A DISCUSSION ON ETHICAL DECISIONS

Edward Cheng

I. INTRODUCTION

Perhaps the most difficult issue for an attorney arises when she is confronted by a law which she believes is wrong. Should she break the law and, if she does, should she do it openly with a willingness to accept the legal consequences? On the one hand, she has a duty as an officer of the court to uphold the rule of law. This duty stems from the practice of law as a "profession" and not as a vocation, occupation or career. "Profession" stems from the Latin root professio, and translates into an oath or declaration of belief—the oath that every attorney takes which commits her to uphold the law and to follow the rules of the bar. On the other hand, she holds a code of personal morality and ethics, developed through the experiences of life. This set of personal values might stem from religion, the community, school, or family. Regardless of its source, a person's code of morality necessarily plays a fundamental role in guiding and shaping the way she considers and resolves the problems which she faces.

The legal profession relies primarily on two codes of ethics to guide the attorney who is faced with such an ethical dilemma. These are the ABA Model Code of Professional Responsibility and the ABA Model

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1. In the sections discussing the philosophy of Rousseau and Locke, the usage of the words "man" and "men" in lieu of "humanity" reflects their historical use of the words. In those sections which reflect the analysis of the author, the gender designations are used interchangeably.


3. See id.
Rules of Professional Conduct. The two codes, however, have the tendency to be loose and flexible sets of rules which do not always provide concrete direction to the attorney. For example, DR1-102(A) of the Model Code provides that a lawyer “shall not . . . engage in illegal conduct involving moral turpitude” and prohibits conduct which involves “dishonesty, deceit or misrepresentation” or is “prejudicial to the administration of justice” or “adversely reflects on his fitness to practice law.” This rule does not define what moral turpitude is, nor does it prohibit attorneys from engaging in illegal conduct which does not involve moral turpitude. As a result of DR 1-102 and other such rules, the attorney is left to confront ethical issues equipped with little more than a code of vague rules and her own personal code of morality. This is not enough.

This is not enough because attorneys occupy a special position in society which demands more of them than of the ordinary layperson. I recently asked a non-lawyer friend what she would do if she were confronted by a law which she did not believe was moral. She declared that she simply did not have any faith in the legal system, and that she would follow laws only so long as they coincided with her personal code of ethics. The lawyer, however, does not have the privilege of adopting such a cynical viewpoint, for he has taken an oath to uphold the laws of society when he was admitted to the bar. When the attorney’s professional existence arises under the system of laws and he enjoys the special privileges and powers in monopolizing access to the legal system, he can hardly turn around and dismiss the law as easily as the layperson. He needs a framework to guide and direct the weighing of the conflicting demands made upon him. In the absence of a guiding framework, the lawyer is lost, without a way to rationally weigh the competing duties


6. Id.; see also Selected Statutes, supra note 4, at 241-42.

7. See Coquillette, supra note 5; see also Selected Statutes, supra note 4, at 241-42.

8. See Coquillette, supra note 5; see also Selected Statutes, supra note 4, at 241-42.

9. She was actually a little more sophisticated than that. She would also take into account the calculations of the marginal cost and marginal return of each alternative.
which call. Although often aspirational, these frameworks can provide, at minimum, a basis upon which an attorney can make and justify a decision, not only to colleagues on the bar, but, just as importantly, to himself.

Professor Daniel Coquillette, in *Lawyers and Fundamental Moral Responsibility*, offers the philosophical construct as a framework to guide the attorney confronted by an ethical dilemma. He presents the excerpted writings of various leading philosophical thinkers and offers their philosophical constructs to attorneys to use to fill in the gaps between the rules of the Ethical Codes and one's personal morality. These writings include the works of such thinkers as Aristotle, John Locke, St. Thomas Aquinas, and Hugo Grotius. In addition, Professor Coquillette also includes a series of ethical problems designed to support the proposition that philosophical models are applicable to legal ethical problems.

This Article addresses three problems found in *Lawyers and Fundamental Moral Responsibility* to examine the utility of the philosophical construct to the hypothetical issues. The analysis of the first two problems supports the application of philosophy. These straightforward problems are "easy" because they represent the extreme ends of the spectrum of possible situations confronting the lawyer. Problem One presents the context of the misapplied but "good" law within a "good society." Problem Two, on the other hand, presents the "evil" law in an "evil society." In these extreme situations, the philosophies of John Locke and Jean-Jacques Rousseau provide a useful analytical tool which empowers the attorney to clearly articulate the balancing and resolution of the issues. With Problem Three, however, this Article will show that philosophy begins to fail the attorney when the situation is not so black and white. The context is the "bad" law in a society which may be considered "good" or "bad". How the society is categorized is dependent upon whether the attorney fully subscribes to the philosophical construct, which philosopher he follows, and his personal code of morality. This Article

10. Coquillette, supra note 5.
11. See id.
12. See id.
13. See id. at 42-48, 173-78, 90-95, 125-27.
14. See, e.g., id. at 8-9.
15. See Coquillette, supra note 5, at 171, Problem XIII.
16. See id. at Problem XIV.
17. See id. at 171, 237, Problems XII, XVII.
will argue that, so long as the philosophical principles are convergent with the personal mores of the lawyer, philosophy is useful. Where the two diverge, the philosophical construct retains only limited utility. In sum, this Article will argue that although philosophy can be applied to straightforward ethical dilemmas, the attorney must ultimately refer back to his own personal code of morality for the most difficult questions.

In considering these problems, this Article will apply the philosophical constructs of John Locke and Jean-Jacques Rousseau. There are several different competing philosophies available to the attorney which would require her to take different actions for any single dilemma. Locke and Rousseau, however, are among the most accessible and influential philosophers of the modern age and would be the lawyer’s likely choice among all philosophers.18 John Locke has been credited as the philosophical father of the American Declaration of Independence, and even today, his theories “dominate our current, popular view of government, and underlie both the most common argument for civil disobedience and the leading argument for compliance.”19 Similarly influential, Rousseau’s Social Contract has been regarded as “one of a small shelf of books that form the tradition of Western political thought.”20 His theories have had considerable political impact, especially in late eighteenth-century France during the Revolution, which continues today.21

II. THE “EASY” PROBLEMS

Problems One and Two are the “easy” problems to which the title of this section refers. They are “easy” because they represent the extreme situations where most philosophical models would clearly resolve the competing duties one way or the other.

18. See id. at 155-57; see also Judith R. Masters, Introduction to JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 1, 2-3 (Judith R. Masters trans., St. Martin’s Press 1978).
19. COQUILLETTE, supra note 5, at 157.
20. Masters, supra note 18, at 1.
21. See id. at 2.
(A) Problem One

While the conviction of Sacco and Vanzetti was pending on appeal in the Massachusetts Supreme Judicial Court... Felix Frankfurter risked his professional reputation by publishing an article... demonstrating their innocence. Nevertheless, their conviction was sustained, and their execution ordered.

Late one night there is a knock on Frankfurter's door. There stands Vanzetti, who has escaped from County jail while awaiting execution. Frankfurter explains that, despite his absolute belief in Vanzetti's innocence, he is going to call the police.\(^{22}\)

This problem is "easy" because the protagonist's difficulty with the law lies in its ultimate result—the finding of guilt for Sacco and Vanzetti. If the attorney believed that the death sentence itself was wrong when applied to anybody, even the guilty, then this problem is transmuted into a "hard" problem, akin to Problem Three. In this problem, however, Frankfurter does not protest that the law against homicide under which the court convicted the defendants is wrong. Nor does he protest that the legal system itself is morally bankrupt or inherently flawed. Instead, Frankfurter's dilemma lies in the fact that, to his best knowledge, the legal system convicted the wrong persons despite the satisfaction of all of the safeguards built into the system. The philosophical frameworks of John Locke and Jean-Jacques Rousseau are clear as to what Frankfurter should have done, and ultimately are in concurrence with his resolution of the situation by calling the police.

In The Social Contract, Rousseau presented his interpretation of the role of society and the myth behind the origins of society.\(^{23}\) First, he describes the original man in a state of nature, when there is no society, and each man protects his person and his goods through the force he can muster by himself.\(^{24}\) At some point, this lonely force will prove to be inadequate to the task when the obstacles to self-preservation prove greater than his strength.\(^{25}\) In order to provide for self-preservation, men can only overcome these obstacles by uniting their separate powers into a

\(^{22}\) COQUILLETTE, supra note 5, at 171.


\(^{24}\) See id. at 59-60.

\(^{25}\) See id.
combination, united by a single motive so that they act in concert. The question that follows is what form this society would take which would simultaneously defend the person and goods of each member, yet preserve the freedom and liberty each man enjoyed prior to unity. For Rousseau, the answer is the Social Contract--an unwritten, unspoken, yet universal pact between members of a society, where, "Each one . . . puts into the community his person and all his powers under the supreme direction of the general will; and as a body, we incorporate every member as an indivisible part of the whole."

The Social Contract creates a society or body politic which acts as the sovereign and provides for the mutual protection of the person of its members and their goods. Furthermore, the Social Contract is not an empty pact and has the power to enforce itself: "whoever refuses to obey the general will shall be constrained to do so by the whole body." This power stems from the reciprocal agreement between society and the individual in making the contract. Needless to say, there will be times when an individual's private interest lay elsewhere from the general interests and where he regards his duties to the common cause as a "gratuitous contribution," the loss of which is less painful to society than the satisfaction of the duty is onerous on him. In other words, a member cannot enjoy the protection and benefits of a society and then balk at the duties imposed upon him in return. Rousseau concludes that in the absence of the commitment, "[t]he growth of this kind of injustice would bring about the ruin of the body politic." The central principle of the social contract, therefore, is one of mutual and reciprocal commitment, where a citizen who enjoys the benefits of society cannot extricate himself from the contract absent the dissolution of the society itself.

Locke's philosophy stems from the similar original conditions as Rousseau, and a similar social contract. His works, however, provide

26. See id. at 60.
27. See id.
28. ROUSSEAU, supra note 23, at 61.
29. See id. at 61-62. Rousseau defines sovereignty as the "exercise of the general will," which cannot be bargained, sold or given away, but which society can delegate. See id. at 69.
30. Id. at 64. Rousseau, however, also describes limits to the sovereign power. For a further discussion of these limits, see infra notes 42-48 and accompanying text.
31. See id. at 63-64.
32. ROUSSEAU, supra note 23, at 64.
33. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 164-65 (Dent & Sons
greater insight as to when this contract may be dissolved by its members. Locke concludes in his discussion "Of the Dissolution of Government," in Two Treatises of Government, that:

[T]he power that every individual gave the society when he entered into it can never revert to the individuals again as long as the society lasts, but will always remain in the community, because without this there can be no community, no commonwealth, which is contrary to the original agreement. . . .

For Locke, the original agreement, the reason why men enter into society is for "the preservation of their property," and to "provide for their safety and security." When a government violates this fundamental rule of society, the nature of its transgression constitutes a forfeiture of the power delegated to it by the general will of society. This political power reverts back to the people who then have the right to dissolve the government and establish a new one which would properly provide for the safety and security of its citizens. The question then arises, who judges when the government violates the original agreement of the social contract? Locke believed that, "the people shall be judge; for who shall judge whether his trustee or deputy acts well and according to the trust reposed in him but he who deputes him."

Application of the philosophies of Rousseau and Locke to Problem One reveals a clear solution to Frankfurter's dilemma. His issue lies with the result of the legal system and not with the legal system itself. Most importantly, he does not believe that the law against homicide is wrong—to the contrary, he most likely believes that this law is absolutely vital for the protection of society. The social contract, therefore, is operating properly, and the state is acting to further the general will and to satisfy its duty to protect the persons and the goods of its citizens. As Rousseau reasoned, the social contract stems from a reciprocal commitment between citizens to each other and to society, and any citizen who enjoys the protection and benefits of society is similarly obligated to follow the general will as manifested in the society's laws. Indeed, the general will supersedes that of the individual will, and the state has the

34. Id. at 241-42 (emphasis added).
35. Id. at 179-80, 228-29.
36. See id. at 228-29.
37. See id.
38. See LOCKE, supra note 33, at 229.
power to enforce the social contract. Part of the enforcement of the laws requires that all citizens cooperate, follow, and obey the laws. In this Problem, Frankfurter has enjoyed the benefits of the social contract, and is similarly obligated to fulfill his duty and report Vanzetti to the police. The general will has created the legal system which conducts a trial with due process, finds a verdict, and executes a sentence. This procedure is part of the mechanism of the exercise of the sovereign power and is in accordance with the social contract.

The power of the state over its citizens is not absolute, however. In situations where the state betrays the trust of its citizens and fails to further the purposes of the original agreement, Locke reasoned, the people may dissolve the government. Only with the breakdown of the government’s operation in protecting its citizens and their property can an individual citizen act to dissolve the contract. In this case, there is no such breakdown, and therefore, Frankfurter, who has enjoyed the benefits of society, cannot arbitrarily decide to violate the laws of the same society. There is no assertion that the legal system itself is flawed, nor that it betrays its duties or its trust. The very law prohibiting homicide, under which Vanzetti was convicted, is a vital tool of any society which seeks to protect its citizens. Frankfurter may disagree with the factual finding of the social mechanisms of the state, but he does not assert that the state itself has failed to function fairly and in accordance with the general will. Although a single application of the legal system may have been flawed, the legal system itself remains sufficiently valuable and viable—there is no reason to undermine the operation and the integrity of the system by harboring the fugitive. Therefore, before the philosophies of Rousseau and Locke, he is compelled to report Vanzetti to the police.

(B) Problem Two

You are a German citizen. You answer the door late one night in 1943. There stands a Jew, escaped from a concentration camp. Do you call the police?39

Like Problem One, Problem Two is also “easy,” although for the opposite reasons. In this problem, the protagonist not only finds the result of the application of the Nazi laws abhorrent, but she also finds the laws themselves abhorrent. It would be fair to say that unlike Frankfurter’s

39. COQUILLETTE, supra note 5, at 171.
continued faith in the American Legal System in Problem One, the citizen in this problem finds the entire Nazi legal system to be inherently morally bankrupt and flawed.

The philosophies of Rousseau and Locke would require the citizen to disobey the Nazi law requiring her to report the Jew. As Locke argued, the State exists to provide for the safety and security of its citizens and their property.40 It follows that the State which violates these governing principles, by the nature of such transgressions, forfeits the power delegated to the State by the general will of the body politic.41 In other words, if the State does not fulfill its duties under the social contract with its citizens, then the contract is broken and the people are no longer obligated to obey the rogue government. As a result, the power of the sovereign reverts back to the people, the State is dissolved, and the people free to reconstitute a new State which would reflect the general will.42

For Rousseau, the legitimacy of a government rested in whether it conformed to the general will of its citizens. The State was merely the political manifestation of the general will of its citizens, and to be legitimate, its acceptance by its citizens must be both universal and unconstrained.43 As Rousseau reasoned, the despotic or totalitarian government can only exist when the body politic pledged itself to simply obey the laws of the State.44 This pledge, however, dissolved the State by its own nature: "once there is a master, there is no longer a sovereign and the body politic is therefore annihilated."45 Also central to the general will was the principle that all citizens stood equal before the laws: "[T]he social pact, far from destroying natural equality, substitutes, on the contrary, a moral and lawful equality for whatever physical inequality that nature may have imposed on mankind; so that however unequal in strength and intelligence, men become equal by covenant and by right."46

The social contract established equality among all of the citizens because each member of society pledged themselves under the same conditions and similarly must enjoy the same rights.47 Inherent in this

40. See supra note 34 and accompanying text.
41. See supra note 35 and accompanying text.
42. See supra notes 35-36 and accompanying text.
43. See ROUSSEAU, supra note 23, at 34.
44. See id. at 70.
45. Id.
46. Id. at 68.
47. See id. at 76.
concept are the limits of sovereignty, such that it can act only for the benefit of society and cannot impose on its subjects any burden which is not necessary to the community.\textsuperscript{48} Every act of sovereignty must apply to all citizens equally any benefit or burden, and make no distinction between any of the members who compose it.\textsuperscript{49}

Nazi Germany in Problem Two represents a State which had lost its legitimacy. With respect to the purposes of the government, the arbitrary seizures, deportations, and executions of Jews and other citizens constituted a fundamental failure to protect the persons and property of a substantial part of the population. In the most basic and fundamental way, the State itself became the threat to the safety and security of its own citizens and transformed itself from the collective force formed for self-preservation, to the aggressive enemy which the social contract was created to protect against. Moreover, Nazi Germany also violated the limits to sovereign action as reasoned by Rousseau. Rousseau required that one of the central principles of the social contract was the equality of all of its citizens before the power of the sovereign as expressed in law. Nazi Germany created a class of citizens—the Jews, Communists and others—who were clearly treated differently than other German citizens before the law. The State arbitrarily subjected the sub-class to the most fundamental violations of persons and property without due process and without fault. The central tenet of the contract which provided that each citizen give equally and benefit equally was violated.

Although Rousseau argued at one point that the State has the power to compel its citizens to obey its laws, the laws are legitimate only so far as they conform with the general will.\textsuperscript{50} The acceptance by the body politic must be both universal and unconstrained.\textsuperscript{51} In contrast, the laws of Nazi Germany clearly violated the general will—obviously, the Jews and other victims of the laws did not accept any aspect of these laws, let alone in a universal and unconstrained way. Furthermore, the totalitarian nature of the State failed to represent the general will in the most fundamental way. The despotic or totalitarian government does not represent the general will—it usurps the general will, and in the process, dissolves the body politic. As soon as the body politic alienates its will by pledging simple and mindless obedience, it is, by definition, no longer a society,

\textsuperscript{48} See ROUSSEAU, supra note 23, at 75.
\textsuperscript{49} See id. at 76.
\textsuperscript{50} See supra note 44 and accompanying text.
\textsuperscript{51} See ROUSSEAU, supra note 23, at 34.
and the social contract is broken. Therefore, both the Rousseauan and
Lockean analysis of Problem Two reveals that the citizen must aid the
Jew. Furthermore, she is under no obligation to do so openly, since the
basis of her obligation to follow the law, the social contract, has been
dissolved by the acts of the Nazi government. Because the State no lon-
ger performs the role entrusted to it by the body politic, the State is no
longer legitimate, and the society has returned to a state of the original
condition, where there is no legitimate society, government nor laws.

III. THE "HARD" PROBLEM: PROBLEM THREE

Judge Lemuel Shaw answers his door late one night in 1854. There
stands a person wanted as a 'fugitive slave.' Shaw explains that, de-
spite his personal aversion to slavery, he is going to send for the
sheriff or, even worse, a federal marshal. What is your view? . . . If
your response to [the first Problem] was to break the law, would you
turn yourself in for punishment?52

At the time of Problem Three, Judge Lemuel Shaw was the Chief
Justice of the Supreme Judicial Court of Massachusetts, who was also
known for his rulings enforcing the Fugitive Slave Act of 1793, provid-
ing for the repossession of escaped slaves.53 His concerns at the time
were two-fold: first, the law was Constitutional and Congress had passed
it with all due procedure; second, he was apprehensive for the security
and harmony of the Union.54 As a "man of peace," he wanted to avoid
above all else, a "great national calamity," to which he believed that the
slavery debate would lead.55 These beliefs led to his decision in 1842, in
the Latimer case, to deny a writ of habeas corpus and order the return of
a slave to his captor.56 Furthermore, he ruled that the Federal Fugitive-
Slave Act preempted the Massachusetts Personal Liberty Law of 1837.57

52. COQUILLETTE, supra note 5, at 171, 237.
53. See LEONARD LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE
SHAW (1957), reprinted in LAWYERS AND FUNDAMENTAL MORAL RESPONSIBILITY
54. See id.
55. See id. at 191, 201.
56. See id. at 194.
57. See id. The Massachusetts Personal Liberty Law of 1837 guaranteed a trial
by jury "on questions of personal freedom." LEVY, supra note 53, at 195. Moreover,
the only exception to this right occurred with the "custody of some public officer of
In 1860, he resigned from the bench and in his last public act, led a group of conciliationists to recommend the unconditional repeal of Massachusetts' Personal Liberty Laws.58 These laws had stood directly in the way of the enforcement of the fugitive-slave laws, and were the basis of writs of habeas corpus.59 The recommendation took the form of a published "address" condemning the Massachusetts laws as "laws commanding civil war," which "violated our great national compact."60 This marked the end of the career of a jurist who had otherwise granted liberty to every non-runaway slave before him in court.61 In the words of his biographer: "As the 'national calamity' he had always dreaded became ever and ever an increasing reality, a man of his conservative temperament and Unionist views could only retreat from the cause of individual freedom in an anxious regard for an even greater value, the nation itself."62 Justice Shaw had chosen to uphold laws which he had personally found morally reprehensible and as a result, ultimately found himself in opposition to "An Act to protect the Rights and Liberties of the People of the Commonwealth of Massachusetts."63

Rousseau would have decried Shaw's course of action. In The Social Contract, Rousseau argued vehemently against the institution of slavery. He first reasoned that no person had any natural authority over another, and that force alone did not establish a right or duty.64 Therefore, any legitimate authority between persons would necessarily stem from covenants.65 Examining the nature of covenants, however, revealed that any covenant rendering one person as a slave of another is inherently illogical and null.66 Rousseau reasoned that:

To renounce freedom is to renounce one's humanity, one's rights as a man and equally one's duties. There is no possible quid pro quo for one who renounces everything; indeed such renunciation is contrary to man's very nature. Is it not evident that he who is entitled to demand everything owes nothing? And does not the single fact of

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58. See id. at 201.
59. See id. at 194.
60. Id. at 201.
61. See LEVY, supra note 53, at 201.
62. Id.
63. See id.
64. See ROUSSEAU, supra note 23, at 53.
65. See id.
66. See id. at 55.
there being no reciprocity, no mutual obligation, nullify the act? 67

Slavery was therefore impossible, and contrary to the general will of the body politic, which always sought the optimum conditions for all citizens within society. It followed that a society which condoned and enforced slavery acted contrary to the general will and lost its legitimacy.

In the context of Problem Three, Rousseau would have reasoned that the Fugitive Slave Act and Article IV of the United States Constitution were laws which fundamentally violated the social contract. They served to legitimize and support the institution of slavery within the State. In doing so, the laws inherently denied the American government any legitimacy as the manifestation of the general will under the social contract. The Fugitive-Slave Act violated the social contract on two levels: first, on the most fundamental level, the State failed to protect the persons and property of the slaves, who were members of society; and second, the State condoned and enforced an institution in violation of the general will of its members, which by definition seeks the greatest good for all of its citizens and automatically opposes slavery. Under Rousseau’s model of society and the State, the fugitive-slave laws would have broken the social contract and the citizens of the State were therefore returned to the original state, free to reform a new government. From this perspective, Shaw’s actions were wrong, and Rousseau would have given him the freedom to harbor the slave, and to do so covertly, even at the cost of undermining the legal system.

In contrast, Locke did not consider the existence of slavery to be a sufficient basis for a people to consider a government illegitimate. 68 In his discussion “Of Slavery” in Two Treatises of Civil Government, Locke first recognized slavery as an unnatural state, inherently inimical to the principles of man’s inalienable right to freedom. 69 He justified slavery, however, as the continuation of the state of war between a lawful conqueror and a captive. 70 Locke wrote that once the slave ceased to struggle for freedom or declined to take his own life, he entered a de facto compact with his captor. 71 In essence, the slave has entered an agreement for “limited power on one side and obedience on the other.” 72 So

67. Id.
68. See LOCKE, supra note 33, at 127-28.
69. See id. at 127.
70. See id. at 128.
71. See id.
72. Id.
long as the compact remains in place, the state of war and the condition of slavery ceases to exist.\textsuperscript{73}

As a result, Locke's justification of slavery as a compact between master and slave also allows the recognition of the antebellum American government as one which fully fulfills its obligations to its citizenship. The American State retains its legitimacy so long as it conforms to the fundamental rules of the social contract by preserving private property and providing for the safety and security of its citizens. When Locke denies that the existence of slavery within a State constitutes a transgression of the public trust, there is no other basis to challenge the political power of the American State. The power that the individual surrenders to society for the common good remains there and the individual must follow the laws of the legitimate government. Moreover, with the strong Bill of Rights and tradition of representational government as a Republic, the American government also satisfies its ancillary duties under the social contract by reflecting the will of its own citizens and maintaining individual liberty. For Locke, because slavery is nothing more than a contractual agreement between master and slave, there is no difference between the government in Problem Three from the government in Problem One. As a result of such analysis, he would have supported the actions of Justice Shaw in following the law of his society and turning in the escaped slave.

\textbf{IV. DISCUSSION}

The analysis of Problems One and Two demonstrate the potential applicability of the philosophical construct to the legal ethical dilemma. Locke and Rousseau neatly resolve the ethical dilemmas and would require the lawyer to follow the law in Problem One and to break the law in Problem Two. The nature of the tool which philosophy offers to the attorney has two parts. The first part is the logical framework which guides the process of decision. Both philosophers require that one follow the law so long as the State remains legitimate. Only when the State fails to fulfill its duties to its citizens does this failure justify the dissolution of that State. The second part of the philosophical construct offers a hierarchy of principles. For example, the philosophers identify the paramount goals of the State as the protection of property and the safety and security of its citizens from physical harm. In the alternative, they could have

\textsuperscript{73} Locke, supra note 33, at 128.
identified the uniform distribution of wealth as the goal of the State. Inherent in the choices Locke and Rousseau make in developing their philosophies are the identification and prioritization of values and principles. When the State violates the paramount goals of government identified by Locke and Rousseau, the conclusion is that the State is "evil." In accordance with these principles, the judgment is made in Problem Two that the Nazi State is evil, because it fails to protect the property and persons of its citizens. In contrast, the American State in Problem One is "good" because it fulfills the primary goals of the state.

The philosophical constructs are successful in solving these problems because both the framework and the hierarchy of principles are relevant. The framework helps the lawyer organize and direct herself to specific issues for consideration, while the principles help her to ultimately judge and make a decision. Most importantly, for most attorneys, the hierarchy of principles largely coincides with their personal code of ethics. With this convergence, the lawyer feels comfortable with the philosophers' resolution of the problems because their values and priorities are the same as the lawyer's. For example, personal moral codes will likely concur with the philosophical construct which declares the Nazi persecution of the Jews as evil. What happens, however, when the individual attorney's values diverge from those identified by the philosopher? In Problem One, what if an attorney believed that the death penalty applied to anyone, guilty or innocent, was wrong. In such case, the philosophical resolution becomes morally unpalatable. For her, capital punishment itself constituted a betrayal of the general will of the citizens of the State.

In the analysis of Problem Three, the limited relevance of the philosophical construct becomes more apparent. Under Rousseau, the attorney is free to violate the Fugitive Slave Act either openly or covertly. The State that condones and fosters slavery violates the social contract and loses its legitimacy. In contrast, Locke does not consider the existence of slavery within the State as a fatal flaw of government. In justifying slavery as a compact between master and slave, Locke maintains that a society free from slavery is not a paramount goal of the State. This is a choice with which many would not agree. In fact, sufficient numbers of antebellum American citizens disagreed with Locke's hierarchy of principles sufficiently to fight the Civil War over the issue. Needless to say, mainstream thought today would likely mark a divergence of personal morality and the principles offered in Locke's philosophical construct.

As a result, the relevance of Locke's philosophical construct becomes questionable. When the philosophical analysis results in a conclu-
sion unpleasant to the personal morality of the attorney, the utility of philosophy becomes inherently marginal. This tension does not, however, necessarily require the repudiation of the applicability of philosophy to the ethical dilemma. The original framework can still remain a helpful aid to the attorney in organizing and balancing the competing priorities involved in the dilemma. Moreover, the philosophical construct can equip the lawyer with the concepts and language to understand and consider the dilemma. Even if one does not agree with Locke and considers slavery to be a fatal flaw in a State, there is still utility in using the philosophical construct as an approach to a problem, a methodology and a way to organize and evaluate the situation. This contribution to the resolution can be valuable, even if the attorney’s personal moral code diverges from the philosopher’s hierarchy of principles.

Nonetheless, the attorney also needs to be aware that to an extent, the framework itself necessarily incorporates evaluative decisions by the philosopher. If the framework includes moral decisions by the philosopher which the lawyer finds personally repugnant, the resultant resolution of a dilemma from using the philosophy will also be unsatisfactory. Some of the necessity for the attorney to compare these “hidden” decisions with her personal morality is mitigated by the virtually universal acceptance (in the West) of some of the philosophical constructs discussed. For example, Locke is often characterized as the de facto official philosopher for the United States. In such case, the moral decisions which he has made regarding the way he organizes and conceptualizes his philosophy will nearly automatically coincide with the personal mores of anyone born and raised within an American society. The fact remains, however, for the philosophical construct to be useful to the attorney, she must look carefully for a philosophy which incorporates moral decisions which coincide with her personal moral code.

The philosophical construct represents a tool to help the lawyer resolve an ethical dilemma. The final responsibility for any decision, however, lies with the lawyer himself. The attorney cannot use philosophy to compensate for a deficiency in his own personal morality. He cannot escape responsibility for his decisions by adopting a philosophical construct to guide his ethical decisions and divorcing this process from his morality. As Aristotle said,

The man, then, must be a perfect fool who is unaware that people’s characters take their bias from the steady direction of their activities. If a man, well aware of what he is doing, behaves in such a way that he is bound to become unjust, we can only say that he is voluntarily
unjust.\textsuperscript{74} Each person is responsible for their actions where there is choice and the power to act: "Now if it is in our power to do noble or base acts . . . then it is in our power to be virtuous or vicious."\textsuperscript{75} In the final accounting, even the attorney's choice of philosophical constructs reflects a moral choice, and ultimately, the resolution of an ethical problem reflects his personal morality.


\textsuperscript{75} \textit{Id.}