6 The fragility of legal ethics

On the role of theory, lawyerly virtues, and moral remainders in the life of a good lawyer

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Introduction

The ability of lawyers to uphold the norms of the rule of law and justice has often proved vulnerable. 'Where were the lawyers?' has been asked many times in response to sundry episodes in modern Western history where fundamental norms of legality, morality, justice, and humanity were violated.[1]

The goodness of lawyers also seems vulnerable because their professional role is characterised by divided loyalties and commitments, leading lawyers to sometimes experience, at least on a pre-reflective level, genuine conflicts of values. Fried expresses this fragility of goodness by asking: 'Can a good lawyer be a good person?'[2]

This vulnerability or fragility of a lawyer's professional life resonates profoundly with the central theme of Martha Nussbaum's magnum opus *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (*Fragility*).[3] In this classic philosophical work, Nussbaum offers an in-depth study of Greek tragedies and Greek philosophy, asking to what extent a good life is fragile – that is, vulnerable to the influence of luck – and what strategies make for a stable ethical life. In *Fragility*, Nussbaum takes issue with what she calls a Platonic answer to these questions, an approach that assigns a 'life-saving role' to reason. Instead, she proposes a luck-sensitive neo-Aristotelian approach to ethics based on her reading of Aristotle's philosophy and the Greek tragedies.

This chapter uses *Fragility* as a lens that allows us to identify and critically discuss Platonic strands within philosophical legal ethics. In addition, and more constructively, it will also draw on *Fragility* as a source of inspiration providing the building blocks for a 'luck-sensitive' neo-Aristotelian approach to philosophical legal ethics.

1 For a brief overview of such periods, see Iris van Domselaar, 'Where Were the Law Schools?' (2021) (1) *Netherlands Journal of Legal Philosophy* 3.

2 Charles Fried, 'The Lawyer as Friend: The Moral Foundation of the Lawyer-Client Relation' (1976) 85 *Yale Law Journal* 1060.

3 Martha C. Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (rev ed, Cambridge University Press 2001).

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The chapter is organised as follows: first, it provides an overview of both Nussbaum's critical and constructive lines of argument. Second, it uses Nussbaum's critique of the Platonic approach to ethics to identify and critically examine Platonic strands within philosophical legal ethics. Third, taking inspiration from *Fragility*, it sketches the contours of a luck-sensitive neo-Aristotelian approach to legal ethics. This approach will be characterised by a holistic philosophical method, a focus on lawyerly virtues, and the accommodation of moral remainders in its understanding of the life of a good lawyer.

Two caveats: Nussbaum has received serious criticism of her interpretations of the classic works she discusses to support her argument.[4] Yet, I will not delve into the exegetic debates and interpretative issues to which her book gave rise, nor will I engage in a critical argument with the book. In this chapter, *Fragility* is used simply as a source of inspiration regarding the roles of luck and reason in the life of a good lawyer – a source from which philosophical legal ethics can hopefully profit. Finally, elements of several theories of legal ethics will be examined in light of *Fragility*. However, due to the limited scope of this chapter, all the nuances of these theories can unfortunately not be addressed.

Nussbaum's fragility of goodness and (the critique of) the life-saving art of reason

Rejecting the common dichotomy between literary works and philosophical treatises, in *Fragility*, Nussbaum draws on both Greek philosophy and tragedy to provide insights into the relation of human beings to luck (*tuchē*), which she defines as follows: 'What happens to a person by luck will be just what does not happen through his or her own agency, what just *happens* to him, as opposed to what he does or makes'.[5] Nussbaum identifies two perspectives within Greek thought on the role of luck in a good life. On the one hand, Greek philosophy and tragedy highlight that a good human life is inherently fragile. Human excellence is conceived 'as something whose very nature it is to be in need, a growing thing in the world that could not be made invulnerable and keep its own peculiar fineness'.[6] On the other hand, Nussbaum discerns an outspoken faith in the capacity of reason to make a life more stable and safer, a sense of hope that human life need not be lived 'on the razor's edge of luck'.[7]

4 Most notably, John M. Cooper, 'Review of *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy*, by M. C. Nussbaum' (1988) 97 *The Philosophical Review* 543; Terence H. Irwin, 'The Fragility of Goodness by Martha Nussbaum' (1988) 85 *The Journal of Philosophy* 376.

5 Nussbaum, *Fragility* 3. Nussbaum stresses that this does not mean that 'luck' refers to events that are random, uncaused, or unintelligible.

6 Ibid., 2.

7 Ibid., 89, citing Sophocles's *Antigone*.

Against this background, the central questions that Nussbaum addresses in *Fragility* are: '[H]ow much luck do these Greek thinkers believe we can humanly live with? How much *should* we live with, in order to live the life that is best and most valuable for a human being?'[8] In answering these questions, Nussbaum develops both a critical and a constructive line of argument. In her critical argument, she takes issue with the 'life-saving role' assigned to reason, which she finds characteristic of Platonic thought. In her constructive argument, Nussbaum sketches the contours of a neo-Aristotelian ethics that accommodates fragility while also providing for sufficient stability in the life of a good agent. Both lines of argument revolve around several more specific, interrelated themes: the philosophical method to use in search of the characteristics of a good human life, the account of practical reason to embrace in a good life, and the role of genuine value conflicts in a good life. These themes will be further explored later in this chapter.

Regarding philosophical method, Nussbaum stresses that philosophy should aim at the search for truth through the exercise of reason. Doing so makes the life of a moral agent stable, based upon the way things are from a moral perspective. However, she rejects the Platonic view that philosophy, in this search for truth, should strive towards an external god's eye point of view – one that is 'more than human, one that can look on the human from the outside'.[9] The Platonist falsely holds that 'philosophy is a worthwhile enterprise only if it takes us away from the 'cave' and up into the sunlight'.[10] More specifically, and related, Nussbaum criticises the Platonic view that philosophy should exemplify the virtues of science (epistēmē), such as systematisation, consistency, coherence, and universality. Moreover, Platonic philosophy, according to Nussbaum, falsely claims to be a 'radical life saver'.[11] It alleges to provide an external, detached viewpoint for evaluating practice, thereby preventing contingent mistakes, biases, immoralities, and genuine conflicts between values to occur, and so contributing to moral progress.[12]

For Nussbaum, this Platonic view of philosophical method is both 'futile and destructive'.[13] By exclusively focusing on the detached intellect as a source of insight, it excludes other invaluable sources, such as the emotions, which are likely to be more receptive to the needy and fragile character of human life and point to a broad range of plural and heterogeneous values to which humans are committed. A Platonic perspective 'stand[s] apart from human

8 Ibid., 4.
9 Ibid., 138.
10 Ibid., 258.
11 Ibid., 237.
12 This claim is, of course, intimately linked with Plato's deep suspicion of the way people tend to see things; the average human being is likely to 'be radically in error', their vision 'deeply buried in some barbaric slime'. Ibid., 147, 138.
13 Ibid., 258.

needs and limitations', due to which typically fragile activities and relationships such as friendship are rejected or ignored.[14]

In her constructive argument, Nussbaum affirms Aristotle's view on philosophical method: that the central task of philosophy is to save the '*phainomena*' – the world '*as it appears to*, as it is experienced by, observers who are members of our kind'.[15] Aristotle's philosophical method emphasises the views of 'the many and the wise'[16] because truth is to be found '*inside* what we say, see and believe'.[17]

From this Aristotelian perspective, philosophy is a reflective practice that should be part of an embedded self-understanding that takes the constraints of human existence seriously.[18] For this purpose, different disciplines help us grasp what a good life consists of. Also, we gain insights from sources other than the intellect: the reading of tragedies, for example, which requires both an intellectual and an emotional grasp of the subject matter.

Through the pursuit of order *within* the *phainomena*, Aristotle's philosophy according to Nussbaum does not amount to conventionalism or an uncritical acceptance of the status quo. Aristotelian philosophy is well able to improve practice and increase the stability of a good life by giving us 'a clearer view of the target at which we are aiming all along' and taking us 'to the world in its ever more precise description', thereby empowering us to respond appropriately.[19]

The second theme that Nussbaum explores in *Fragility* concerns practical reason. In her critical line of argument, Nussbaum takes issue with a Platonic conception of practical reason, which she also recognises in the preceding work of Homer and in the reasoning of certain protagonists in Greek tragedies, such as Creon in Sophocles's *Antigone*. On the Platonic view, practical reason is a *technē*, a science of measurement, allowing individual agents to control *tuchē*, the 'accidents of step-motherly nature'.[20] In this view, *technē* and *tuchē* are conceived as opposites.[21]

Relatedly, within a Platonic conception of practical reason, a rational agent sees the world as fully commensurable – as a world in which, by means of intellectual effort, seemingly qualitative differences can be measured, ordered, and ranked so that right decisions can be made.[22] A rational agent guides themself by the products of theoretical reason: that is, by general rules and principles.

14 Ibid., 154.
15 Ibid., 245.
16 Ibid., xxviii, 245.
17 Ibid., 243.
18 On this view, therefore, the philosopher could be described as a professional human being: ibid., 261.
19 Ibid.
20 Ibid., 49.
21 Ibid., 94.
22 Ibid., 106–109.

These rules and principles allow the rational agent to appraise a situation according to predefined, repeatable items, which unambiguously reveal the right course of action.[23] This brings stability and limits vulnerability:

> The person who lives by *technē* does not come to each new experience without foresight or resource. He possesses some sort of systematic grasp, some way of ordering the subject matter, that will take him to the new situation well prepared, removed from blind dependence on what happens.[24]

Within this Platonic conception, potential 'internal sources of uncontrolled danger', such as the emotions and passions, are placed under the control of practical reason.[25] As the practical world is understood as fully commensurable and thus measurable, practical reasoning boils down to an exclusively intellectual exercise that fully subdues the affective, emotional dimension of the lived experience of practical agents, thereby also modifying them: 'the belief in commensurability modifies all our irrational motivations'.[26] Hence, not surprisingly, within a Platonic conception of practical reason, hardly any attention is paid to the problem of 'weakness of will' (*akrasia*), since that is seen as stemming from a viewpoint that is simply 'sick',[27] nor to the constructive and intrinsic role that emotions may play in the life of a good agent.[28]

In her critical line of argument, Nussbaum again claims that this Platonic conception is ineffective and harmful for practice: that it presses its aim for control over *tuchē* too far.[29] In so doing, she largely draws on Aristotle, who stresses that practical reason cannot be a form of scientific understanding; the practical world is characterised by mutability, indefiniteness, and particularity – and thus also by incommensurability.[30] Hence, general rules and principles will never suffice as practical guides: they lack the necessary flexibility to grasp the particularities of concrete situations.[31] To recognise what is salient in a concrete situation, and to know how to respond to such situations, one needs a flexible and responsive measure.[32]

In *Fragility*, Nussbaum endorses Aristotle's conception of practical reason for striking a balance between fragility and control over both internal and

23 Ibid., 298.
24 Ibid., 95.
25 Ibid., 307.
26 Ibid., 121.
27 Ibid., 117.
28 Ibid.
29 Ibid., 310.
30 Ibid., 301–4.
31 Ibid., 301.
32 Ibid., 300.

external contingencies. Practical reason, according to Aristotle, boils down to a form of perception that Nussbaum describes as follows:

> [p]erception is a complex response of the entire personality, an appropriate acknowledgment of the features of the situation on which action is to be based, a *recognition* of the particular.[33]

In this account of practical reason, a constructive role is assigned to emotions. It is emotions that open the door for fragility, as they are outside of our direct control and invite the agent to respond to the unexpected, the new.[34] One crucial emotion, according to Nussbaum, is pity: '[t]hrough pity we recognize and acknowledge the importance of what has been inflicted on another human being similar to us, through no fault of his own'.[35]

Nussbaum stresses that this account of practical reason is intimately linked to other character virtues, such as courage, moderation, and justice.[36] Without these, practical reason will be distorted. For instance, without courage it is difficult to do what is right. A courageous person is not only able to overcome the fear of certain risks, they also see when and in what specific form courage is called for.

These virtues, according to Nussbaum, are to be developed not so much by theoretical knowledge acquisition but rather similarly to the way in which skills are developed: by means of habituation. As such, it is crucial that sufficiently high quality formative practices be in place within which the virtues can be developed. Citing Aristotle: '[i]t makes no small difference whether one is brought up in these or those habits from childhood, but a very great difference.'[37] However, even once a virtue has been developed – or so Nussbaum learns from Euripides's *Hecuba* – still there always remains the serious risk of character becoming corrupted as a result of exposure to situations where basic ethical conventions and practices have become corroded: 'Worst of all, even formerly good agents are blighted when betrayal and violation take root. Nothing protects them'.[38]

Nussbaum stresses that Aristotle's focus on practical reason, understood as a perceptive quality, and on other character virtues does not mean that rules and principles do not have a role to play. They do, but they play a more modest role as rules of thumb and as pedagogical instruments for novices, and always only to the extent that they do not violate the demands of the particular.[39]

33 Ibid., 309.
34 Ibid., 317.
35 Ibid., 385.
36 Ibid., 308–9.
37 Ibid., 346.
38 Ibid., 405.
39 Ibid., 299.

Finally, in the examination of how to strike a balance between fragility and stability in a good human life, Nussbaum examines the role that Greek thought assigns to practical conflict. As part of her critical line of argument, she discusses the conflict-evasiveness of Platonic thought.[40] On the Platonic view, practical commensurability entails that all practical conflicts can be resolved rationally and exhaustively. Conflicts are, if anything, signs of irrationality that ought to be resolved by reason.[41] The losing claim in such conflicts boils down to a false belief that 'does not simply lose out, it vacates the field. It is not on the scene any more at all'.[42]

Whereas for Plato one of the reasons to reject Greek tragedies and to expel the Greek poets from Athens was that they dwelt excessively on the conflictual character of life, for Nussbaum they are important sources of ethical insight precisely because they show the 'richness and the depth' of these value conflicts.[43] Greek tragedy, according to Nussbaum, shows that genuine value conflicts do exist and that the rational resolution of such conflicts may amount to a genuine disvalue, a moral cost. Consequently, also for this reason a good agent will always be vulnerable; contingent facts may force them to violate the values they are committed to. Greek tragedies also show that this genuine disvalue – this moral cost – deserves a response: 'Agamemnon and Eteocles found themselves, through no fault of their own, in situations where revulsion, remorse, and painful memory seemed, for the person of good character, not only inevitable, but also appropriate'.[44]

An important objection to the acknowledgement of practical conflict into an account of the good life is that it leads to laziness or complacency with regard to the morally troublesome status quo. In responding to this objection, Nussbaum argues that Greek tragedies also teach us that the painful experience of a genuine practical conflict invites us to think of ways to avoid or reduce such conflict, for instance by means of certain institutional and social arrangements.[45] They show that 'what looks like grim necessity is often just greed, laziness, and lack of imagination'.[46] In this context, Nussbaum also highlights the proverbial *pathei mathos* (wisdom comes through suffering) that is entrenched in Greek tragedy. Tragedies show that 'often it takes the shock of such suffering to make us look and see'.[47] Importantly, these painful insights are not merely instrumental for moral progress, they also constitute goodness

40 According to Nussbaum, this conflict-evasive strand within Platonic thought has profoundly influenced modern moral philosophy. Ibid., 31.

41 Ibid.

42 Martha C. Nussbaum, 'Aeschylus and Practical Conflict' (1985) 95 *Ethics* 243.

43 Nussbaum, *Fragility* (n 3) 49.

44 Ibid., 51.

45 Ibid., xxxi. However, such intellectual effort should not press too far and violate the reality of such conflicts.

46 Ibid., xxxi.

47 Ibid., 45.

as a way of having it right and responding rightly. As Nussbaum states: '[t]here is a kind of knowing that works by suffering because suffering is the appropriate acknowledgment of the way human life, in these cases, is'.[48]

Philosophical legal ethics and the life-saving art of reason

This section will use Nussbaum's critique of the Platonic aspiration – to use reason to make life safe against luck – to explore whether similar aspirations can be discerned in the domain of philosophical legal ethics, where philosophical method, the account of practical reason, and the accommodation of practical conflicts are concerned.

As to philosophical method, at first sight, Nussbaum's critical line of argument seems less relevant for contemporary theories of legal ethics. That is, contrary to (versions of) utilitarianism and Kantianism, these theories are sensitive to the institutional and professional context in which lawyers function. As Wendel puts it: '[O]nly by incorporating . . . the practical and the theoretical, is it possible to understand the distinctive nature of the ethics of the legal profession'.[49]

Nonetheless, in prominent theories such as those proposed by Pepper, Luban, Simon, Wendel, and Dare, we can discern the Platonic ambition for clarity, order, systematisation, control, and stability.[50] That is, despite the messy, ambivalent practice of lawyers, these theories offer a relatively abstract, general, and unifying normative perspective that seeks to exhaustively grasp the moral nature of the practice of lawyers. They also strive for control and stability by offering categorical principles or formulas directly or indirectly providing guidance to lawyers. By means of general and abstract normative viewpoints, they aim to limit the extent to which practice is influenced by contingent facts, mistakes, or immoralities. Pepper, for instance, famously defends the principle that lawyers, within the constraints of the law, should serve the interests of their clients.[51] Similarly, Wendel's legal entitlements theory offers the categorical principle that a lawyer's proper role is 'to ascertain and protect her client's entitlements, not to be a "zealous advocate within the bounds of the law"'.[52]

48 Ibid.

49 W. Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton University Press 2010) 16.

50 Stephen L. Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities' (1986) *American Bar Foundation Research Journal* 613; David Luban, *Lawyers and Justice. An Ethical Study* (Princeton University Press 1988); William Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard University Press 1998); Wendel, *Lawyers and Fidelity to Law* (n 49); Tim Dare, *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role* (Ashgate 2009).

51 Pepper (n 52) 618.

52 Wendel, *Lawyers and Fidelity to Law* (n 49) 176.

Because of their external perspective, these theories are presented as highly apt to bring both clarity and moral progress to practice; they can be used to evaluate whether lawyers are justified in causing harm to the public interest or the interests of third parties. On the basis of his theory, Wendel, for instance, concludes that the lawyers involved in writing the torture memos or in assisting Enron in concealing the true financial conditions of the company were acting unethically.[53] These theories also claim to bring clarity to the purportedly naïve and mistaken beliefs on the part of 'average' citizens, as revealed in the long history of 'lawyer bashing'.[54] As Wendel asserts: 'the subject of academic legal ethics is nothing more than the attempt to respond to these accusations in a rigorous way'.[55]

Against the background of Nussbaum's critical line of argument, the question arises whether this search for clarity, order, control, and moral progress through the application of an abstract normative viewpoint will possibly lead to troublesome simplifications that fail to reflect the rich phenomenology of lawyering.[56] This concern, albeit in other terms, is reflected in a critique of theoretical and regulatory frameworks that apply one normative unitary framework to all lawyers.[57] These one-size-fits-all frameworks are charged with taking insufficient heed of the many qualitative, contextual differences between lawyers: for instance, the category of clients they assist (e.g., a natural person or a corporation), their professional environment (whether they work at a large firm or as a sole practitioner), or the specific area of law they are working in (for instance, criminal law or civil law). For Wilkins and others, a unifying approach is in any case 'difficult to maintain in the face of mounting evidence that most lawyers specialize and that differences across these specialties are relevant to the task of defining and enforcing appropriate standards of lawyer conduct'.[58]

A Nussbaumian concern over reductionism and simplification is also reflected in the critique that certain theories are insufficiently responsive to

53 Ibid., 8.

54 As Sullivan has succinctly put it: 'The practice of lawyer bashing runs from Shakespeare to the present'. See Kathleen M. Sullivan, 'The Good That Lawyers Do' (2000) 4 *Washington University Journal of Law & Policy* 7.

55 Wendel, *Lawyers and Fidelity to Law* (n 49) 18.

56 Nussbaum, *Fragility* (n 3) 259.

57 For such criticism, see, for instance, Donald Nicolson and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford University Press 2000); Alice Woolley, 'Context, Meaning and Morality in the Life of the Lawyer' (2014) 17 *Legal Ethics* 1; Deborah Rhode, *In the Interests of Justice: Reforming the Legal Profession* (Oxford University Press 2003); Leslie C. Levin and Lynn Mather (eds), *Lawyers in Practice: Ethical Decision Making in Context* (University of Chicago Press 2012).

58 David B. Wilkins, 'Making Context Count: Regulating Lawyers after Kaye, Scholer' (1992) 66 *California Law Review* 1145, 1151.

the reality of the way legal systems work, as they do 'not exist in a vacuum'.[59] Some theories are, for instance, criticised for ignoring the influence of socio-economic factors on the ethical merits of lawyers' behaviour.[60] As Kim puts it:

> To defend a moral (or amoral) framework of legal ethics without accounting for the radically unequal economic and social power that comprise the background conditions under which legal services are delivered is to retreat into . . . empty formalism.[61]

As already stated, according to Nussbaum, a Platonic philosophical method privileges the detached intellect in the search for ethical truth. Also in this regard, philosophical legal ethics seems sensitive to Nussbaum's concern: theories of legal ethics are often presented as the outcome of a thorough analysis of several alternative abstract theories of legal ethics in confrontation with judgements made in a 'calm reflective frame of mind', thereby excluding insights from many other sources.[62] Think, for instance, of those insights gained on the spot, in concrete confrontation with the particular, as expressed in self-reflective reports and interviews, literary texts, movies, and documentaries. As such, from a Nussbaumian perspective philosophical legal ethics risks ignoring the very cognitions that may reveal the vulnerable and morally ambivalent character of a lawyer's practice, those that are constitutive of emotions such as compassion, pity, and anger. From this perspective, it may even be asked to what extent the intellectualism present in the methods pursued by certain theories of legal ethics is sufficiently equipped to respond to the 'cries' of those who suffer from what lawyers do.[63]

A Platonic spirit can also be discerned in the conception of practical reason that is embraced within several theories of legal ethics. Within these conceptions the ethical deliberations of good lawyers tend to be portrayed or reconstructed as ideally a species of principle, formula, or rule application. In *Lawyers and Justice*, Luban for instance presents 'the fourfold root of sufficient reasoning' as an abstract model of practical reason that individual lawyers can use to assess whether they are justified in performing a certain act. In this account, Luban proposes – albeit cautiously and with several caveats – the metaphor of

59 Sung Hui Kim, 'Economic Inequality, Access to Law, and Mandatory Arbitration Agreements: A Comment on the Standard Conception of the Lawyer's Role' (2020) 88 *Fordham Law Review* 1665, 1671.

60 Ibid. A similar criticism has been made by Luban of Wendel's legal entitlements view for relying on an idealised picture of the American legal system: David Luban, 'Misplaced Fidelity' (2012) 90 *Texas Law Review* 673, 679.

61 Kim (n 59) 1671.

62 Wendel, *Lawyers and Fidelity to Law* (n 49) 15.

63 For a general critique of the unresponsiveness of legal theory to the suffering generated by law-doers, see Louis Wolcher, *Law's Task: The Tragic Circle of Law, Justice and Human Suffering* (Ashgate 2008).

a mathematical formula, thereby suggesting that, in the end, practical reason boils down to a highly detached and exclusively intellectual activity.[64]

A similar intellectualist understanding of practical reason can also be discerned in Wendel's legal entitlements view, where ethical lawyering is portrayed as essentially a text-driven, interpretative practice. On this view, it seems that all that was wrong with the behaviour of the 'torture lawyers' was that they failed to properly interpret the law, here understood as a predominantly intellectual practice of making and analysing legal arguments.[65] Even in Simon's theory of legal ethics, which assigns a central place to the discretionary judgement of lawyers, the reasoning of lawyers is conceptualised as a species of principle-application that resembles the activity of solving a jurisprudential analytical puzzle.[66]

In view of this rationalistic understanding of practical reason, it is not surprising that philosophical legal ethics literature is notably silent on the sensitivities lawyers need to assign meaning to the situations they encounter: that is, to recognise the legal-ethically salient facts of a case and to adequately qualify them. How will they distinguish between, for instance, an 'aggressive' or a 'legitimate' litigation tactic, or between a 'cruel' or a 'professional' interrogation technique? How will they assess whether their client, an ex-spouse who is involved in a highly antagonistic divorce, is indeed 'a so called "bomber" who has no value in life other than stripping the husband of every penny and piece of property he has',[67] or whether their client should rather be viewed as a courageous woman with a legitimate wish for financial compensation for the caretaking role she performed during her marriage?[68] Within the dominant theories of legal ethics, this process of assigning meaning to concrete situations appears to be taking care of itself. This is also suggested by the fact that, in the examples these theories discuss, the salient facts and their qualifications are often simply assumed instead of being argued for as part and parcel of an ethical inquiry.

Moreover, within philosophical legal ethics little has been said about the valuable function that the emotions and perceptive qualities of lawyers might play in recognizing and adequately responding to the potential moral costs

64 Luban, *Lawyers and Justice* (n 50) 128–47. In *Lawyers and Justice*, Luban does stress (p. 121) that 'immediate affections and tensions . . . are the source of the moral life'; however, this dimension is not further explored in his account of practical reason.

65 In reaction to Shaffer, Wendel admits that legal advising can be described as involving moral discernment, but at the same time he offers a rather intellectualist interpretation of discernment: '[U]nderstanding how the client's interest fit with the scheme of available legal entitlements', Wendel, *Lawyers and Fidelity to Law* (n 49) 141.

66 Simon (n 50) 13, 138; Alice Woolley and W. Bradley Wendel, 'Legal Ethics and Moral Character' (2010) 23 *Georgetown Journal of Legal Ethics* 19.

67 Simon (n 50) 9.

68 That such a perceptive capacity may indeed be required has to do with the fact that, in the words of Hart, '[p]articular fact-situations do not await us already marked off from each other, and labelled as instances of the general rule, the application of which is in question; nor can the rule itself step forward to claim its own instances'; see H. L. A. Hart, *The Concept of Law* (3rd ed, Oxford University Press 2012) 126.

of hard choices. Think of the decision to advise a corporate client on how to reduce their liability risks for exposing their employees to asbestos. From a Nussbaumian critical perspective, one might rhetorically ask: can a good lawyer, when confronted with the relatives of the employees who have died because of asbestos-related cancer, do without certain moral cost-responsive reactions?

Of course, all this is not to deny that philosophical legal ethics has increasingly engaged with the affective and emotional dimension of being a lawyer, predominantly by attending to the insights gained from the rich body of literature within behavioural legal ethics.[69] One important insight that has been taken on board is that ethical infractions by lawyers should not be seen as negligible, isolated phenomena caused by 'bad' apples or individual incompetence: Rather, they 'result from a combination of situational pressures and all too human modes of thinking'.[70]

However, the current literature nonetheless suggests a Platonic approach, by treating these psychological and affective factors predominantly as obstacles that lawyers should overcome to vindicate the rational demands of practical reason. Luban, for instance, stresses that a good lawyer should be able to resist these forces in everyday situations in which they have to say no to their clients or colleagues, potentially leading to several 'awkward moments' during their career.[71] Such a framing seems to rely on a clear divide, as well as a hierarchical relationship, between the 'pure' normative, evaluative realm of practical reason and the messy, impure, and troublesome domain of psychology, emotions, and affections.

This brings us to the final theme of this section: the way philosophical legal ethics accounts for the value conflicts that lawyers may face. This is, of course, a highly relevant question for philosophical legal ethics because, on a pre-reflective level, the life of a lawyer is characterised by a commitment to a range of heterogeneous values that are likely to conflict. The preamble of the American Bar Association *Model Rules* puts it as follows:

> In the nature of law practice . . . conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.[72]

69 See, for example, David Luban, *Legal Ethics and Human Dignity* (Cambridge University Press 2007) 207, 298 (chapter 3 on 'Moral Complications and Moral Psychology'); David Luban, 'Integrity: Its Causes and Cures' (2003) 72 *Fordham Law Review* 279; Woolley and Wendel (n 66); David Luban and W. Bradley Wendel, 'Philosophical Legal Ethics: An Affectionate History' (2017) 30 *Georgetown Journal of Legal Ethics* 363.

70 Jean R. Sternlight and Jennifer K. Robbennolt, 'Behavioral Legal Ethics' (2013) *Arizona State Law Journal* 883, 1111.

71 David Luban, 'How Must a Lawyer Be? A Response to Woolley and Wendel' (2010) 23 *Georgetown Journal of Legal Ethics* 1101, 1008.

72 American Bar Association, 'Model Rules of Professional Conduct: Preamble and Scope' <www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/> accessed 14 July 2022.

In its approach to these conflicting values, philosophical legal ethics can indeed be characterised by a Platonic spirit, to the extent that it is conflict-evasive, committed to the idea that a unifying, all-encompassing theoretical viewpoint can resolve the 'recurring tensions'[73] that lawyers may face in practice. According to several theories of legal ethics, value conflicts can be shown by means of theoretical analysis to be merely apparent. In this way, from a Nussbaumian perspective, such theories contribute to the 'tidiness of the moral landscape'[74] that lawyers inhabit; they even grant lawyers a chance at moral innocence.

Within this conflict-evasive approach, several strategies are used. One strategy is prioritisation, whereby theoretical arguments are offered for the categorical prioritisation of one value independently of the concrete particularities of a case. For instance, theorists who defend the standard conception have tended to do so by providing a commensurans, such as autonomy or legality, to justify lawyers granting categorical priority to serving the interests of their clients over the legitimate interests of third parties or certain public values.[75] Moreover, also those criticising the standard conception often do so on the basis of prioritising another commensurating value, such as dignity or legal justice; they then simply assume that, in trying to live up to this alternative value, lawyers will (except in negligible circumstances) not face genuinely conflicting commitments.[76]

Another conflict-evasive strategy is specification: in the literature it is sometimes argued that the abstract values to which a lawyer is committed, such as loyalty, once properly specified in view of the concrete situation, are generally understood as fully reconcilable. For example, Dare seems to adopt this strategy when arguing that the value of loyalty 'properly understood' only entails 'mere zeal' rather than 'hyper zeal'.[77] By excluding 'hyper zeal' from protection, Dare 'minimize[s] the conflict between the demands of role morality and those of ordinary or broad-based morality by limiting the excesses of advocacy'.[78]

A more general conflict-evasive strategy that can be discerned in the literature is redescription, whereby an action of a lawyer that could possibly amount to a genuine value conflict is redescribed in such a way that the conflict is concealed. By re-characterising the activities of lawyers in terms of the abstract concepts and principles offered by such theories or the principles of professional

73 Simon (n 50) 139.

74 Gregory Cooper, 'The Role of Roles in the Normative Economy of a Life' in Tim Dare and Christine Swanton (eds), *Perspectives in Role Ethics: Virtues, Reasons, and Obligation* (Routledge 2019).

75 Richardson describes a commensurans as 'the commensurating value or good'. See Henry Richardson, *Practical Reasoning about Final Ends* (Cambridge University Press 1997) 15.

76 For instance, according to Simon the categorical principle to which lawyers should be committed is that of '[taking] those actions that . . . seem likely to promote justice'. Simon (n 50) 138.

77 Tim Dare, 'Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers' (2004) 7 *Legal Ethics* 24.

78 Tim Dare, 'Philosophical Legal Ethics and Personal Integrity' (2010) 60 *University of Toronto Law Journal* 1021, 1027.

regulations, certain categories of conflict that a lawyer on a pre-reflective level would perhaps otherwise experience are allegedly fully dissolved.[79] For instance, the behaviour of lawyers who use the economic power of their client to delay legal procedures could be redescribed as 'procedural skill', a label that conceals the moral costs that may result from such behaviour.[80]

At the same time, certain theories of legal ethics do try to capture the experience of conflict that lawyers may face in their everyday practice. Taking inspiration from Bernard Williams's concept of a moral remainder, Wendel acknowledges the possibility that a lawyer, despite having made a right decision, may retain 'a justified belief that "something discreditable has been done"'.[81] Dare also acknowledges that lawyers, in view of the morally troublesome consequences of their actions, may have a moral reason to participate in law reform in their role as citizens.[82]

However, from a Nussbaumian perspective, it remains to be seen to what extent these attempts satisfactorily accommodate the conflictual nature of a lawyer's life. For one, it is notable that the dilemmas conceptualised in the literature as leaving moral remainders are predominantly seen to stem from an intra-personal conflict between the perspectives of the lawyer and the moral agent or citizen. From this, one might conclude that the lawyer's everyday *professional* universe can remain free of a sense of conflict and tragedy, with concomitant consequences for the extent to which attention will be paid to the dilemmatic character of the lawyer's professionalism within legal and vocational education and, relatedly, within the professional rules of conduct. This position is also supported by the common claim that genuine dilemmas and tragic choices will only occur in exceptional, rather exotic cases.[83]

Moreover, it is a serious question to what extent, for instance, Wendel's understanding of moral remainders will be of any value to those who bear the moral costs of lawyers' actions, and whether it sufficiently acknowledges the fact that on certain occasions a moral-cost responsive reaction towards those who bear these costs might be intrinsic to responsible lawyering.[84]

79 For a discussion of redescription see Arthur Isak Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* (Princeton University Press 2000); Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (Princeton University Press 2008) 76–88.

80 Daniel Markovits, 'Legal Ethics from the Lawyer's Point of View' (2003) 15 *Yale Journal of Law and the Humanities* 266.

81 Wendel, *Lawyers and Fidelity to Law* (n 49) 172.

82 Dare, *Counsel of Rogues?* (n 50) 53–4, 149.

83 Wendel, *Lawyers and Fidelity to Law* (n 49) 17. However, more recently and in the context of a new wave of 'lawyer shaming' in the US, Wendel has placed more emphasis on the conflictual and messy character of the phenomenology of the legal profession and has assigned greater weight to moral remainders and to the relational dimension implicated by this concept, largely drawing on the work of Peter Strawson. See W. Bradley Wendel, 'Lawyer Shaming' (2022) *University of Illinois Law Review* 175.

84 For this point, see also Luban, 'Misplaced Fidelity' (n 60) 690.

Adopting Nussbaum's critical perspective, one could thus question whether philosophical legal ethics, by introducing stability and moral reassurance to a lawyer's life by means of conflict-evasive strategies, sacrifices the phenomenology of what lawyers actually do – and whether, in addition, it precludes a proper grasp of what responsible lawyering amounts to in light of moral costs.

The fragility of legal ethics: holistic method, lawyerly virtues, and moral remainders

Drawing on *Fragility*, this section will tentatively sketch the contours of a luck-sensitive neo-Aristotelian philosophical approach to legal ethics by, again, engaging with philosophical method, practical reason, and the role of practical conflict and moral remainders.

A neo-Aristotelian approach to legal ethics has a quasi-phenomenological spirit in that it aims to be responsive to the *phainomena* and, thus, to the views of 'the many and the wise'. It strives towards what Nussbaum calls a '"perceptive equilibrium": an equilibrium in which concrete perceptions "hang beautifully together," both with one another and with the agent's general principles.'[85] This suggests an in-context, interdisciplinary approach, in which no discipline is a priori excluded. As part of this holistic method, the main theories of legal ethics as expressions of the 'wise' are critically analysed alongside the dominant conceptions of good lawyering as laid out in different regulatory frameworks. But, due attention will also be paid to relevant empirical studies, insights gained by lawyers in direct confrontation with the cases at hand, and by those who bear the consequences of their actions, and to art forms in which the phenomenology of lawyering is well captured.

A telling example of a holistic method is Abbe Smith's 'Representing Rapists' on the ethics of cross-examination in rape cases.[86] Smith, a criminal defence lawyer herself, stresses that she seeks to do justice to the 'complexity of the entire issue' rather than 'to be prescriptive in a general sense'.[87] She aims to honour the concrete experiences of criminal defence lawyers as well as those of victims of rape, thereby 'reject[ing] simplistic narratives and dichotomies'.[88] Smith for instance draws on 'rape memoirs' to put herself 'as much as possible in the shoes of a victim' so as 'to write about rape with [her] eyes wide open, digging

85 Note that this description is a variation of Rawls's reflective equilibrium, the difference being that where Rawls seriously limits the sort of concrete judgement that can be used as a ground for revision of general principles, for Nussbaum a variety of resources can be used in coming to grips with 'what one gets only on the spot'. Martha C. Nussbaum, *Love's Knowledge: Essay's on Philosophy and Literature*, (Oxford University Press 1990) 182–183.

86 Abbe Smith, 'Representing Rapists: The Cruelty of Cross Examination and Other Challenges for a Feminist Criminal Defense Lawyer' (2016) 53 *American Criminal Law Review* 255. For a similar appreciation of Smith's phenomenologically rich approach, see Wendel, 'Lawyer Shaming' (n 83).

87 Smith (n 86), 300, 291.

88 Ibid.

deeper than [her] own experience as a defence lawyer'.[89] In addition, she invokes a broader sociocultural, psychological, and political perspective on the matter.

Admittedly, Smith limits the scope of her philosophical method to the domain of criminal defence practice and to cases in which the interests of women are implicated. However, from a neo-Aristotelian perspective, her method is equally valuable in other contexts. That is, for each context of practice in order to do justice to 'the complexity of the entire issue'[90], in addition to critically engaging with the dominant theories of legal ethics, there might be good reasons to also engage with emotional insights gained on the spot, narratives, (fictive) stories, and the insights of different academic disciplines.

Importantly, a holistic method, by its 'deeper and more inclusive attunement'[91] to the *phainomena* does not leave everything as it is but also seeks to improve the moral quality of practice. But, instead of providing general normative action-guiding principles, it offers, in the words of Wiggins, 'a nucleus of ideas or notions that at once reflect and enlighten practical reflection'.[92] As such, it can help to conceptually anchor moral quality in the practice of lawyering, thereby making the moral life of a lawyer more stable. Moreover, because a holistic method also encompasses the emotional dimension involved in being a lawyer as well as the perspectives of those affected by their actions, it can also make more sense of the fragile and morally ambivalent character of the life of a good lawyer.

Regarding its account of practical reason, a luck-sensitive neo-Aristotelian approach will assign an important place to a set of lawyerly virtues and as such take more seriously the internal, psychological obstacles that lawyers may face and should be able to overcome to adequately respond to the situations they encounter. It will focus, as Nicolson puts it, on lawyers possessing 'the sort of character which regards doing the right moral thing (whatever that might involve) as important and worthy of pursuit notwithstanding the many disincentives and counter-pressures thrown up in contemporary legal practice'.[93]

Obviously, the selection of this set of lawyerly virtues should not be based on abstract theory, starting from certain premises and arriving at conclusions through deductive reasoning. Rather, following a holistic approach, this selection will draw upon the main theories of legal ethics; the many codes of professional conduct for lawyers; a wide range of relevant background psychological, sociological, and political theories; the views of those affected by lawyers' decisions; and the actual experiences of lawyers.

The development and justification of a full-fledged virtue-ethical account of lawyering along the methodological lines described above is beyond the

89 Ibid., 266.
90 Ibid., 300.
91 Ibid.
92 David Wiggins, 'Neo-Aristotelian Reflections on Justice' (2004) 113 *Mind* 477, 486.
93 Donald Nicolson, 'Making Lawyers Moral? Ethical Codes and Moral Character' (2005) 25 *Legal Studies* 601, 605.

purview of this chapter.[94] But, whatever the outcome of such a holistic endeavour, it will likely include a specification of the cardinal virtues, which are crucial to the flourishing of any social endeavour.[95] Hence, a good lawyer will need lawyerly wisdom or lawyerly vision, allowing them to discern and appreciate the relevant features of a concrete case as well as to see appropriate responses. Their attitude will not be merely technocratic or intellectual, exclusively focusing on the right application or interpretation of legal and professional rules; rather, a good lawyer will be *attuned* to the relevant facts of a case.[96] For instance, by means of this lawyerly wisdom or vision, a family lawyer instead of merely focusing on the applicable rules or principle will know how to perceive the situation, including for instance the weight to be assigned to de-escalation when a client asks them to use information about the psychological state of a spouse in a highly polarised divorce case where the interests of young children are at stake.

In addition, a good lawyer will possess the virtue of lawyerly courage: the ability to adequately respond to the specific personal risks that arise in the work contexts of lawyers. For instance, in her search for an explanation of the enabling role played by in-house lawyers in the Volkswagen scandal, Woolley seems to suggest that they were lacking in courage, as they were not able 'to face the disapproval of clients and colleagues when telling a client and perhaps also colleagues that they are doing wrong'.[97] A good lawyer exemplifying lawyerly courage will be able to overcome these situational challenges, such as the existential fear of standing alone, be it through losing their job, through exclusion from their professional group, or by being 'spat upon by outraged citizens while walking through the corridors of a courthouse'.[98]

Good lawyers also need lawyerly temperance: the capacity for self-restraint in response to personal urges, needs, and desires that arise in their specific practice

94 See for different lists of virtues that are proposed as part of a virtue-ethical approach to legal ethics: Robert F. Blomquist, 'The Pragmatically Virtuous Lawyer' (2009) 15 *Widener Law Review* 93; Robert Araujo, 'The Virtuous Lawyer: Paradigm and Possibility' (1997) 50 *SMU Law Review* 433; for defences of virtue ethical approaches to lawyering with a primary focus on the virtue of practical wisdom, see: Adrian Evans, *The Good Lawyer* (Cambridge University Press 2014); Heidi Li Feldman, 'Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?' (1996) 69 *Southern California Law Review* 885; Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard University Press 1995).

95 This discussion of the specification of the cardinal virtues in the context of lawyering largely draws upon my earlier work on the role of judicial virtues in accounting for the moral quality of adjudication. See Iris van Domselaar, 'Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship' (2015) 44 *Netherlands Journal of Legal Philosophy* 24.

96 Feldman (n 94) 898.

97 Alice Woolley, 'The Volkswagen Scandal: When We Ask, "Where Were the Lawyers?"' Do We Ask the Wrong Question?' *ABlawg* (1 October 2015) <https://ablawg.ca/2015/10/01/the-volkswagen-scandal-when-we-ask-where-were-the-lawyers-do-we-ask-the-wrong-question/> accessed 14 July 2022.

98 Blomquist (n 94) 129 (citing Bruce R. Jacob).

and may keep them from doing the right thing. For instance, a temperate lawyer will not display improper anger in court or inappropriate humour, nor will they behave flirtatiously with their client. Importantly, a temperate lawyer will also be sufficiently insensitive to personal and financial advantages that may corrupt their capacity for judgement – a particularly challenging task in view of the dramatic, widely discussed increase in the commercialisation of legal practice. As Kronman puts it: '[T]he more preoccupied a lawyer is with money, and hence with his own welfare, the more difficult he will find it to suspend his self-interest'.[99]

The virtue of lawyerly justice entails that lawyers effectuate their commitment to society at large, and more specifically to the rights and legitimate expectations of their fellow citizens as expressed in settled law and background values of political morality when advising and representing clients. Importantly, this virtue is inextricably linked to lawyerly wisdom, which enables a lawyer to recognise the salient factors in a concrete case and introduce general concerns as expressed in legal rules, professional rules, and background legal principles.[100]

Of course, also more specifically *lawyerly* virtues are needed, the selection of which will partly depend on the specific contexts in which lawyers work. One crucial virtue that lawyers share with other legal professionals, such as judges or public prosecutors, is independence, which is closely related to courage insofar as courage is sometimes necessary to act independently.[101] Lawyerly independence entails that a lawyer, as both litigator and adviser, be able to resist the influence of undue external factors and pressures, be it from their own clients, governmental bodies, lobbyists, or the public at large. As the Code of Conduct for European Lawyers states on providing advice: 'Advice given by a lawyer to the client has no value if the lawyer gives it only to ingratiate him- or herself, to serve his or her personal interests or in response to outside pressure'.[102]

A virtue that largely characterises the specific phenomenology of the lawyer's role is of course loyalty.[103] A lawyer that exemplifies loyalty is concerned with the good of their client and will seek to pursue their legitimate interests within the constraints of the law – as is demanded by the lawyer's commitment to justice and independence. Loyalty also entails that a lawyer will respect the autonomy and thus the informed preferences of their clients and will take due care to provide sufficient information to their client about their legal position and the range of legal avenues available and their implications. The virtue of loyalty also includes the 'disposition of lawyers to deliberate, to engage with

99 Kronman (n 94) 299.

100 Van Domselaar (n 95) 33.

101 For instance, Rule 2.1.1. of the CCBE 'Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers' (2013) states that 'independence is as necessary to trust in the process of justice as the impartiality of the judge'.

102 CCBE, rule 2.1.2.

103 Michael K. McChrystal, 'Lawyers and Loyalty' (1992) 33 *William and Mary Law Review* 367.

their clients in the mutual interchange of information and understanding', thereby reducing the risk of paternalism faced by lawyers who largely rely on their own practical vision.[104]

A final, specific lawyerly virtue is confidentiality. Confidentiality ensures that lawyers maintain secrecy for the right reasons, on the right occasions, and in the right ways; observing confidentiality allows lawyers to resist all sorts of professionally irrelevant motives – such as vanity, mere habit, or thoughtlessness – that may lead them to disclose confidential information.[105] But, importantly, confidentiality does not preclude that, under some conditions, a good lawyer may, all things considered, decide to reveal certain information concerning his client. Such a possibility illustrates the fact that the lawyerly virtues are not hierarchically ordered and can sometimes come into conflict.[106]

To develop the lawyerly virtues, a range of social background practices and specific professional practices must be in place in which (aspirant) lawyers can learn by doing, by trial and error, by emulating role models,[107] and by experiencing the appropriate satisfaction or regret at the outcomes of their actions. Hence, within a neo-Aristotelian approach to legal ethics, an important concern is whether the legal landscape in which lawyers' identities are formed provides for sufficient high quality formative practices, ethical infrastructures, and cultures: at law schools and law firms, for instance, but also more broadly in the public realm in which the central concepts of the rule of law are more generally internalised. Without such professional practices and legal cultures in place, the ethics of lawyers are at risk.

This dependence on formative practices being in place is, of course, not to deny that professional codes of conduct also have a role to play in fostering the ethical sensitivity of (aspirant) lawyers. For instance, they can provide guidance by listing the range of contextual factors that lawyers should take into account in their deliberations over what to do, such as the actual needs of clients, the 'respective harms likely to ensue to prospective clients, those associated with them, third parties, the legal system, the general public, the environment' – as well as the balance of power between lawyer and client.[108]

Also, context-sensitive codes may provide direction regarding typical dilemmas arising in specific contexts; they may indicate the central challenges to be overcome in view of the core values of the legal profession. But, at the same

104 Amy Gutmann, 'Can Virtue Be Taught to Lawyers?' (1993) 45 *Stanford Law Review* 1759, 1769.

105 See for a discussion of confidentiality as an Aristotelian virtue (albeit in a psychoanalytical setting): Jonathan Lear, 'Confidentiality as a Virtue' in Charles Levin, Allannah Furlong and Mary Kay O'Neal (eds), *Confidentiality: Ethical Perspectives and Clinical Dilemmas* (Analytic Press 2003).

106 Evans (n 94) 77.

107 Neil W. Hamilton and Verna E. Monson (2012) 'Ethical Professionalism (Trans)Formation: Themes from Interviews about Professionalism with Exemplary Lawyers' 52(3) *Santa Clara Law Review* 921; Evans (n 94) 33.

108 Nicolson (n 93) 622.

time, these rules and principles can and should never exert control over the *phainomena* and always leave ample room for lawyerly discretion. In this way, students and beginning lawyers will feel encouraged, in the words of Nicolson, 'to explore alternative solutions to moral problems and their justifications'.[109]

Finally, a neo-Aristotelian approach to legal ethics will accommodate genuine value conflicts into its understanding of the life of a good lawyer. Value conflicts may occur due to contingent constellations of facts in which heterogenous values such as loyalty and justice prove incompossible. When such conflicts occur, a good lawyer will take an 'all things considered' justified decision that will nonetheless lead to a moral remainder, a genuine disvalue or moral cost. A good lawyer will then not only, as Postema puts it, 'appreciate the moral costs of [their] actions':[110] they will also adequately respond to these costs as an expression of a sense of 'uncancelled moral disagreeableness'.[111] These expressions might be self-conscious moral emotions such as guilt, regret, and remorse.[112] They might be expressed in an action, such as an apology, an explanation, (financial) compensation for the victims, or some other 'substantial reparatory action'.[113]

From the perspective of a luck-sensitive legal ethics, the way lawyers respond to moral costs, in addition to their actual decision, is thus highly relevant from an evaluative point of view. An illustration of such a broader evaluation is provided by Feldman when praising the infamous lawyer Armani for his open acknowledgement in a newspaper of the moral costs of his decision to remain silent about the fact that his client killed two adolescents and his knowledge of the location where the victims of his client were buried. According to Feldman, Armani's response deserves praise:

> Armani's remarks reveal his deeply emotional and empathic response to the situation, demonstrated by his awareness of "the breaking hearts of a parent," the pain he caused the victims' families and the evident anger and revulsion he felt toward [his client].[114]

Of course, discerning which lawyerly response is appropriate to a particular moral cost requires highly situational lawyerly judgement, which consequently

109 Ibid., 619.

110 Gerald J. Postema (1980) 'Moral Responsibility in Professional Ethics' 55 *New York University Law Review* 63, 69.

111 Bernard Williams, 'Conflicts of Values', *Moral Luck: Philosophical Papers 1973–1980* (Cambridge University Press 1981), 61. For a more extensive discussion on the relation between a virtue-ethical approach to legal decision-making and moral remainders, see: Iris van Domselaar, 'Law's Regret: On Moral Remainders, (In)Commensurability and a Virtue-Ethical Approach to Legal Decision-Making' (2022) 13 *Jurisprudence* 220.

112 Jonathan Haidt, 'Moral Emotions' in K.R. Scherer and H.H. Goldsmith (eds), *Handbook of Affective Sciences* (Oxford University Press 2003) 859.

113 Williams (n 111) 74.

114 Feldman (n 94) 900.

may give rise to serious disagreements. In any case, such situational judgements will need to consider the specific type of moral cost, the specific client, and the specific institutional role of the lawyer in each case. Smith, for instance, argues that defence lawyers should never apologise to victims: 'To do so would be narcissistic and vain. Victims of serious crime get to hate us. It is the least we can do for them'.[115]

Will the accommodation of moral remainders make the life of a lawyer too fragile or unstable? Or, as Luban and Wendel put it: '[y]ou simply cannot lead a professional life in a constant state of moral arousal, any more than a physician can practice emergency room medicine in a constant state of sympathetic anguish for the patients'.[116] This is not an easy question to answer. The contrary could also be argued. That is, the accommodation of moral remainders may well contribute to the stability of a lawyer's life by not forcing them to abandon the value of the losing claim simply because it conflicts with a different relevant value. As such, moral remainders might enhance the lawyer's integrity by providing a welcome counterweight to the risk of the intrapsychic dynamic of cognitive dissonance, to which lawyers are particularly vulnerable precisely because they are likely to face value conflicts.[117] By allowing conceptual room for the honouring of the moral costs of their decisions the risk of self-delusion will be reduced.

In the spirit of the Greek tragedies, the pain felt by lawyers over moral remainders may also encourage lawyers to rethink certain parts of the legal system and prevailing understandings of a lawyer's role. For instance, a recurring sense of moral disagreeableness experienced by a family lawyer when representing clients in divorce cases might lead such a lawyer to write a critical article in a professional journal as to the troublesome effects of zealous lawyering in divorce proceedings on the mental health of children.

Striking a balance between the importance of detachment regarding the moral costs of one's actions and the ethical need to be sufficiently responsive to these costs will, again, require situational appreciation on the part of the individual lawyer. Ideally, this situational appreciation will be informed by formative practical experiences, which play a central role in developing lawyers' capacity to identify and respond to moral costs. Such formative experiences may be gained, for example, in primary and secondary schools, law schools, and vocational training as well as in professional practice. In any case, a luck-sensitive approach to legal ethics suggests that these practices foster a keen sense for the moral ambivalence of lawyering by means of a genuine engagement with the moral costs stemming from lawyerly (in)action.[118]

115 Smith (n 86) 277.

116 Luban and Wendel (n 69) 360.

117 Cf. Ann Tenbrunsel and David Messick, 'Ethical Fading: The Role of Self-Deception in Unethical Behavior' (2004) 17 *Social Justice Research* 223; David Luban, 'Integrity: Its Causes and Cures' (n 69).

118 Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles* (Cambridge University Press 2001) 137.

Conclusion

Nussbaum's *Fragility* invites us to consider how the ethical life of lawyers is fragile and vulnerable vis-à-vis luck, i.e., external and internal factors that are not under lawyers' direct control. By using *Fragility* as central source of inspiration, I have aimed to show that one does not need to be an anti-theorist to take seriously the risks that come with theorising about the ethics of lawyers in a way that seeks to control and dismantle the phenomenology of lawyering and of those whose interests are at stake.

If philosophical legal ethics takes the phenomenology – and thus the vulnerable dimension – of the ethical life of lawyers more seriously, it may develop the conceptual resources that can foster their goodness. These resources are also conducive to lawyers responding responsibly to the moral costs that sometimes result from doing the right thing.