turns out, proceed on the same understanding of the relationship of law and morality that Jackson expresses in his opening statement at Nuremberg. The chief difference is that, because the Legal Process treatment of this question is more extensive, the understanding developed there is more nuanced and refined. The core vision, however, is the same.

The starting point for analysis is understanding the nature of the common law. The view of the common law embraced by the Legal Process materials is the classic nineteenth century view as expressed by Chief Justice Shaw of the Massachusetts Supreme Court in his famous description in the *Norwood Plains* case:⁵³

It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular

50. *Id.* at 38-39.

51. *Id.* at 39.

52. *Id.* at 37.

53. *Norwood Plains Co. v. Boston & Maine R.R.*, 1 Gray 263 (Mass. 1854) (discussed in HART & SACKS, *supra* note 41, at 362-83).

cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it. These general principles of equity and policy are rendered precise, specific, and adapted to practical use, by usage, which is the proof of their general fitness and common convenience, but still more by judicial exposition; so that, when in a course of judicial proceeding . . . the general rule has been modified, limited and applied, according to particular cases, such judicial exposition, when well settled and acquiesced in, becomes itself a precedent, and forms a rule of law for future cases, under like circumstances. The effect of this expansive and comprehensive character of the common law is, that whilst it has its foundations in the principles of equity, natural justice, and that general convenience which is public policy; although these general considerations would be too vague and uncertain for practical purposes, in the various and complicated cases, of daily occurrence, in the business of an active community; yet the rules of the common law, so far as cases have arisen and practices actually grown up, are rendered in a good degree, precise and certain, for practical purposes, by usage and judicial precedent.⁵⁴

The great virtue of the common law, Shaw tells us, is that it "consists of a few broad and comprehensive principles founded on reason, natural justice, and enlightened public policy."⁵⁵ These principles form, as it were, the ethical core of the common law. Examples include the principle that no one should be able to profit by his own fraud or take advantage of his own wrong,⁵⁶ the prohibition against unjust enrichment,⁵⁷ and the principle that those with great economic power ought not to be allowed to take unfair advantage of others.⁵⁸ Other examples are the principle that, as between an innocent party and a wrongdoer, the wrongdoer should bear the damages; and the principle that, in the case of two wrongdoers, damages ought to be proportioned according to wrong. Around a core of such fundamental principles, which have both moral and legal dimensions, a more or less coherent body of jurisprudence has gradually developed. To put it in terms of Plato's discussion

54. *Norwood Plains Co.*, 1 Gray at 267 (emphasis supplied).

55. *Id.*

56. See, e.g., *Riggs v. Palmer*, 115 N.Y. 506 (1889); John W. Wade, *Acquisition of Property by Willfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715 (1936).

57. The ethical prohibition against unjust enrichment is expressed in the common law in, among other places, the doctrine of constructive trust. See, e.g., AUSTIN W. SCOTT, *THE LAW OF TRUSTS* § 404.2 (2d ed. 1956).

58. See, e.g., *Railroad Co. v. Lockwood*, 17 U.S. (1 Wall.) 358 (1873).

in the *Gorgias*, the principles lie at the heart of a body of jurisprudence that is constantly striving "in the direction of justice."⁵⁹

The student of Legal Process would be expected to regard these fundamental principles as a "precious inheritance and possession"⁶⁰—so much so, indeed, that even a democratically elected legislature should not be allowed to depart from them unless it does so thoughtfully and responsibly and makes its intention to do so unmistakably clear.⁶¹ The following propositions form the core of the Legal Process understanding:

that the law rests upon a body of hard-won and deeply-imbedded principles and policies—such, precisely, as the principle that one should not be allowed to profit by his own wrong; that this body of thought about the problems of social living is a precious inheritance and possession of the whole society; that the legislature, within broad constitutional limits, has the right and power to modify or depart from one or more of these traditional principles and policies if after due consideration it deems it wise to do so; but that no body of men and women constituting for the time being merely one session of the legislature has authority to abandon any part of this inheritance unthinkingly or without making clear openly and responsibly its purpose to do so; and that accordingly every statute is to be read as subject to established principles and policies of the general law save only as a decision to modify or depart from them is made unmistakably plain.⁶²

Like Jackson at Nuremberg, moreover, the Legal Process materials embrace the view that the common law has continued to evolve over time and, furthermore, that the primary process through which it has done so is through the progressive incorporation by the courts of the evolving moral customs of the community. That view is given classic articulation in James Carter's famous lectures on the role of custom in the development of the law, subsequently published in book form under the title, *Law: Its Origin, Growth and Function*.⁶³ The core of that understanding is expressed in the following passage from Carter's book:

The judges are both by appointment and tradition the experts in ascertaining and declaring the customs of life. As the higher forms of conduct become customary they pervade all social and business life [The role of the judge is] to recognise and sanction the improving

59. See *supra* note 39 and accompanying text.

60. HART & SACKS, *supra* note 41, at 92-93.

61. *Id.*

62. *Id.*

63. JAMES C. CARTER, *LAW: ITS ORIGIN, GROWTH AND FUNCTION* (Da Capo Press 1974) (1907) (discussed in HART & SACKS, *supra* note 41, at 430-35).

customs of life. Here is the process by which the unwritten private law recognises the advance in morals and manners and affixes upon advancing forms of custom the authenticating stamp of public approval In short, it is the function of the judges to watchfully observe the developing moral thought, and catch the indications of improvement in customary conduct, and enlarge and refine correspondingly the legal rules. In this way, step by step, the great fabrics of common law and equity law have been built up without the aid of legislation and the process is still going on.⁶⁴

This notion that the law evolves through judicial transformation of "developing moral thought" and "improvement in customary conduct" into enforceable "legal rules" lies at the core not only of the Legal Process view but also, it will be recalled, the view embraced by Jackson in his opening statement at Nuremberg. Here once again, we find an almost perfect correspondence between the two.

One important implication of adopting this view is the recognition that the law is not, and should never be, bound by mindless adherence to precedent or *stare decisis*. The law is always and inescapably in a state of flux. Earlier precedents are constantly being modified and adjusted to accommodate doing whatever justice requires under present circumstances.

The student of Legal Process would be expected to bring all of this to bear in drafting a memorandum for the Ames Supreme Court in the injured motorcyclist case. The immediate implication should be clear. Professor Tortson's initial assertion that "[w]ith the moral side of the question courts are not concerned," the student would be expected to say, is patently and demonstrably false. It runs counter to the most fundamental understanding of what law is and how it has developed.

That is not to say, however, that the reverse is necessarily true: that whatever is moral is also legal. Indeed, much of what Tortson goes on to say after his initial assertion has a certain validity. The student has to make distinctions here. That is what learning to think like a lawyer means: It means, as Thomas Reed Powell once remarked, "learning to think about a thing that is hitched to other things without thinking about the things that it is hitched to."⁶⁵ While there are some kinds of moral questions with which the law is and ought to be concerned, in other words, there are others that ought to be left to the conscience. Thus, when Tortson goes on to claim that only "the omission or negligent discharge of legal duties . . . comes within the sphere of legal cognizance," he is speaking accurately. He is also right when he insists that

64. *Id.* at 327-31 (quoting J.A. DIXON, JOURNAL OF JURISPRUDENCE 312 (1874)).

65. Letter from T. Powell to R. Schuyler, *supra* note 1.

there is a whole range of moral behavior and conduct that is not properly the subject of legal recognition or enforcement: for example, "failure to respond to the calls of worthy charity" and "faltering in the bestowment of brotherly love on the unfortunate." The law can and ought to enforce a legal "duty of care," but it would be venturing beyond its proper limits if it sought to create and enforce a generalized duty of caring.⁶⁶

The challenge is drawing the line between those matters that ought to be the subject of legal enforcement and those that ought to be left to the conscience. Should an affirmative obligation to provide relief for the suffering be established by the courts? Or should withholding relief from the suffering be treated instead simply as a matter of conscience? To the student of Legal Process, putting it that way is putting it too broadly. A more refined approach is called for, based on a wise understanding of institutional limitations and possibilities. In simplified terms, that more refined approach would include at least the following steps:

First, the law has evolved to the point where the judicial establishment of a *limited* affirmative obligation to aid a stranger in distress is possible and perhaps appropriate. The establishment of such a limited duty would not require recognition of a generalized duty of caring, but could be adopted through marginal extension of the already established duty of care.

Second, a number of factors make this case a particularly strong one for extending the common law to include a limited duty of rescue. (1) The "custom" of the medical community, as reflected in the "Principles of Medical Ethics," establishes a clear expectation that a physician will "respond to any request for his assistance in an emergency or whenever temperate public opinion expects the service."⁶⁷ Failure to so act is clearly considered a "wrong." Thus Doctor Drake cannot claim that in refusing to come to Jones' assistance, he did not know that he was acting in a way that would be considered both by his profession and by temperate public opinion as wrong. (2) Moreover, the law in Ames has already evolved to the point where it imposes an affirmative duty "to act with reasonable care" on those who voluntarily undertake to perform Good Samaritan activities.⁶⁸ It imposes a similar affirmative obligation

66. Cf. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988), in which Professor Bender argues for a legal duty to rescue inspired by "a feminist ethic based upon notions of caring, responsibility, interconnectedness, and cooperation." *Id.* at 34.

67. Legal Process Exam, *supra* note 40, at 39.

68. *Id.*

on drivers of vehicles involved in an accident in which others are injured, regardless of fault.⁶⁹ These legislatively created requirements, while not directly relevant, reflect a general societal judgment that people in a position to help a stranger in distress ought in certain circumstances to be legally required to do so, even though they may not have originally been at fault. Creation of a limited affirmative obligation in this case, in other words, could help bring about a certain coherence in this emerging body of jurisprudence.

This is one of those moments in the life of the culture, in other words, where the law stands poised to incorporate into legal standards the evolving moral sense of the community. Under these circumstances, as Jackson argued at Nuremberg, those who do what they know is considered wrong by the community in the hope that the law will be "laggard" in incorporating the moral sense of the community into legal standards act at their peril.⁷⁰

(3) Before creating a limited affirmative duty to act in such situations, however, the court should consider arguments for not doing so. Why might it be unfair to require someone in the position of Doctor Drake to come to the aid of a stranger in a medical emergency? The major reason is that it would subject him to potential economic liability or risk of personal harm. The first of these concerns is disposed of by state legislation which insulates "a physician or registered nurse" who "renders emergency care at the scene of an emergency" from liability for negligence. The only circumstance in which Doctor Drake could be potentially subject to liability is if he acted in a way that could be characterized as "gross negligence or wilful and wanton misconduct." The second concern, the concern with risk of personal physical injury, is simply not present under these circumstances. So, in this case, there is no good reason for not imposing an affirmative duty to act.⁷¹

(4) Before recommending such a disposition to the court, however, the student would be expected to identify parameters of the duty being created so as to ensure its fair and evenhanded application in the future. Without attempting to define those parameters exactly for all future cases, the court could rule that liability would be limited to those cases where (a) there is a clear emergency, (b) failure to act could result in serious injury or death, (c) failure to act under the circumstances would

69. *Id.*

70. *See supra* note 27 and accompanying text.

71. Legal Process Exam, *supra* note 40, at 39. There is also a possible reliance argument under these circumstances, since Doctor Drake purported to be relying on the law as it was described in Tortson's lecture. I do not think the reliance argument is terribly strong here, but if it were, then the Court should consider prospective application of the new rule.

be considered by temperate public opinion to be wrong, and (d) there was no significant risk to the defendant of either personal physical injury or economic harm.

So bounded, the court's decision could be reconciled with its earlier decision that an expert swimmer did not have an affirmative duty to rescue a drowning child, since, even for an expert swimmer, such a rescue effort might pose a risk of injury or death. Having gone through an analysis along these lines, the student would then be in a position to recommend that the Court reverse the lower court and remand for a trial consistent with the principles announced above.

* * *

Though crudely done, this analysis reflects in rough terms at least the traditional understanding of what it means to learn to think like a lawyer. The key thing to notice, for present purposes, is how similar the view of law reflected here is to that expressed by Justice Jackson at Nuremberg. In both cases, the basic understanding is that the law consists at its core of fundamental principles. In both cases, the primary way in which the law grows is through progressive incorporation into legally enforceable standards of the evolving moral sense of the community. In both cases, there is clear rejection of the view that law and morality are radically separate.

If the Legal Process view were not fairly reflective of the traditional view, it would be one thing. But one cannot find any more classic expression of the traditional view than in the Legal Process materials. Moreover, it is difficult to think of any other single overview course to which, over the years, a greater number of law students have been subjected. If there is any course or set of materials that can be fairly said to express what it means to think like a lawyer in the traditional understanding, this is it.

IV.

But if mainstream legal education does not teach that law and morality must be kept radically separate, indeed, if it teaches, and always has taught, just the opposite, why then do law students so consistently *feel* as if they are being asked to make that sort of separation? Why do they feel as if, as a cost of acquiring a legal education, they are being asked to deny important aspects of their selves?

I am not sure I know the answers to these questions, but I do know that the feelings themselves are real and widely shared. My own view is that the contributing factors are probably much more subtle and

complex than those who complain about the dehumanizing impact of law school education are generally prepared to recognize. And one crucial factor that is often overlooked, it seems to me, if the problem is not the education itself, is what the students bring to it.

The core of the problem, in my view, is the "sentimental fallacy." The sentimental fallacy is the notion that in undertaking *any* kind of technical education, one loses one's capacity for responding to experience in human terms. Thus we all nod knowingly when we hear the story of the student who, before coming to law school, looked out the window and saw a meadow filled with flowers, but, after having undergone a legal education, looked out the same window at the same meadow and could see only restrictive covenants running up and down. We nod knowingly because somewhere along the way we have been taken in by the myth that one cannot acquire a technical education without losing one's basic humanity.

The sentimental fallacy is a deeply persistent one in our culture. One finds it expressed not only in the context of a legal education but in connection with almost any kind of technical or professional education. The following passage from Mark Twain's *Life on the Mississippi*, in which Twain describes what happened to him as he learned to become a riverboat pilot, is a classic example:

The face of the water, in time, became a wonderful book—a book that was a dead language to the uneducated passenger Throughout the long twelve hundred miles there was never a page that was void of interest The passenger who could not read it was charmed with a peculiar sort of faint dimple on its surface . . . ; but to the pilot that was an *italicized* passage; indeed, it was more than that, it was a legend of the largest capitals, with a string of shouting exclamation points at the end of it; for it meant that a wreck or a rock was buried there that could tear the life out of the strongest vessel that ever floated. It is the faintest and simplest expression the water ever makes, and the most hideous to a pilot's eye. In truth, the passenger who could not read this book saw nothing but all manner of pretty pictures in it, painted by the sun and shaded by the clouds, whereas to the trained eye these were not pictures at all, but the grimmest and most dead earnest of reading matter.

Now when I had mastered the language of this water, and had come to know every trifling feature that bordered the great river as familiarly as I knew the letters of the alphabet, I had made a valuable acquisition. But I had lost something, too. I had lost something which could never be restored to me while I lived. All the grace, the beauty, the poetry had gone out of the majestic river! I still keep in mind a certain wonderful sunset which I witnessed when steamboating was new to me. A broad expanse of the river was turned to blood; in the middle distance the red hue brightened into gold, through which a

solitary log came floating, black and conspicuous; in one place a long, slanting mark lay sparkling upon the water; in another the surface was broken by boiling, tumbling rings, that were as many-tinted as an opal; where the ruddy flush was faintest, was a smooth spot that was covered with graceful circles and radiating lines, ever so delicately traced; the shore on our left was densely wooded, and the somber shadow that fell from this forest was broken in one place by a long, ruffled trail that shone like silver . . .

I stood like one bewitched. I drank it in, in a speechless rapture. The world was new to me, and I had never seen anything like this at home. But as I have said, a day came when I began to cease from noting the glories and the charms which the moon and the sun and the twilight wrought upon the river's face; another day came when I ceased altogether to note them. Then, if that sunset scene had been repeated, I should have looked upon it without rapture, and should have commented upon it, inwardly, after this fashion: "This sun means that we are going to have wind tomorrow; that floating log means that the river is rising, small thanks to it; that slanting mark on the water refers to a bluff reef which is going to kill somebody's steamboat one of these nights . . . ; those tumbling 'boils' show a dissolving bar and a changing channel there; the lines and circles in the slick water over yonder are a warning that that troublesome place is shoaling up dangerously; that silver streak in the shadow of the forest is the 'break' from a new snag . . ."

No, the romance and the beauty were all gone from the river. All the value any feature of it had for me now was the amount of usefulness it could furnish toward compassing the safe piloting of a steamboat.⁷²

Anyone who has ever undergone a legal education—or any other kind of professional education, for that matter—has probably felt this way, or something close to it, at one time or another. As one learns to master the "river" from a technical point of view, "the romance and the beauty" seem to go out of it.

The feeling is there, but how valid is it? In the first place, there is something a little phony, is there not, about the claim that Twain makes here. He claims that he has lost his capacity for responding to experience in poetic terms, but who is it that is doing all this nice poetic writing? The answer is: the Twain who *had already become the pilot*. The passage itself is testimony, in other words, to the fact that Twain had not entirely lost his capacity for thinking and talking about the world in poetic terms.

72. MARK TWAIN, *LIFE ON THE MISSISSIPPI* 67-69 (Reader's Digest ed. 1987) (1883).

The deeper problem has to do with the quality of the poetic vision itself. As a crude foil for the subsequently described technical view, the "pretty picture" that Twain paints performs its duty. But standing on its own, there is really nothing very vital or interesting about it. It is simply a "pretty picture," cliché-ridden and syrupy. Commenting on this passage, Professor James White asks tellingly: "What has Twain really lost: the poet's view . . . or the sentimentalist's? Can this passage be read as the story of growing out of a childish way of thinking and talking?"⁷³ Merely to ask this question is to draw attention to shortcomings of the sensibility and voice that Twain presumably lost in the course of becoming a riverboat pilot. As White asks, how much is really lost in losing this way of thinking and talking?

It should not surprise us then to find that law students feel about their education much the same way that Twain felt about his. That is not to say that students do not bring to law school a great deal of experience and understanding that is truly valuable, because they do, and it would be a shame if their legal education forced them to abandon that. But it is also true that, like the youthful Twain, they also often bring a highly sentimental view of the world and the way it works. The reason they feel the way they do about their legal education is that legal education is not terribly welcoming to sentimentalism in any form. It constantly insists that we make hard, critical judgments—something that is anathema to the sentimental imagination. So part of the resistance to a legal education, surely, is simply a resistance to giving up one's former sentimental ways of thinking and talking about experience.

That resistance is often framed in terms of head versus heart.⁷⁴ But the dichotomy itself, it should be apparent, is a false one. The aim of law school is not to replace the heart with the head, or to deny in any other way the instincts of the heart, but simply rather, to borrow from Hooker, to teach the heart how to think.⁷⁵ It is to transform the sentimental imagination into a critical one.

Part of the problem is that, notwithstanding everything that has been said so far, legal education *does* require a kind of separation of law from morality, of the personal from the professional self, and some students

73. JAMES B. WHITE, *THE LEGAL IMAGINATION* 12 (1973).

74. Typical is the comment of one of the law students quoted in Elkins' paper: "Most law professors look askance at a student who relies on his heart rather than his head," Elkins, *supra* note 15, at 527.

75. "[M]y whole endeavor is to resolve the conscience, and to shew as near as I can what in this controversy the heart is to think, if it will follow the light of sound and sincere judgment, without either cloud of prejudice, or mist of passionate affection." RICHARD HOOKER, *OF THE LAWS OF ECCLESIASTIAL POLITY* 122 (Everyman's Library 1969).

feel deeply uncomfortable with having to make that kind of separation. I am talking about the kind of separation that is required by the Legal Process examination considered above: about the difficulty and importance of drawing a line between those kinds of moral conduct that the law can effectively transform into legal enforceable duties and those kinds that are best left to matters of conscience. It is not that moral considerations falling on one side of the line are relevant and those falling on the other are not. The need for drawing the line arises, rather, from the recognition that there are limitations to what the law can do. If we were to try to create, as some feminists have suggested,⁷⁶ a legally enforceable duty of "caring," a duty that incorporated all those aspects of moral behavior that Professor Tortson would relegate to matters of conscience, there are serious questions whether the law could handle the problems that would arise. It is not just that the law is not well equipped to deal with problems arising from failure to live up to certain kinds of moral expectations, it is that the world in which we live is probably a better place by virtue of the fact that we leave a wide range of moral conduct to matters of conscience. Knowing the difference between what kinds of moral conduct can be effectively incorporated into legally enforceable standards, and what kinds cannot, requires a sophisticated understanding of institutional possibilities and limitations. That is why developing an understanding of those possibilities and limitations forms the core of a traditional legal education.

In acquiring such an education, students are often required to make unaccustomed distinctions and separations. They have to learn how to think about things that are hitched to other things without thinking about the other things they are hitched to, and that leaves them sometimes deeply perplexed and uncomfortable. When they are asked to deny (as they see it) some aspects of their moral response to experience, they do not know how to respond, so they respond by making the exaggerated claim that law requires radical separation of law and morality—which, as we have seen, is not true. They take a difficulty and elevate it into an impossibility; they take a partial truth and transform it into an absolute one. The surest indication that we are in the presence of a sentimental imagination is when we see this pattern at work.

It is important to recognize that law students are not alone in this regard. Law professors—Elkins' "Professor Lawson," to name one—also sometimes have trouble making these sorts of distinctions and end up as a consequence reinforcing the same radical but inaccurate view.

76. See, e.g., Bender, *supra* note 66.

Another factor that contributes to the unease students feel with their legal education, I think, is the widespread misunderstanding and misuse of the Socratic method. This is an enormous subject and I can touch upon it only briefly and inadequately here. I happen to think that the Socratic method is an extremely valuable pedagogical tool. When used properly, there is no better method for training the critical judgment. I realize, however, that there is another view. In *Zen and the Art of Motorcycle Maintenance*, Pirsig portrays the Socratic method as the weapon of the dissecting intelligence. Dialectic, as he views it, is the antithesis of rhetoric. According to him, the Sophists employed rhetoric to tell stories through which they communicated the "wholeness" of life. Then along came Plato with his dialectic, which he proceeded to deploy in a way calculated to deplace rhetoric and destroy the Sophists' view of life. This was the great cultural event that issued in a destructive fragmentation of consciousness. Dialectic, as Pirsig views it, is employed to tear things apart; rhetoric, to put things together. Elkins appears to share, if not entirely, at least part of, this view.

But I think that if you read the *Gorgias* thoughtfully and carefully, you will see that that is not at all what dialectic meant to Plato. The great advantage of dialectic over rhetoric, in Plato's view, is that it depends for its effective operation upon the existence of a relationship of mutual trust and respect between the parties engaging in it. Not only is every point that one makes open to criticism by the other, the form itself invites such criticism. Dialectic proceeds from the belief that out of a process of thoughtful, focused, self-critical discussion a much better understanding of whatever it is that is being considered will arise. Unlike rhetoric, it does not lend itself to manipulation of one's audience. Also unlike rhetoric, it is unsparingly critical of sloppy, unfocused—"fuzzy"—thinking in whatever form.

I think the sentimentalist's hostility to dialectic lies precisely here: that it is unsparingly critical of fuzzy thinking. But to the genuinely poetic imagination, dialectic offers nothing to fear. As Plato's performance in the *Gorgias* demonstrates, as does Jackson's performance at Nuremberg, there is no inherent inconsistency between being thoughtful, focused, and self-critical on the one hand, and being poetic and caring and human on the other. Making connections between the imagination and the critical judgment, between the heart and the head, between feeling and thinking, may not always be easy, but that is not to say that such connections cannot be made.

So the problem in the final analysis is not losing one's poetic capacity, but finding ways to make connections between what one knows specially as a lawyer and everything else that one knows. This brings us, I think, to the core problem: It is not that the connections cannot be made, it is

that they are not always easy to make.⁷⁷ Indeed, there often exists a tension between how we see the world as lawyers and how we see it in our other capacities, which means that making connections—certainly, making them in a fresh and original way—often requires a considerable art.

The starting point of any intelligent effort to come to terms with a legal education, it seems to me, is to recognize that there are tensions between the way we see the world as lawyers and the various other ways we see it. The existence of these tensions need not be viewed as a bad thing, however. Indeed, just the opposite. In a very real sense, the life of the mind in the law is composed of these tensions and the creative pressures they exert.⁷⁸

The situation of the lawyer is not all that different in this respect, I would argue, from that of one who has grown up in this country as an African-American. Both are in the position of having to look at the world from two different—sometimes seemingly incompatible—perspectives at once. For the lawyer, it is having to look at the world through the specialized lens of the lawyer while at the same time not abandoning the human perspective. For the African-American, it means looking at the world from the special perspective of one who is black without abandoning also the shared human perspective.

The writer, Ralph Ellison, once had to wrestle with this problem. Accused by Irving Howe of not being a genuine “Negro writer” because he did not write about experience the way that Richard Wright did in *Black Boy*,⁷⁹ Ellison responded that, while he recognized the uniqueness of black culture and the impact that it had on him, he had not learned to write from Richard Wright. He had learned from writers like Hemingway and Faulkner and Melville and Hawthorne—from writers in the mainstream of the American literary tradition—and he saw the world through their eyes as much as through any other. He resented being pigeonholed as a “Negro writer,” even more being told that he was

77. On this point, Elkins and I would probably agree. The chief difference between us is that Elkins seems to regard the existence of difficulties and tensions in a legal education as evidence of a defect of legal education, whereas I view these same difficulties and tensions as a central source of the life of the mind in the law.

78. For a highly original treatment of these tensions and the creative possibilities they represent, see WHITE, *supra* note 73. Among traditional jurisprudential writers, Lon Fuller and Alexander Bickel stand out as among the most creative in working the tensions that constitute the life of the mind in the law. On Fuller, see Teachout, *The Soul of the Fugue: An Essay on Reading Fuller*, 70 MINN. L. REV. 1073 (1986). On Bickel, see Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985).

79. Ellison describes his dispute with Howe in “The World and the Jug,” in RALPH ELLISON, *SHADOW AND ACT* 115 (1966).

not an "authentic" one. He was a Negro and he saw the world through a Negro's eyes, there was no escaping that, and he would not want to if he could, but he was also a writer and he saw the world through the eyes of an American writer as well. The whole challenge, then, was finding a way to bring these two perspectives together.

In a classically beautiful passage, Ellison described what it meant to be both a "Negro" and an "American writer" in the following terms:

It imposes the uneasy burden and occasional joy of a complex double vision, a fluid, ambivalent response to men and events which represents, at its finest, a profoundly civilized adjustment to the cost of being human in this modern world.⁸⁰

"It imposes the uneasy burden and occasional joy of a complex double vision . . ." If I had to find a single phrase that captures what it means to learn to "think like a lawyer"—as epitomized by Jackson's performance at Nuremberg, as embodied in the Legal Process materials, and as it really is—that would be it.

80. *Id.* at 137.

Appendix A

Legal Process Question II from Final Examinations at Harvard Law School, Fall Term, 1967-68

Professors Hart and Sacks

In 1967, *D*, a doctor specializing in brain surgery, accompanied his neighbor *T*, a Torts professor, to a public meeting at which *T* gave a lecture on the subject: "Some Public Misconceptions About Law." In the course of his lecture, *T* made reference to the common law's refusal to impose an affirmative obligation to aid a stranger in distress. Of this he said the following:

"With the humane side of the question courts are not concerned.

It is the omission or negligent discharge of legal duties only which comes within the sphere of legal cognizance. For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure."

While walking home from the meeting, *D* and *T* saw a motorcycle driven by *P* skid on an ice patch and collide with a tree. They found *P* lying unconscious on the side of the road, bleeding profusely from a deep gash in his thigh. To *T*'s urging that *D* "do something to stop the bleeding," *D* replied that he did not wish to get involved. *T* immediately telephoned the police from a nearby public phone and requested that an ambulance be sent. Because of hazardous highway conditions caused by snow and ice, it took thirty minutes for aid to arrive. *P* died of loss of blood on the way to the hospital.

Subsequently *P*'s administrator filed a wrongful death action against *D* in an Ames state court, alleging that *D* was under a legal duty as a doctor to provide emergency care, and that if *D* had fashioned and

applied a tourniquet to *P*'s wound, as he easily could have, the bleeding would have been checked and *P* would have survived.

The trial court dismissed the complaint for failure to state a cause of action, and *P*'s administrator has appealed to the Supreme Court of Ames. Counsel for the litigants have presented the following material:

(1) Numerous decisions of the state supreme court in accord with the assertion of the Torts professor that there is no duty to come to the aid of a stranger. In a recent application of this principle, the court absolved an expert swimmer of any liability by reason of his failure to attempt the rescue of a drowning child.

(2) Decisions to the effect that one who undertakes, whether by request or officiously, to assist a person in peril must act with reasonable care and prudence and cannot abandon his efforts if to do so would expose the injured or endangered person to further risk of harm.

(3) Decisions allowing recovery in *quantum meruit* for necessary medical services furnished in an emergency, even where the patient did not specifically request or agree to pay for the services.

(4) A so-called "Good Samaritan" statute of a common type, enacted by the state legislature in 1966, which provides:

"A physician or registered nurse who in good faith renders emergency care at the scene of an emergency, where a physician-patient or registered nurse-patient relationship did not exist prior to the advent of such emergency, shall not be liable for any civil damages as a result of acts or omissions by the physician or registered nurse in rendering the emergency care, except acts or omissions amounting to gross negligence or willful and wanton misconduct."

(5) A provision in the Principles of Medical Ethics promulgated by the American Medical Association (a voluntary professional organization, membership in which is not a prerequisite for the practice of medicine):

"A physician is free to choose whom he will serve. He should, however, respond to any request for his assistance in an emergency or whenever temperate public opinion expects the service * * *."

(6) A penal provision in the state's Motor Vehicle Code which requires the driver of any vehicle involved in an accident to "render to any person injured in such accident reasonable assistance in securing medical aid or transportation."

(7) The state's medical licensing statute which authorizes suspension or revocation of a doctor's license for "professional misconduct." The latter phrase is defined in the act as meaning certain enumerated things, such as criminal abortions, improper advertising, fee-splitting, and so forth; but the statute makes no reference to refusal of services.

State what the decision of the Supreme Court of Ames should be, canvassing all issues.