

Table 3.2. *Distinctions for lawyers between the ethics of duty, virtue ethics and Confucian teaching*

The ethics of duty		Virtue ethics (character, values)	Confucian teaching
1	Duty defines moral theory There is no moral theory that is not based in duty to act, be it a duty to maximize the happiness and welfare of the greatest number of people, or a duty to identify through rational reflection what is the 'right' thing to do, or a combination of duties. The ethics of duty is initially attractive to many lawyers, and remains so because it identifies morality with law, allowing duty to be located and in some senses confined to written rules of professional conduct, or a combination of those rules, judges' decisions and governments' laws. The ethics of duty is attractive to legal thinking, which places great store on a perceived certainty of law and its capacity to order human relationships dispassionately and effectively, through the power of its own authority.	Extends beyond legal duties Virtue ethics is not confined to the orbit of morality as law or duty, but upturns the territory of morality fundamentally by looking at the actor, not the act. Appropriate character and values give rise to the moral actor and are the well-spring of that actor's moral actions. While these actions may be identical in any one set of circumstances to those that an ethic of duty would prescribe, there is no necessary congruence. For example, a lawyer may choose to represent a morally reprehensible client (for example, a casino corporation) on the basis that that client has a right to representation, and he believes he has a duty to provide that representation in order for all actors to have access to justice, but a virtuous lawyer might readily	Incorporates both duty and values 'Chinese people hold a strong respect for hierarchy and a weak sense of legality.'^d Respect for hierarchy and the priority of hierarchical relationships is based in duty rather than law. In addition to respect as a key value, there are also supporting values of patience, perseverance, civility and especially obedience without question: all combine to deliver a strong sense of conformity and a degree of predictability in decisions and behaviours. The central goal of the Confucian world view is harmony – which is to be achieved by <i>Moral Thought</i>, which involves '... regulation based on virtue, benevolence, social rightness and morality. ... It dictates that people should be considered fundamentally good, with a sense of

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	consider it unjust to assist that client because casinos exploit people after addicting them to gambling. Michael Sandel affirms the Confucian view that 'we simply cannot flourish as 'unencumbered selves', divorced from the claims of community'. ^a It is reasonable therefore to allow virtue ethics to enter the debate. Reid Mortensen identifies the major limitation of written rules of professional conduct for lawyers (and indeed, of all written law). Written law/rules have limited adaptive capacity (they cannot cover everything). They can be supplemented by new rules as needed, but these refinements themselves undermine the Rule of Law because they add complexity, can obscure principles and create a culture of compliance rather than moral reflection. ^b	integrity instilled in them by social customs, norms and education. Preferably, disputes are settled by relationship-based mediation, not courts. ^c Confucius saw the law as a complete last resort – he focused on developing character and attitudes rather than adhering to law. ^f

Virtue ethics allows the virtue of justice in that lawyer to override a conduct rule requiring them to act for the casino.^e

2 Law educates	Michael Sandel asserts that the law's punitive power is not its most important quality and that the law also performs a strongly educative function, simply because it exists. So he rejects Yong Huang's view that for Confucians, law cannot be an instrument of moral education.^g											
Virtue develops character and reflection	Sandel also refers to Huang's preference for Confucian 'rules of propriety' to influence and guide behaviour, as preferable to laws, in the sense that such rules guide behaviour by 'mobilizing shame' rather than fining or imprisoning people. Sandel gently criticizes this bifurcation arguing that '... the Aristotelian and Confucian accounts of moral education have much in common'.^h Confucian rules of propriety (rites) appear to be indistinguishable in their intended effect from actual formal laws that entail state punishment, rather than family disgrace or loss of face. Sandel doubts that roles, independent of the concept of any 'self', can fully											
Rites and roles educate	Confucians '... promote virtue by personal example and by rules of propriety'.^k For Confucius, the correct way to remonstrate with others in relation to their non-virtuous acts, is to do so gently, in low tones, with careful facial expression and soft voice'^l – because this approach promotes acceptance of the wrongdoing. While Confucians and Aristotelians agree that a part of a government's job is to make people virtuous, Confucians would not agree at all that his can be done by legislation and punitive laws: 'If you lead common people with political measures and keep them in order with punitive laws, they will stay out of trouble but will have no											

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The ethics of duty	Virtue ethics (character, values)	Confucian teaching
3 Duty asks: ‘What should I do?’ An ethics of duty person tells the truth because they believe it is right to do so. So a lawyer with an ethic of duty approach will tell the truth in court	explain morality and the development of virtue: ‘... I reject the notion that morality issues from the choices of autonomous individual selves, but I do not agree that we can “think about morality without moral agents”.’ⁱ And this is so because roles and rites leave out the function of critical reflection, something that only a core true self can fully come to grips with. Thus ‘... this interpretative activity ... constitutes moral agency.’^j	sense of shame; if you lead them with virtue and keep them in order with propriety, they will have a sense of shame and not make trouble.”^m ‘... the Confucian view is neither retributive nor utilitarian, but restorative, rehabilitative, or therapeutic ... although [this view] also aims at rectification, unlike the two familiar theories which aim to rectify the result of the unjust acts, [Confucianism] aims to rectify the source of the unjust acts, the immoral agent.”ⁿ
3 Duty asks: ‘What should I do?’ An ethics of duty person tells the truth because they believe it is right to do so. So a lawyer with an ethic of duty approach will tell the truth in court	Virtue asks: ‘What should I be?’ or ‘How should I be?’ “The virtuous person expresses <i>who</i> they are when acting and, in acting, they develop <i>who</i> they are.” [UVE 11] A virtuous person tells the truth because they love the truth.	Confucians ask: to whom do I owe respect and obedience? A Confucian’s sense of self is initially subordinate to their wider responsibilities. A Confucian lawyer will tell the truth and not actively hide behind silence if the wider question of

and insist that others do so too, because it is right to do so. But if another rule establishing the rightness of a contradictory action conflicts with the duty to tell the truth, then the lawyer's decision to lie (or commonly in legal practice, to remain relatively ignorant and silent), is as ethically justifiable as is the duty to tell the truth.

For example, in the English case of *Meek v. Fleming* [1961] 2 QB 366, a lawyer remained silent and allowed his client to pretend (by wearing his previous police uniform in the witness box) that he still held a certain rank in the police force, rather than disclosing that he had been demoted. The lawyer believed, erroneously, that he had the right to remain silent because of a rule which, arguably, permitted such silence (in effect, passive deception) as long as it did not amount to active deceit of a court.

A lawyer who loves the truth will find it internally difficult to remain silent when a lie is told by another or a deception is practised by another, because their love of the truth is compromised. Their primary virtue of love of truth is central to who they are and is not susceptible to variable rule permission.

'what happened' is under active investigation.

But a wise Confucian lawyer will also exercise practical judgment in critically reflecting on their actions, as they weigh up the choices they must make between the layers of their responsibilities to clients, their colleagues, the courts and to the state, in an effort to prioritize the good over the right. In most cases, they will not be silent in the face of passive deception of a court.

The individualism that is strongly embedded in duty ethics is not inherently attractive to Confucian teaching, but Confucian-leaning lawyers will not automatically give up their clients to any system: they will assess where the balance of goodness and harmony lies in the need to ensure that an accused person receives judgment according to the legitimate claims of a just community.

Table 3.2. (cont.)

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4	Deontic (Greek, meaning necessity – right, wrong, obligated, forbidden, required, prohibited) [UVE 12] The deontic view of the actions of lawyers forms the basis of teaching in many law courses and is the dominant ethos of legal practice in most Western jurisdictions. Lawyer role models are almost always of financially successful men and women who have applied rationality to rule definition and devised mechanisms that capitalize on imprecise laws in the interests of their clients. Since most law is capable of and requires interpretation if it is to be applied at all, there is endless scope for the deontic approach. What is right or wrong is clear enough to be stated by law. For example, it is	Aretaic (Greek, meaning virtue, excellence – virtuous, good, admirable, honest, courageous, modest, friendly) [UVE 12] Virtue ethics’ focus on admirable character can contribute outstanding role models to legal practice (for example, the fictional Atticus Finch in <i>To Kill a Mockingbird</i>), but it is unclear how many practising and financially well-off lawyers are guided by character before the ethics of duty. It is plausible that successful lawyers are attuned to both virtue and duty over the long term. Note that virtue ethics does not insist that virtue always trumps duty: the virtuous lawyer will be aware of their duties under positive legal systems and, in particular, of the rules of professional conduct that formally	Role (<i>jué sè</i> , Old French <i>rolle</i> , that is, the roll of parchment on which an actor’s part was written) Roles of lawyers are accepted as formally established to support the proper functioning of society, where such propriety is understood to require honesty, determination, resilience and respect for proper authority. Leading lawyers are effectively the hierarchical leaders of law and lawyering, but their leadership role contains a cultural expectation to <i>share</i> responsibility, as an expression of harmony. Paradoxically however, lawyers – whether leaders or not – are expected to stand up for themselves strongly and to negotiate strongly but respectfully for their client, as the way to manage harmony when legitimate

forbidden for a lawyer to abuse the process of justice by commencing a legal action on behalf of a client that is based on lies or distorted evidence and is really intended to achieve an ulterior purpose unconnected with the merits of the particular case.

bind them. Often, what duty requires will be what virtue encourages. But virtue ethics does say that duty without virtue is ultimately barren, particularly for the actor (lawyer). Accordingly, the virtuous lawyer will, when their virtue requires it, disobey a law, and if they do that, must be prepared to take adverse consequences if they arise.

competing roles do not provide clarity as to the way forward. For example, if a client is accused of corruption but the evidence against them is ambiguous, their lawyer is expected to argue firmly and carefully that the interests of the community and state are not served if someone who could be innocent is convicted simply because the lawyers for the state have charged them with corruption.

On the contrary, good Confucian lawyers would argue that the interests of harmony in society are threatened if unsafe convictions become common, because the community will lose confidence in the ability of the state to manage the risk of unsafe convictions.

5 Duty focuses on action

Since action is important, it does not matter in a strict sense what motives are behind the action.
Legal representation is typically

Virtue focuses on character

There is something real within us that comes to expression in our behaviour ... such that it takes a greater effort to act contrary to our

Confucius focuses on harmony

Whatever actions (or lack of action) achieve and support familial and social harmony, are good and therefore right.

Table 3.2. (*cont.*)

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available to all clients, regardless of their personal worthiness or corporate reputations. Accordingly, planning lawyers whose firms represent, for example, fast food restaurants, big tobacco or armaments manufacturers, all of which are legal operations and which are entitled to legal representation, are not obliged by duty-based ethics to examine their conscience as to the merits of their decision to act. Similarly, lawyers who act for accused rapists, accused terrorists, accused paedophiles and accused politicians are not required to justify their decisions so to act, in order that the fair administration of justice is able to proceed according to law (and duty). Law is critical, but laws should be understood as minimum standards (needed for lawyers' proper governance); but these are	character than in accord with it.' [UVE 13] Character does not involve a uniform and predetermined moral position. A virtuous lawyer will often represent bad clients or clients who may be exploiting others and will do so because of their love of justice. There will also be virtuous lawyers whose emotional reaction to a particular case and a possible client is so strongly negative (even allowing for the fact that allegations made against defendants do not amount to proven behaviour) that they identify their emotional inability to properly represent those clients and decline to act. Virtuous lawyers in this position would not be discouraged by a contrary rule of conduct that might apply to them (for example, the PRC rule requiring that they act for some defendants in	Justice is not a precondition for harmony, because harmony is best understood as a verb, not a noun, so that harmony is never achieved, but is an ongoing productive process. For classical Confucian thinkers, there were '... two main apparatuses influencing society: "fa" meaning "law" and "li", meaning "ritual" or "ritual propriety".' 'Confucius did not favour "fa" . Cultivation through <i>li</i> leads people to "ren", that is "human-heartedness" or benevolence. 'The Confucian ideal is to practice <i>li</i> in order to cultivate people's sense of care and benevolence towards other human beings and to establish and maintain positive relationships in society.'^u 'In such communities the highest virtue is harmonious relationship rather than justice.'^v

minimums, and that the lawyer of character will aspire to more than the minimum: 'For a principles-based approach to work, the character of the lawyer and their understanding of professional values are key.'³⁰

criminal cases³¹), because their love of justice is such that they know justice is not served if defence counsel are personally conflicted in this way.

In regard to the Confucian ideal of harmony, Michael Sandel has asked 'What to make of the claim that harmony, not justice, is the first virtue of social institutions'?³² He responds that in some social institutions, for example, the family, justice is probably not the first virtue. But no family is without conflict, and therefore '... the primacy of justice depends on the attitudes and dispositions that a good family, or a good community, seeks to cultivate'.³³ Sandel asserts that the presence of clamorous dissent and disagreement inside social institutions can be signs of a healthy pluralism, and need not be inconsistent with a harmonious society.³⁴ He agrees with Chengyang Li that harmony does not mean conformity, where 'disharmony is overcome through domination and the suppression of dissent'.³⁵

Confucians are clear that the objective is genuine harmony. Chengyang Li makes the point that the Confucian ideal of harmony was developed as an alternative idea to domination that is disguised as harmony, because Confucian harmony is strongly communitarian and involves constructing dynamic equitable human relationships³⁶ – and therefore harmony is not to be understood as simple conformity.³⁷

Further, '[i]n the Confucian view, social harmony is essential to the good life or, put more strongly, it is the good life'.³⁸ Therefore, '[p]ersistently disadvantaging a racial minority in a society is contrary to achieving a harmonious society'.³⁹

Table 3.2. (cont.)

The ethics of duty		Virtue ethics (character, values)		Confucian teaching
6	Goodness is defined in terms of rightness The 'right thing' is the most powerful concept in duty-based ethics. Few can disagree that if the truly right action can be identified, then it ought to be carried out and if carried out, it will be good. A lawyer who 'knows' what is right because of their sense of duty is confident in themselves, in the applicable law and in their decisions. Rightness is understood as the applicable law. For example, a lawyer who hears his client threatening to kill his spouse if she does not agree to his contact with their infant daughter will be properly anxious that murder is not committed. If that lawyer believes his client, or is at least persuaded that his client could be serious, then he will be	Goodness is defined in terms of excellence Goodness is first a fundamental personal quality of humans and only in a derivative sense is it an objective and rational concept that describes some aspect of humanity. The goodness of a single human being is a function of the sum total of their personal virtues; that is, of their excellence. The virtuous lawyer who may be known for their selfless defence of those charged with terrorist offences but who is also known for their compassion for others and understands the practical necessity of preventing terrorist attacks, may hear from his client – who is someone charged with conspiring to carry out a terrorist attack – that another terrorist group is also planning an attack.	Goodness is defined in terms of cohesion The concept of social cohesion in Confucian thought has been adapted over time by the PRC to provide a pedagogy for (cohesive) socialism, and in that context, to embody goodness. For the good role-bearing lawyer, the socially cohesive approach to legal practice requires moving beyond competition (between lawyers) and individualism, because that approach has become too 'dysfunctional'. ^{bb} Rosemount considers (admittedly, in a non lawyer context) that there is an alternative in '... the "family" networks of role bearing "children, parents, neighbours, colleagues, friends and citizens", [which] stand a better chance of solving modern societies' challenges than can be	

persuaded that a conduct rule allows him to breach confidentiality and report his client because he considers there to be a real possibility of imminent and serious physical harm to another person.^{aa}

In taking such action, the ethics of duty are facilitative, because a secondary rule allows the lawyer to disregard a primary rule.

This lawyer may be far from certain that his client is telling the truth about this prospective attack because of their clients' unbalanced state of mind.

In the pursuit of excellence, the virtuous lawyer will consider if they are: too emotionally involved because they are anxious for themselves or their family or friends; competent enough to make a decision as to their client's truthfulness (and whether or not they require forensic psychological assistance to make that decision); and then examine (through their compassion and benevolence for their client) whether their client will be able to gain suitable alternative representation if they are forced to withdraw after reporting their client to the police.

Finally, the virtuous lawyer will seek advice from those they admire for their virtue and only then make a decision, knowing that while that decision might turn out to be 'wrong', it was as 'good' as they could make it – in the sense that the decision was the product of a pursuit of excellence.

accomplished by "rights-holding, self-interested, autonomous individuals ... confronting one another competitively".^{cc}

The cohesive Confucian lawyer will utilize *Guanxi* (the system of social networks and influential relationships that facilitate business and other dealings), work out who is the chief decision-maker and ensure this person is paid due respect; and then seek to negotiate and mediate everything, in the interests of harmony.

But it is hard if not impossible to achieve total social cohesion through law. Lawyers will still occasionally be faced with clients whose personal liberty cannot be adequately protected just through mediation and negotiation. And in that moment, they may face a crisis of identity, because of the risk that Confucian roles do not easily accommodate personhood: 'Altruism denotes selfless behaviour, but that behaviour requires a self to negate, which Confucian role-bearing persons do not have.'^{dd}

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7 ‘Practical necessity’ (that is, what we feel we must do or ought to do in a difficult situation) – a matter of obligation and obedience, based on the command quality of the norm. [UVE 16] Major theistic ethics codes (for example, the <i>Torah</i>/Ten Commandments/the <i>Koran</i>) are law-based and therefore command-oriented. Reasoning is deductive (what rule binds me here?; or, what rule is likely to lead to the greatest good for the greatest number?) [UVE 16–17]	‘Practical necessity’ – an expression of character and response to values. The virtuous lawyer will act in a particular way because they want to do what their developing sense of good character pushes them towards. Their values drive them. They are compelled by their passion for or heartfelt commitment to truth. The honest lawyer will tell the truth because they want to. A virtuous lawyer will also be guided by what other virtuous lawyers would do. [UVE 18] One theistic ethics code (Christianity) focuses strongly on character rather than law, and in so doing, occupies similar moral ground to Confucian thinking, particularly in the context of justice in the face of injury. Yong Huang refers to Confucius teaching about an ‘upright’ response	‘Practical necessity’ – as the harmonious way to reconcile competing roles and loyalties. A harmony-directed lawyer will weigh up their diverse role obligations, discuss them with colleagues inside their law firm and, if necessary, advise all to whom they owe obligations, of their proposed course of action. They will seek to explain, justify and reconcile their proposed course of action with all to whom they owe loyalty, including, for example, adversaries, court officials and bar association representatives. They cannot guarantee harmony through such careful discussion and representation, but they will be satisfied that they have made all practically necessary efforts to achieve this.

to injury, but would not agree with Laozi and Jesus that one ought to repay an injury with a ‘good turn’^{ee} and Confucian scholars generally would see that requirement as ‘too demanding’^{ff} but would adopt a middle position (more than just an upright response, but less than a good turn) and repay an injury with what is felt to be appropriate at the moment.^{gg}

But Huang thinks that what Confucius really meant by repaying injury with uprightness is to help the person who injures by doing things to help them become an upright person – so that the truly upright person is one who is not just upright themselves, but one who helps others to be likewise.^{hh}

Confucian teaching requires both respect for duty and practical judgment in prioritizing competing duties
 A Confucian-leaning lawyer will do all that a virtuous lawyer would do in

Virtue is varying in stringency, requiring judgment
 Virtue ethics allows the lawyer-agent to decide priority between competing claims on loyalty and other duties.
 A virtuous commercial lawyer faced

Duty is absolute, leading to moral dilemmas
 If duties are absolute and more than one duty applies in a given situation, how is the conflict resolved? A common duty ethics answer is to assert that

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duties are only <i>prima facie</i> superior to any other duty and then to argue that one loyalty is more important than the other, allowing the inferior duty to be cancelled out. [UVE 19] How, therefore does a lawyer who has two clients in conflict with one another resolve their duty of loyalty and confidence to both clients without in some (even minor) way preferring one over the other? In practice, they do so by trying to avoid choosing between loyalties and avoiding the conflict through some sort of information barrier and by obtaining both clients' consent. However, duty-based ethics would doubt the morality of that avoidance, arguing that one loyalty should dominate the other and that there is no dishonour in one client being sacrificed to the other providing that	with competing claims on their loyalty and confidence would determine if their loyalties to both clients can be truly and faithfully reconciled by information barriers and fully informed consent. Such reconciliation could never be unequivocally ruled out, but if they cannot be so reconciled in the particular circumstances of the case, then the virtuous lawyer would explain to both clients that neither client can be preferred to the other and assist them to find other competent lawyers, so that neither client is worse off than the other. If one client is retained and one departs, the virtuous lawyer would recognize the moral cost to themselves in discarding one client, including a possible loss of reputation and self-esteem. [UVE 19]	working out which of several competing role obligations to particular clients should be prioritized. Such lawyers will reflect, discuss and explain their own understanding of priority roles. In many cases, the comparative strengths of different obligations to particular clients will be obvious. There will be no loss of face in preferring one such client to another, and requiring the client who is lesser in the hierarchy of role obligations to find another lawyer. When role obligations to clients of similar status cannot be differentiated, the Confucian lawyer will further discuss their conflict with both clients simultaneously and seek their agreement on a harmonious solution. If one client then leaves, a debt/ obligation will be owed to that

sacrifice occurs according to applicable regulations.

9 Duty is based on general principles

Lying is wrong in principle and it is therefore also wrong for lawyers to lie. The ethics-of-duty lawyer will know they have done the right thing because they have succeeded in acting in a way that is strongly or even marginally inside and allowed by a law. Their conscience is likely to be clear because they have behaved according to their duty to act within the law.

[However, assigning personal responsibility for actions to the authority of a principle or rule only attenuates our sense of responsibility. We remain fully responsible despite rules. [UVE 22]

The ethics of duty provide a degree of comfort and the illusion of easy decision-making, but there is no longer a 'superior orders' defence for moral failure.]

The virtuous lawyer would emerge scarred and bearing the loss of virtue.

Virtue is responsive to particular considerations

Moral duties are not helpfully articulated in a general form. Particular circumstances are such that a virtuous lawyer will need to judge whether to lie or not (for example, to deceive as to the whereabouts of refugees facing oppression and self-harm) and be responsible, and be prepared to take rather than evade the consequences if that judgment in those particular circumstances turns out to attract a penalty. [UVE 21]

Virtuous lawyers acknowledge moral ambiguity in almost every situation they are confronted with and will feel the tension and risk of choosing to lie or to remain silent when others might say they should speak up.

Virtuous lawyers will not be certain of the rightness of their actions but will be courageous in the knowledge that they have tried to act according to their character and values.

client by the lawyer, to be redeemed at some point in the future.

Confucius values loyalty above all else, in the interests of harmony

A Confucian lawyer will apply the lens of varying role obligations to determine what is right and what is wrong.

If a role obligation (of, for example, obedience) owed to a superior lawyer in their law firm requires the inferior lawyer to agree to a transaction that immorally disguises profits generated by a client, so that the client pays less tax, the inferior lawyer will stop and consciously compare that direction with their wider social obligation to support the income of the state. They will choose to prioritize their role-obligation to society.

Such a lawyer will not feel a sense of moral ambiguity, though they will need practical support as they look for another job.

Table 3.2. (cont.)

The ethics of duty		Virtue ethics (character, values)	Confucian teaching
10	Duty is justified by reason The ethics of duty asserts that moral thinking must be entirely rational and devoid of all emotional involvement. Only in focused rational reflection can the proper course be discovered. For example, Kant considered 'pure reason' to be the safest of guides in difficult situations and the emotion of love for others to be a distraction in the task of establishing what it is our duty to do. [UVE 23] An ethics-of-duty lawyer is concerned first with upholding the law because it is the law and only secondarily with achieving justice, though the rationalism of the ethics-of-duty lawyer will also acknowledge that law which is unfair for too long or with too many adverse consequences (injustice) will be an unstable law and	Virtue is influenced by emotion Sentiments of care, love and concern (benevolence) and distress, sadness, appropriate revulsion and a desire for justice are valued by virtue ethics as entirely appropriate considerations when making difficult moral decisions. 'Emotion is part of the dynamic link that connects character and behaviour.' [UVE 23] Virtuous lawyers will be especially concerned for justice because their care for their clients and the wider community cannot be fully achieved without a degree of fairness in outcomes, as between people and as between communities.	Emotional care in all relationships (that is, respect) is a reasonable act Respect for properly authorized law is integral to a Confucian world view and a Confucian lawyer will see the need to uphold such laws to be obvious, even if their enforcement causes suffering. However, such lawyers are more strongly bound by an obligation to promote harmony and will be concerned not to needlessly cause anguish or despair. Respect by lawyers (and rulers) for those whom are ruled – that is, their willingness to do justice to them – requires conscious emotional care. Lawyers need to show empathy in all their relationships, including to those who owe them obligations of obedience and respect, if social harmony and justice are to be

will not be either respected or successfully enforced.

achieved. And the social and legal institutions that lie behind lawyers will be just if they are composed of empathetic lawyers.ⁱⁱ

In this sense, genuine emotional engagement by lawyers with all those in their role networks is a reasonable act, and the fruits of this engagement will be more harmony and less injustice.

11 Rule logic perspective^{jj}

Carol Gilligan's UK studies of early school age children identified that young boys preferred to think of moral issues in terms of 'following rules and receiving what is theirs by right, while girls preferred to compromise so as to maintain friendly relationships'.^{kk}

The ethics-of-duty stance makes no comment on a genetic basis for morality, let alone for male *versus* female lawyers, but emphasizes that all lawyers should be 'doing the right thing'.

Caring perspective

Caring lawyers, that is, those exhibiting an ethic of care, may be the same as virtuous lawyers, but need not be.

A virtuous lawyer will not shirk a tough or 'uncaring' decision if their good character is such that they feel compelled to choose to act in that way.

What distinguishes the caring perspective of virtuous lawyers is their care(ful) attention to how they act, who they impact upon and how their decision is received.

Virtuous lawyers are vitally interested in

Appropriate role relationships are by definition care(ful)

The essence of Confucian roles is their contribution to social stability. As a matter of social design, such roles are legitimate and because they are legitimate, they aid social stability.

A judge is owed obedience by the lawyers appearing before them, and in turn owes obedience to the law above them.

Superficially, this is a rule logic consistent with duty-based ethics, but Confucian role ethics goes further than rule logic: Confucian role ethics

Table 3.2. (*cont.*)

The ethics of duty	Virtue ethics (character, values)	Confucian teaching
The ethics of duty is not formally concerned with how acts are perceived or explained, with any pain that may be caused by those acts or with their consequences for humans, providing that they are right, as determined by law or <i>a priori</i> reason. For the legal ethicist of duty, right actions become good actions.	mediating their decisions in a care-filled manner.	is intensely relational rather than dispassionate in the Kantian sense, or objective according to consequentialist analysis. The Confucian perspective requires active (emotional) care by role-bearers for those to whom they owe obligations. The product of such care is harmony and this in turn legitimizes the carer's actions.
12 Duty is impartial If an agent is confronted by a burning house with two people in it (one their aged mother and the other 'a world-famous scientist who will bring great good to the world')¹¹ and can save only one, who should they choose to save? The consequentialist (utilitarian) agent will choose the scientist because the calculus of greater contribution to the world, based on impartial reason, is clear. [UVE 24]	Virtue is partial Virtue ethics applauds the agent's decision to save his mother because of their emotional ties, but the virtuous rescuer would feel a sense of regret that the scientist could not also be saved. Virtue acknowledges that it is highly appropriate to be partial in acknowledging 'the web of interpersonal relationships'.¹² [UVE 24–25]	Relationship is partial Confucian teaching is confident that there is only one choice here for the moral agent: to save their mother's life. There would be little or no recrimination for this choice, and mystification for the private debate of the consequentialist actor – bordering on utter contempt – who would think it acceptable to save the scientist instead of a close relative.

The Kantian agent will acknowledge that one must die but will be morally incapacitated because they cannot (unless they turn to another ethical framework) prefer one to the other, since to do so offends a central Kantian principle (a categorical imperative) that each life is as valuable as another.

The impartial ethics-of-duty lawyer who authored the US Pentagon's *Torture Memos*,^{mm} which justified the use of waterboarding and other torture of suspected terrorists during the US presidency of G.W. Bush, was and is content in having done their duty to protect as many people as possible from the threat of terrorism. Indeed, such torture may have saved the lives of others and proof to the contrary is unlikely.

A virtuous lawyer in a similar position as the Pentagon author might be appalled at the thought of, and will weigh up:

- torture as the opposite of care, and ask themselves if the torture really would produce reliable information,
- whether the weight of evidence against the suspect was of greater probity than the certain harm that will be done by torture to him and his family relationships,
- whether the reputation desired by the US will be damaged if the torture and its justifications were ever to become public, and
- whether they, as the lawyer proponent of that torture, ought to take full responsibility for their decision by seeking to personally conduct the torture themselves.

There may be some regret, alongside the feelings of the virtuous lawyer, that anyone had to die; but this feeling will not overturn the key choice.

In relation to the ethics of torture, the Confucian lawyer would be anguished by the infliction of pain because that action offends harmony, but would also be inclined to accept it if the torture were deemed necessary by a superior role-bearer, particularly if the physical security of other close relatives and role-bearers were directly threatened by the probability of terrorism and the person being tortured was likely to be in receipt of relevant information that might prevent such terrorism.

Unfortunately, the Confucian lawyer should have the same rational doubts about the efficacy of torture as the virtuous lawyer, but would be inhibited by role loyalty in objecting to its use.

Table 3.2. (*cont.*)

The ethics of duty		Virtue ethics (character, values)		Confucian teaching
13	Universal Moral actions are absolutes because of their universal nature, for example, to tell the truth, show courage and practise benevolence. Foundational, duty-based ethics avoids the problem of aberrant cultures with deficient moral codes. A lawyer whose being is grounded in universal duty-based ethics may be less likely to succumb to the perversion of morality that characterized Nazi Germany, or apartheid-era South Africa or even some agencies of governments in contemporary liberal democracies. But if such lawyers' grasp of universal principles is actually parochial or blunted by nationalism, they may succumb to the blandishments of employers or governments that identify nation-state interests as the proper base of their duty. If that	Culture-relative 'Virtues are always culture specific. They have moral validity because the culture they have developed within values them.' [UVE 39] Nazi Germany developed loyalty to the point of unwavering obedience, but such unquestioning obedience was (and is) not perceived as a virtue outside Nazism or similar totalitarian societies. [UVE 40–41] The corruptibility of a community or state's moral position in the manner of the Nazis represents a challenge to the authenticity of virtue ethics, because there is nothing intrinsically right about culture-specific virtues. So virtue ethics appeals to the reality that individuals, despite their moral theorizing, always make decisions in very precise circumstances and rely on their general connections to others: there is always a 'spark of	Culture relative and evolutionary The Confucian approach '... grants priority neither to rights or to the individual'.^{oo} Accordingly, any acceptance of rights in Greater China will not take priority over a consequentialist and universal social consciousness. 'Ideal Confucian politics are a politics based on virtue with a special emphasis on the inseparability of political affairs from virtue ... and thus here there exists no political neutrality.'^{pp} Chen Lai thinks that any practical separation between politics and morality is impossible in the PRC. Because of its history of great ethnic diversity and the 150 year-drive to oppose external imperialism, contemporary China has evolved the concept of community to mean a political community that has	

occurs, they may be willing to work on legislation or its enforcement that denies universal values and assists injustice.

It is possible that the lawyers who during the 1930s developed the anti-Semitic legislation that came to define the Nazi Holocaust were persuaded that their duty-based ethics were owed to the German state alone.

creativity' that allows individuals to look at intuitions and insights from other societies [UVE 41];

in effect, they are always subject to a wider hermeneutic that judges their morality against the whole of human experience. For example, while slavery was for a long time regarded as entirely acceptable, it gradually became suspect according to wider understandings of human decency and was formally abolished in culturally advanced societies. [UVE 41]

Specific cultural contexts for moral actions also extend to MacIntyre's concept of a 'community of practice' [UVE 39]: that is, a group of people who for a particular reason develop and formally agree on a specific moral code.

Lawyers have developed such a culture-relative moral code and their particular code provisions, such as zealous advocacy, are characterized by lawyers as both the essence of lawyering and as only part of lawyering.

completely transcended ethnicity and has become the political-community state.⁹⁴

At present, the ultimate role-bearer of contemporary Confucian thought is the state. However, subject to the primary role obligation to actively care for close and extended family, Confucian values extend beyond the state and encompass a wider universal responsibility to achieve harmony.⁹⁷

To the extent that government and private lawyers are required to do what the state requires regardless of any private clients' instructions, they will be culturally and morally constrained by Confucian teaching to remain obedient to that teaching.

Table 3.2. (cont.)

The ethics of duty	Virtue ethics (character, values)	Confucian teaching
	The virtue of a code that comes from a community of practice, such as the legal profession, is that it is provisionally authentic for the lawyer community and is in a state of more or less constant development, in order to maintain the approval of the wider community.	

^a See, generally, Michael Sandel, 'Learning from Chinese philosophy', in Michael Sandel and Paul D'Ambrosio (eds.), *Encountering China: Michael Sandel and Chinese Philosophy*, Harvard University Press, Cambridge MA, 2018, Ch. 11.

^b See, generally, Reid Mortensen, 'The clergy of liberalism: Lawyers' character, virtue and moral education in pluralized societies', in John Witte, Michael Welker and Stephen Pickard (eds.), *The Impact of Law on Character Formation: Ethical Education and the Communication of Values in Late Modern Pluralistic Societies*, Evangelische Verlagsanstalt, Leipzig, 2020, 215–32.

^c See further R.M. Saguie, 'A virtuous profession: Reconceptualising legal ethics from a virtue-based moral philosophy' (2006) *Windsor Review of Legal and Social Issues* 1; Angela Olivia Burton, 'Cultivating ethical, socially responsible lawyer judgment: Introducing the multiple lawyering intelligences paradigm into the clinical setting' (2005) 11 *Clinical Law Review* 15, at 19, noting that law schools lag behind other professional schools in incorporating the teaching of judgment-making into the curriculum; Nathan M. Crystal, 'Using the concept of "a philosophy of lawyering" in teaching professional responsibility' (2007) 51 *St. Louis University Law Journal* 1235, at 1240, noting the 'number of approaches' used in the professional responsibility literature to assist lawyers in making discretionary decisions and the 'wide range of discretionary decisions' that lawyers will face in their practice, at 1241; and David Luban, 'Epistemology and moral education' (1983) 33 *Journal of Legal Education* 638, 639, noting that 'judgment cannot be taught in the form of rules'.

Table 3.2. (cont.)

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- ^d Zhihong Chen and Emma Pitt, 'Chinese culture and the law', 2013 87(12) *Law Institute Journal* 46.
- ^e *Ibid.*, 46.
- ^f Peter R. Woods and David A. Lamond, 'What would Confucius do? – Confucian ethics and self-regulation in management' (2011) *Journal of Business Ethics*, 669.
- ^g Michael Sandel, 'Learning from Chinese philosophy', in Michael Sandel and Paul D'Ambrosio (eds.), *Encountering China: Michael Sandel and Chinese Philosophy*, Harvard University Press, Cambridge MA, 2018, 256.
- ^h *Ibid.*, 257.
- ⁱ *Ibid.*, 274.
- ^j *Ibid.*, 274.
- ^k *Ibid.*, 255.
- ^l Yong Huang, 'Justice as a virtue, justice according to virtues, and/or justice of virtues', in Michael Sandel and Paul D'Ambrosio (eds.), *Encountering China: Michael Sandel and Chinese Philosophy*, Harvard University Press, Cambridge MA, 2018, 49.
- ^m *Ibid.*, 53, citing *Analects* 2.3.
- ⁿ *Ibid.*, 59.
- ^o Paula Baron and Lillian Corbin, 'The unprofessional professional: Do lawyers need rules?' (2017) 20(2) *Legal Ethics* 155–73, at 172.
- ^p *Lawyers Law of The People's Republic of China*, 2017, Article 42, at Lawyers Law of the People's Republic of China (Chinese and English Text) | Congressional-Executive Commission on China (cecc.gov).
- ^q Michael Sandel, 'Learning from Chinese philosophy', in Michael Sandel and Paul D'Ambrosio (eds.), *Encountering China: Michael Sandel and Chinese Philosophy*, Harvard University Press, Cambridge MA, 2018, 250.
- ^r *Ibid.*, 250.
- ^s *Ibid.*, 251.
- ^t *Ibid.*, 251.
- ^u Chengyang Li, 'Community without harmony?', in Michael Sandel and Paul D'Ambrosio (eds.), *Encountering China: Michael Sandel and Chinese Philosophy*, Harvard University Press, Cambridge MA, 2018, 5.
- ^v *Ibid.*, 6.
- ^w *Ibid.*, 10.

Table 3.2. (*cont.*)

^x Ibid., 9.

^y Ibid., 13.

^z Ibid., 14.

^{aa} In respect of the PRC, see All China Lawyers' Association, *Codes of Profession Conduct for Lawyers* 2018, Article 9.

^{bb} See Henry Rosemount Jr, 'How to think about morality without moral agents', in Michael Sandel and Paul D'Ambrosio (eds.), *Encountering China: Michael Sandel and Chinese Philosophy*, Harvard University Press, Cambridge MA, 2018, 221.

^{cc} Ibid., 225.

^{dd} Ibid., 218.

^{ee} Yong Huang, 'Justice as a virtue, justice according to virtues, and/or justice of virtues', 46.

^{ff} Ibid., 47.

^{gg} Ibid., 47.

^{hh} Ibid., 47.

ⁱⁱ Ibid., 37. Huang asserts that Confucians (with Aristotle) '... require not just good acts, but that they be done ... from the right heart-mind'.

^{jj} Van Hooft calls this category the 'justice perspective'. See *Understanding Virtue Ethics*, 24.

^{kk} Ibid.

^{ll} Ibid.

^{mmm} See n 22.

ⁿⁿ Van Hooft, *Understanding Virtue Ethics*, 25.

^{oo} Chen Lai, 'Sandel's *Democracy's Discontent* from a Confucian perspective', in Michael Sandel and Paul D'Ambrosio (eds.), *Encountering China: Michael Sandel and Chinese Philosophy*, Harvard University Press, Cambridge MA, 2018, 92.

^{pp} Ibid., 93.

^{qq} Ibid., 95.

^{rr} See Kweku Ampiah, 'Who's afraid of Confucius? East Asian values and the African' (2014) 13 *African & Asian Studies*, 385–404.