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## The Shape of a Life: Deborah L. Rhode in Memoriam

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# THE SHAPE OF A LIFE: DEBORAH L. RHODE IN MEMORIAM

David Luban\*

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A distinctively moral thread runs through most of Deborah Rhode’s immense and wide-ranging authorship. Her main scholarly interests were in the legal profession, gender justice, and leadership, but in addition, she wrote many books about other topics of general interest—books on ambition, character, cheating, academic prestige-mongering, and the beauty bias.<sup>1</sup> They all grew out of a ground-level sensibility that she lived as well as studied. My aim in this Essay is to examine that moral sensibility—to explore its roots, to connect it to her writings, and to situate it on a map of moral theories.

A prefatory confession: although the best way to approach a scholar’s work is through the work itself and not their biography, I can’t write about

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1. She was, by a large margin, the most cited legal ethics scholar in the world, and one of the two most cited scholars of feminist jurisprudence. See *Top Cited Professional Responsibility/Legal Profession Scholars*, LEGAL ETHICS F. (Jan. 5, 2015), <https://www.legalethicsforum.com/blog/2015/01/top-cited-pr-legal-profession-scholars.html> [<https://perma.cc/JE8X-PGUG>]; Fred R. Shapiro, *The Most-Cited Legal Scholars Revisited*, 88 U. CHI. L. REV. 1595, 1604 (2021). I include these data with mixed feelings, because one of the themes of Deborah’s book on university culture is the perversity of academic prestige-hunting, see generally DEBORAH L. RHODE, *IN PURSUIT OF KNOWLEDGE: SCHOLARS, STATUS, AND ACADEMIC CULTURE* (2006), and one of my own themes in this Essay is her critique of distorted ambitions, including the ambition to make “top-anything” lists.

Deborah that way.<sup>2</sup> We were close friends and coauthors for almost forty years, and I read her writing through the lens of our conversations and the way she conducted her own life, as well as her publications. In this Essay, I will be focused on her “earnest” side. I’m all too conscious of how much that leaves out. It leaves out the light touch and wicked humor she uses throughout her writing to skewer hypocrisy and sophistry, and her delightfully unwicked sense of humor in social settings. It leaves out her gift for friendship, her generosity, her remarkable photography, and her eccentricities. It leaves out her unpublished book on dogs. In the limited space available, I won’t do more than touch on her feminist scholarship.<sup>3</sup>

Early in our friendship, Deborah told me that two works had a major impact on her, shaping both her ideas and her life.<sup>4</sup> The works could hardly be more different. One is Leo Tolstoy’s 1886 novella *The Death of Ivan Ilyich*;<sup>5</sup> the other is Peter Singer’s famous paper *Famine, Affluence, and Morality*, published in *Philosophy & Public Affairs* in 1972.<sup>6</sup> Tolstoy’s novella is, of course, a masterpiece of world literature, and Singer’s paper is a professional one—albeit far more urgent than most professional papers—published in an analytic philosophy journal. Tolstoy’s meditation has pronounced Christian overtones, while Singer argues about moral obligations from a hard-nosed and entirely secular, utilitarian perspective. Yet, as I shall explain, both works deal (in very different ways) with the ultimate question of how a person should lead their life, and both offer disquieting and radical answers to the question.

### I. THE DEATH OF IVAN ILYICH

Tolstoy’s novella begins with a casual conversation in a government law office about the news that a colleague, the magistrate Ivan Ilyich Golovin,

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2. I will refer to her by her first name, which—given our long friendship—feels much less artificial than “Rhode” or “Professor Rhode.”

3. The scholarship includes several sole-authored books—*Justice and Gender: Sex Discrimination and the Law* (1989), *Speaking of Sex: The Denial of Gender Inequality* (1997), *The Beauty Bias: The Injustice of Appearance in Life and Law* (2010), *What Women Want: An Agenda for the Women’s Movement* (2014), *Women and Leadership* (2016), and *Adultery: Infidelity and the Law* (2016)—edited anthologies and coauthored textbooks, and the crucial article *The “No-Problem” Problem: Feminist Challenges and Cultural Change*, 100 *YALE L.J.* 1731 (1991). For an overview and appreciation of Deborah’s work on gender injustice, see Joanna L. Grossman, *The Problem of Gender Inequity: The Legacy of Deborah Rhode*, 88 *U. CHI. L. REV.* 1643 (2021); Nora Freeman Engstrom, *She Stood Up: The Life and Legacy of Deborah L. Rhode*, 74 *STAN. L. REV. ONLINE* 5 (2021).

4. A third powerful influence is Simone de Beauvoir’s *The Second Sex* (1949), which Deborah read in 1970, and which solidified her as “a staunch and unapologetic feminist.” Engstrom, *supra* note 3, at 5. I don’t discuss it here, both because Deborah and I never discussed *The Second Sex* and its influence on her, and because my focus is on her moral views across multiple subjects.

5. LEO TOLSTOY, *THE DEATH OF IVAN ILYICH* (Lynn Solotaroff trans., 1981).

6. Peter Singer, *Famine, Affluence, and Morality*, 1 *PHIL. & PUB. AFFS.* 229 (1972). Google Scholar reports that Singer’s paper has been cited more than four thousand times across its many republications. See *GOOGLE SCHOLAR*, <https://scholar.google.com/> [<https://perma.cc/N5E4-847S>] (last visited Feb. 6, 2023) (search “Peter Singer ‘Famine, Affluence, and Morality’”).

has died at age forty-five.<sup>7</sup> His colleagues knew he was ill, and they remember him respectfully, but at the same time, their thoughts aren't wholly about Ivan Ilyich—they can't help noting to themselves that his death might open up promotion opportunities.<sup>8</sup> One of the colleagues also feels a bit irritated that the obligatory condolence call to Ivan Ilyich's widow might make him miss his evening bridge game.<sup>9</sup>

There is nothing malicious about their thoughts. They are ordinary men treating a colleague's death as a fact of life—sad news, no doubt, because Ivan Ilyich died before his time, but nevertheless a fact among the many facts that all of us process on a daily basis. We go on with our lives.

Tolstoy flashes back across Ivan Ilyich's life. Ilyich was a success story. He came from a prosperous but not rich family.<sup>10</sup> He was a good law student with a lively sense of fun.<sup>11</sup> As a young, single, government lawyer, he sowed his wild oats, but never to excess.<sup>12</sup> His personality was outgoing and attractive, he was liked by the right people, and he was good at his job.<sup>13</sup> As Tolstoy puts it:

He worked, saw to his career, and, at the same time, engaged in proper and pleasant forms of diversion. When from time to time he travelled to country districts on official business, he maintained his dignity with both his superiors and inferiors and fulfilled the duties entrusted to him (primarily cases involving a group of religious sectarians) with an exactitude and incorruptibility in which he could only take pride.<sup>14</sup>

Ivan Ilyich married (not altogether happily), had children, received steady promotions with only one brief setback, and finally secured a judgeship in St. Petersburg.<sup>15</sup> He bought and furnished a house that pleased him immensely, though in reality it was just like the houses of other “people who are not really rich but who want to look rich, and therefore end up looking like one another.”<sup>16</sup> At work, he had power over other people, which he never abused—“on the contrary, he tried to exercise it leniently”—but knowing he had power added zest and interest to his job.<sup>17</sup> His sole flaw, mostly due to pressure from his wife, was living beyond his means—but not alarmingly so.

In short, Ivan Ilyich had a legal career and a life which, though not perfect, was comfortable, conventional, and enviable. The arc of his career and life was not very different from those aspired to by a great many lawyers and law students: a good job well done, a family, a nice house, a circle of respectable

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7. See TOLSTOY, *supra* note 5, at 31–32.

8. *See id.*

9. *See id.* at 36.

10. *See id.* at 44.

11. *See id.* at 44–45.

12. *See id.* at 46–47.

13. *See id.* at 47.

14. *Id.* at 45.

15. *See id.* at 48–55.

16. *Id.* at 57.

17. *Id.* at 47.

friends, and plenty of fun. He fit comfortably into all his roles, as lawyer, public official, and a member in good standing of respectable society—a round peg secure in a round hole. Undeniably, Tolstoy tinges his portrait of Ivan Ilyich with irony, and disdain is not far from the surface. But Ivan Ilyich is no caricature, and Tolstoy leavens disdain with sympathy.

Then Ivan Ilyich has a minor accident with fatal consequences: an internal injury that slowly gets worse and finally kills him. The doctors are reassuring, and for months he is able to convince himself that he's on the mend—but just when it seems that the pain has gone away, and normal life can resume, the pain returns.<sup>18</sup> It gets worse. Gradually, reluctantly, fearfully, he faces the inevitable, but he cannot bring himself to believe it:

This syllogism he had learned from Kiesewetter's [L]ogic—"Caius is a man, men are mortal, therefore Caius is mortal"—had always seemed to him correct as applied to Caius, but by no means to himself. That man Caius represented man in the abstract, and so the reasoning was perfectly sound; but he was not Caius, not an abstract man; he had always been a creature quite, quite distinct from all the others. He had been little Vanya with a mama and a papa . . . . Had Caius ever known the smell of that little striped leather ball Vanya had loved so much? . . .

Caius really was mortal, and it was only right that he should die; but for him, Vanya, Ivan Ilyich, with all his thoughts and feelings, it was something else again. And it simply was not possible that he should have to die. That would be too terrible . . . .

. . . .

"If I were destined to die like Caius, I would have known it; an inner voice would have told me. But I was never aware of any such thing; and I and all my friends—we knew our situation was quite different from that Caius's . . . ." <sup>19</sup>

In the opening scene, Ivan Ilyich's friends do indeed feel that their situation is quite different: "'[H]e's dead, but I'm not,' was what each of them thought or felt."<sup>20</sup>

Weeks pass, and Ivan Ilyich agonizes about the senselessness of his suffering and his impending death. The arc of his life had been steadily upward, but was it really so?

["]Perhaps I did not live as I should have," it suddenly occurred to him. "But how could that be when I did everything one is supposed to?" he replied and immediately dismissed the one solution to the whole enigma of life and death, considering it utterly impossible.<sup>21</sup>

Further weeks pass. His suffering grows more intense, and his wife's assurances that if only he takes his medicine he will recover become

18. *See id.* at 63–78.

19. *Id.* at 79–80.

20. *Id.* at 33.

21. *Id.* at 102.

increasingly hollow.<sup>22</sup> His sole comfort is a kindly servant holding his leg in a less painful position for hours on end.<sup>23</sup> The indifferent doctors have their own lives to lead, and Ivan Ilyich turns increasingly inward.

It occurred to him that what had seemed utterly inconceivable before—that he had not lived the kind of life he should have—might in fact be true. It occurred to him that those scarcely perceptible impulses of his to protest what people of high rank considered good, vague impulses which he had always suppressed, might have been precisely what mattered, and all the rest not been the real thing. His official duties, his manner of life, his family, the values adhered to by people in society and in his profession—all these might not have been the real thing. He tried to come up with a defense of these things and suddenly became aware of the insubstantiality of them all. And there was nothing left to defend.<sup>24</sup>

Tolstoy's verdict: "Ivan Ilyich's life had been most simple and commonplace—and most horrifying."<sup>25</sup>

*Ambition: For What?* is Deborah Rhode's final book, published posthumously. It begins with a personal recollection of her father's death from pancreatic cancer when she was twenty-seven. It made her think back to *The Death of Ivan Ilyich*, which she read in college. "After watching my father struggle with some final moments not unlike those of Ilyich, I suddenly realized that this could happen to me too. I could die of cancer tomorrow and what would I have accomplished?"<sup>26</sup> She goes on:

I reread *The Death of Ivan Ilyich* when I was in my fifties after doctors discovered potentially malignant cysts in my pancreas . . . . Again during the completion of this book, as the coronavirus was taking its toll on my demographic, I showed symptoms of bladder cancer . . . . I had months of misery waiting for test results that eventually returned me to the happy state of "at least I don't have cancer, as far as I know." Still, the looming possibility of mortality has often encouraged me to revisit priorities . . . .<sup>27</sup>

She wonders what might be said at her memorial service and hopes it is what Justice Thurgood Marshall—for whom Deborah clerked—wished for his own: "He did what he could with what he had."<sup>28</sup> Quoting Justice Marshall, Deborah adds: "And my hope is that some readers of this book will think more deeply about what they want to be said about them."<sup>29</sup>

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22. *See id.* at 108–09.

23. *See id.* at 85.

24. *Id.* at 108.

25. *Id.* at 43.

26. DEBORAH L. RHODE, *AMBITION: FOR WHAT?* 1 (2021). She spoke to me often about how powerfully her father's death affected her. In *Ambition*, she writes sadly that her father came to Ivan Ilyich's realizations too late. *Id.* at 190.

27. *Id.* at 2.

28. *Id.*

29. *Id.* at 2–3.

## II. FAMINE, AFFLUENCE, AND MORALITY

Philosopher Peter Singer begins his most famous paper with this: “As I write this, in November 1971, people are dying in East Bengal for lack of food, shelter, and medical care”—the consequence of Bangladesh’s war of independence from Pakistan, which created a severe refugee crisis.<sup>30</sup> Aid efforts were pathetically underfunded. Singer notes that to keep the refugees alive for a year would cost only a bit more than the price of a then current luxury airliner project.<sup>31</sup> Surely, he argues, the money would be better spent saving lives.

Most of us, he observes, would have no hesitation about saving a drowning child from a shallow pool even if it muddies our clothes. To prevent a large, tragic harm at relatively small cost to oneself seems like minimal human decency. Singer argues that the principle at work is this: “[I]f it is in our power to prevent something very bad from happening, without thereby sacrificing anything morally significant, we ought, morally, to do it.”<sup>32</sup>

By “sacrificing anything morally significant,” Singer means that our rescue efforts would cause harm, involve acts that in themselves are morally wrong, or would divert us from preventing an even greater harm.<sup>33</sup>

He then points out something he thinks is obvious: the fact that the drowning child is in close proximity while the Bengali refugees are thousands of miles away from most of his readers has no moral relevance.<sup>34</sup> Geographical distance may be a practical obstacle to aiding the needy, but if we can do it—for example, through donations to an effective, on-the-ground relief fund—distance is a morally irrelevant contingency.<sup>35</sup> Singer’s point is even more obvious today, with the availability of one-click donations to a whole universe of relief organizations. There are serious questions about international aid’s efficacy and downsides, but geography as such is not the issue.

What makes Singer’s position distinctive is that, for him, helping the desperately needy is not simply a nice, or praiseworthy, or benevolent act of charity. Nobody but a misanthrope would deny that. Singer’s conclusion is that helping the desperately needy is of such urgency that acting on his principle is a moral obligation, not just a nice thing to do.<sup>36</sup> Singer thinks his

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30. Singer, *supra* note 6, at 229.

31. *Id.*

32. *Id.* at 231. Singer first states the principle in an unqualified way, referring to preventing things that are “bad,” not only things that are *very* bad, and sacrifices of *comparable* moral significance, not any moral significance. *Id.* Later, he says that he sees no reason to prefer the “moderate” version that I have quoted in the text to the more radical version. *Id.* at 241.

33. *Id.* at 231.

34. *Id.* at 232.

35. *Id.* at 231–32. Saying this sets aside the argument that we have special “associative” duties to our compatriots that are lacking in the case of distant strangers. For a critique of that argument, see JUDITH LICHTENBERG, *DISTANT STRANGERS: ETHICS, PSYCHOLOGY, AND GLOBAL POVERTY* 168–76 (2014).

36. *See generally* Singer, *supra* note 6. Singer tells us in a footnote that he is using the phrase “I have an obligation to” as a synonym for “I ought to.” *Id.* at 233 n.2. However,

principle follows from common sense, but he acknowledges that it entails weighty and extreme consequences that are neither common nor, in most people's eyes, sensible—i.e., that we are morally obligated to give away our wealth to the point of marginal utility, the point at which giving any more would cause as much suffering to ourselves and our dependents as our gift would relieve or prevent (what we might call the “give until it hurts” conclusion).<sup>37</sup> The reason: money has no moral significance, and compared with the human lives or acute suffering that money could save or alleviate, giving money is like muddying your clothes as you save the child.<sup>38</sup>

He admits that if his principle were acted upon, “our lives, our society, and our world would be fundamentally changed.”<sup>39</sup> Even a less stringent demand than “give until it hurts” would spell the end to consumer society.<sup>40</sup> But for Singer, this is not an objection to his argument. It's an objection to the way we now lead our lives. To quote again from *The Death of Ivan Ilyich*—“It occurred to him that what had seemed utterly inconceivable before—that he had not lived the kind of life he should have—might in fact be true.”<sup>41</sup>

Singer is an unabashed utilitarian, and his essay probably counts as the founding text of the movement known today as effective altruism (EA), which combines Singer's principles with a demand for an unsentimental and rigorous quantitative evaluation of what use of our resources will do the most good.<sup>42</sup> Singer counts himself as an effective altruist.<sup>43</sup> I shall have more to

“I ought to” is weaker than “I must,” which to my ears is closer to “I have an obligation to.” To say “I ought to get some exercise every day” does not normally mean that I have violated an obligation to myself if I skip exercising for a few days. And so “I ought to help the desperately needy” sounds more like an imperfect obligation than a perfect obligation. But we should take Singer at his word when he says that he is speaking of obligations, not (optional) charity. *Id.* at 235.

37. *Id.* at 234, 241.

38. A skeptic might object that Singer's proposed principle far exceeds our intuitions in the case of the drowning child. Notice that Singer's principle weighs preventing something very bad against wealth's moral significance, where he defines “moral significance” narrowly. See *supra* note 32 and accompanying text. Money may not be morally significant under Singer's narrow definition, and that is why his principle justifies giving away everything to the frontier of marginal utility. But, the skeptic would point out, sacrificing most of our worldly possessions is a huge ask. And, the skeptic continues, the drowning child hypothetical does not come close to supporting the principle that “if it is in our power to prevent something very bad from happening by sacrificing most of our worldly possessions, we ought, morally, to do it.” That principle may or may not be true, but it is not, as Singer purports, a commonsense principle with which nearly everyone would agree. Its disguised premise is strict act-utilitarianism.

39. Singer, *supra* note 6, at 231.

40. See *id.* at 241.

41. TOLSTOY, *supra* note 5, at 108.

42. See, for example, what the website of a leading effective altruism organization, Giving What We Can, has to say about Singer's essay (which the website provides in full text). *Famine, Affluence and Morality*, by Peter Singer, GIVING WHAT WE CAN, <https://www.givingwhatwecan.org/get-involved/videos-books-and-essays/famine-affluence-and-morality-peter-singer> [<https://perma.cc/8KVF-FKUT>] (last visited Feb. 6, 2023).

43. See PETER SINGER, THE MOST GOOD YOU CAN DO: HOW EFFECTIVE ALTRUISM IS CHANGING IDEAS ABOUT LIVING ETHICALLY vii (2015); see also TED, Peter Singer: *The Why and How of Effective Altruism*, YOUTUBE (May 20, 2013), <https://youtu.be/Diuv3XZQXyc> [<https://perma.cc/6QRJ-5CGM>].

say about effective altruism a bit later, because the question arises why Deborah, an altruist committed to effectiveness, was nonetheless *not* an effective altruist as the EA movement understands itself. For the moment, though, let's stay with Singer's 1972 essay. Much of it consists of a defense of his principle and its extraordinary consequences against a host of objections. Among them, the most prominent is what philosophers have labeled the "demandingness objection," namely, that Singer asks far too much of us. Singer has more recently come to agree, although for strictly utilitarian reasons—asking too much will likely be counterproductive and will discourage giving, and therefore the demands on individuals should be scaled down to whatever raises the most total money to alleviate global suffering.<sup>44</sup> Figuring out where that equilibrium point lies is an empirical issue, and one of the attractions (and, for some of us, repulsions) of utilitarianism is its commitment to deriving moral obligations exclusively from a tough-minded empirical calculation of consequences.

I mention this last point because a commitment to empiricism is one of the hallmarks of Deborah's scholarship. Her books are exhaustively researched, with a heavy commitment to following the (social) science. On the social science "producer" side, she conducted several original and notable survey studies—in her student note on unauthorized practice, her pioneering article on moral character as a credential, her study of lawyer pro bono work and what motivates it, and her book on women as leaders.<sup>45</sup> She was also an ardent and sophisticated consumer of social-scientific studies, and her books are packed with data. For example, her critique of the bar's character and fitness requirement made devastating use of psychological research on the predictive power of past conduct, finding that it is negligible, and her book on cheating documents more than a dozen psychological mechanisms by which cheaters let themselves off the moral hook.<sup>46</sup>

What, then, did Deborah take from Singer's paper? First, his deep indignation at remediable human suffering; second, his conviction that doing something about it is a duty; third, that discharging the duty falls on us as individuals—not something we can delegate to somebody else (the

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44. PETER SINGER, *THE LIFE YOU CAN SAVE* 151–52 (2009). He proposes "roughly 5 percent of annual income for those who are financially comfortable, and rather more for the very rich." *Id.* at 152.

45. See Deborah L. Rhode & Ralph C. Cavanagh, Note, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 *YALE L.J.* 104 (1976); Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 *YALE L.J.* 491 (1985); DEBORAH L. RHODE, *PRO BONO IN PRINCIPLE AND IN PRACTICE* 125–65 (2005) [hereinafter RHODE, *PRO BONO IN PRINCIPLE*]; Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public?: Rethinking Unauthorized-Practice Enforcement*, 82 *FORDHAM L. REV.* 2587 (2014); DEBORAH L. RHODE, *WOMEN AND LEADERSHIP* 3 (2017). There may be others of which I am unaware.

46. Rhode, *supra* note 45, at 555–62; see also DEBORAH L. RHODE, *CHARACTER: WHAT IT MEANS AND WHY IT MATTERS* 7–10, 41–55 (2019) [hereinafter RHODE, *CHARACTER*]; DEBORAH L. RHODE, *CHEATING: ETHICS IN EVERYDAY LIFE* 5–6 (2018) [hereinafter RHODE, *CHEATING*] (citing behavioral research showing that cheating in one context does not correlate with cheating in others, except for a small minority of people); *id.* at 6–15 (surveying research on the psychology of cheating).

government? Or Caius, maybe?); fourth, that the duty falls especially on those of us who lead comfortable lives; fifth, that the world would be a better place if we were willing to live up to these principles;<sup>47</sup> sixth, that even if one doesn't fulfill Singer's ultra-demanding moral principle, doing more is morally better than doing less; and seventh (a kind of "meta" point), that scholarship can be practical, engaged, and passionate without ceasing to be rigorous. Although Deborah accepted the demandingness objection, her moral principles do place significant demands on us to do better.<sup>48</sup> And it's revealing that in her 2019 book, *Character: What It Means and Why It Matters*, the moral exemplars she offers are Jane Addams, Albert Schweitzer, and Mother Teresa—individuals who, despite well-known character flaws that Deborah does not flinch from describing, made immense "personal sacrifices for the common good."<sup>49</sup>

Another theme woven throughout Deborah's scholarship is less apparent in Singer's essay (although he would not disagree). In addition to direct aid to those in need, we must work to reform institutions because one of the major stumbling blocks to individuals acting on Singer's principle is institutional structures that create misaligned incentives—incentives that discourage rather than promote helping those in direst need.

For lawyers, this is true in obvious as well as less obvious ways. The obvious way is, simply, that the market for legal services does not reward poor peoples' lawyers or public interest lawyers. In our market system for legal services, the greatest financial rewards go to lawyers whose job is to protect or enhance existing inequalities, not those who would reduce them. (In a cartoon that Deborah liked to show in class, one lawyer says to another, "Remember, we can only afford to do all this pro bono because of how much anti-bono pays."<sup>50</sup>) As Deborah's teacher and coauthor Professor Geoffrey C. Hazard, Jr. once wrote, "historically, the American legal profession's basic function in our society has been to aid the development and protection of business property," not to enhance justice for the least fortunate members of society.<sup>51</sup>

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47. This point is less obvious than it appears. Giving to nongovernmental organizations (NGO) may not improve their clients' welfare because NGO activity creates incentives for the state to decrease its own commitment of resources. Emily Clough, *Effective Altruism's Political Blind Spot*, BOS. REV. (July 14, 2015), <https://bostonreview.net/articles/emily-clough-effective-altruism-ngos/> [<https://perma.cc/FK2L-DXG8>]. I note that Singer assumed the opposite in his 1972 paper. See Singer, *supra* note 6, at 239. Clough, however, offers evidence unavailable to Singer at the time. See Clough, *supra*.

48. She voices the demandingness objection in *Ethical Perspectives on Legal Practice*. See Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 645–46 (1985).

49. RHODE, CHARACTER, *supra* note 46, at 138–54.

50. Pat Byrnes, *Remember, We Can Only Afford to Do All This Pro Bono Because of How Much Anti-Bono Pays* (illustration), in NEW YORKER (Jan. 3, 2005).

51. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1241 (1991). Hazard also notes that "the profession's traditional function of protecting business property has suffered from a decline in legitimacy." *Id.* at 1242. Hazard himself (unlike Deborah) was comfortable with that traditional role and lamented its decline in legitimacy. *Id.* at 1267, 1278–80.

As for indirect misalignment of incentives, heavy law school debt steers graduates away from low-paying public interest jobs, regardless of their original aspirations. As Deborah confirmed through her pro bono surveys, some law firms discourage pro bono work overtly, out of fear that pro bono advocacy might antagonize wealthy clients; other firms do so indirectly by not counting pro bono hours toward billable or receivable hours.<sup>52</sup> Even so, Deborah makes a powerful case for pro bono service notwithstanding the institutional incentives. Institutional reform to realign misaligned incentives is important, but, in Deborah's view, it is emphatically not a substitute for individuals fulfilling their moral duties to enhance justice and reduce human suffering.

Let me now attempt a first approximation of the moral outlook of someone powerfully moved by *The Death of Ivan Ilyich* and *Famine, Affluence, and Morality*. From the former, Deborah took the idea that the preeminent moral question is about the shape of our entire life, judged especially from what we might call the "valedictory standpoint" of how we and others will look back on it.

This whole-life view is how Plato and Aristotle conceived of ethics. Socrates, in a passage from the *Republic* that Deborah and her coauthors quote in our legal ethics textbook, notes that the subject of ethics "is not about just any question, but about the way one should live."<sup>53</sup> In *Gorgias*, Socrates reminds his conversational partners: "[These] are not at all small things, but they are something that is nearly the finest thing to know and the most shameful thing not to know. You see, the crowning point of these things is knowing or not knowing who is happy and who is not."<sup>54</sup> For Plato and Aristotle, happiness requires virtue. The moral questions Tolstoy raises are not about determinate prescriptions in concrete dilemmas. They are Platonic and Aristotelian questions about the shape of an entire life.<sup>55</sup>

What, then, about the *content* of our moral life gives it the right shape? That's where Singer comes in: the moral life is not simply the life of someone who never breaks rules, but one who actively cares about the well-being of others—especially (but not only) those whose need is most desperate—and works to promote it.<sup>56</sup> In *Ambition: For What?*, Deborah quotes Simone de Beauvoir: "One's life has value so long as one attributes

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52. RHODE, PRO BONO IN PRINCIPLE, *supra* note 45, at 140–41. On fear of antagonizing wealthy clients, see DEBORAH L. RHODE, DAVID LUBAN, SCOTT L. CUMMINGS & NORA FREEMAN ENGSTROM, LEGAL ETHICS 486–89 (8th ed. 2020).

53. RHODE ET AL., *supra* note 52, at 2 (quoting PLATO, THE REPUBLIC OF PLATO 31, \*352d (Allan Bloom trans., 1968) (c. 375 B.C.E.)).

54. PLATO, GORGIAS 68, \*472c–d (James A. Arieti & Roger M. Barrus trans., 2007) (c. 380 B.C.E.).

55. For Aristotle's discussion of the "whole life" perspective on virtue, see ARISTOTLE, NICOMACHEAN ETHICS bk. I, ch. 10, \*1100a (Terence Irwin trans., Hackett Publ'g Co. ed. 2019) (c. 384 B.C.E.).

56. Strictly speaking, Singer and other utilitarians do not suggest that the neediest are worthier than anyone else—on the contrary, a familiar utilitarian axiom is that each counts for one and none for more than one. The argument is that aiding the most desperately needy will create more utility than devoting equal effort and resources to those who are better off.

value to the life of others . . . .”<sup>57</sup> Tolstoy tells us the stakes of living well; Singer unlocks at least part of the content.

I turn next to how these principles play out in legal ethics.

### III. IVAN ILYICH AND ROLE MORALITY

In her final book, Deborah describes Ivan Ilyich’s flaw as his perpetual ambition to make more money, and she calls Tolstoy’s tale “one of the world’s most enduring novels about ambition.”<sup>58</sup> That is one way to read *The Death of Ivan Ilyich*, but it isn’t the best way—and it isn’t the way Deborah read it when she first discussed it with me many years ago. Ivan Ilyich is ambitious, to be sure, and he is always short of the money that would support a more opulent life. But there is more to his story than ambition or finances.

Recall his doubts about his life: “‘Perhaps I did not live as I should have’ . . . . ‘But how could that be when I did everything one is supposed to?’”<sup>59</sup> He did everything he was supposed to; he played all his roles to a T, as a lawyer, as a judge, as a member of good society. The problem was that playing those roles properly was not enough to live as he ought to have done. In our early conversations, Deborah brought up *The Death of Ivan Ilyich* in connection with the discrepancy between morality and professional role-playing, not in connection with ambition or the pursuit of money.

The discrepancy between morality and role-playing can take an acute form for lawyers because acting in their professional role may require lawyers to do things, or support causes, that seem morally repellent not only to outside observers but to the lawyers themselves. If clients have unjust ends, their lawyers must nevertheless pursue those ends diligently (unless the ends are illegal); in doing so, all lawful means are permitted, no matter what the collateral damage to nonclients. The nineteenth-century British historian Thomas Babington Macaulay caustically defined a lawyer as someone who would, “with a wig on his head, and a band round his neck, do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire.”<sup>60</sup> Call this discrepancy between professional and lay morality the *problem of role morality*. It was the central preoccupation of my own work on legal ethics at the time Deborah and I met.

The problem is an ancient one, but it took its modern form in the theoretical legal ethics of the 1970s and 1980s. The lawyer’s role combines maximum partisanship on behalf of the client with a disclaimer of moral accountability for the ends of the representation and the (lawful) means used to achieve them; in the words of today’s Model Rules of Professional Responsibility, “[a] lawyer’s representation of a client . . . does not constitute an

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57. RHODE, *supra* note 26, at 189 (quoting SIMONE DE BEAUVOIR, *THE COMING OF AGE* 540–41 (Patrick O’Brian trans., 1972)).

58. *Id.* at 1, 43.

59. TOLSTOY, *supra* note 5, at 102.

60. THOMAS BABINGTON MACAULAY, *Macaulay’s Essay on Bacon*, in 6 *THE WORKS OF LORD MACAULAY* 135, 163 (G. Trevelyan ed., 1873).

endorsement of the client's political, economic, social or moral views or activities."<sup>61</sup> This picture of the lawyer's role came to be called "Neutral Partisanship" because it combines zealous partisanship with a studied moral neutrality toward the ends and means of representation—and a disclaimer of personal moral accountability for either one.<sup>62</sup> It's this paradoxical and pernicious combination of maximum partisanship and minimum accountability that creates the problem of role morality. In a pioneering 1975 paper, Professor Richard Wasserstrom worried that "at best the lawyer's world is a simplified moral world; often it is an amoral one; and more than occasionally, perhaps, an overtly immoral one."<sup>63</sup> A year later, Professor Charles Fried began *The Lawyer as Friend* with the question, "Can a good lawyer be a good person?"<sup>64</sup>

Our shared interest in the problem of role morality was what initially drew Deborah and me together, after we met at a conference in the early 1980s.<sup>65</sup> And this problem, rather than ambition, was the context in which Deborah wrote about *The Death of Ivan Ilyich* in the first edition of our legal ethics casebook. Her discussion appears in a short section titled "Note: The Psychological Tension in Role Morality." Deborah emphasizes that "we also have an identity beyond our roles," and she quotes from Professor Roberto Mangabeira Unger's *Knowledge and Politics*: "The self whose continuity your obedience [to your professional role] ensures is not your own, but merely the mask you are compelled to wear in order to win the approval you crave. The others save you from being nothing, but they do not allow you to become yourself."<sup>66</sup> She then adds, "This sense of conflict between the demands of one's social role and the 'real self' receives a noble and moving expression in Tolstoy's short story *The Death of Ivan Ilyich*," quoting the passage in which Ivan Ilyich realizes that "his professional duties and the

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61. MODEL RULES OF PRO. CONDUCT r. 1.2(b) (AM. BAR ASS'N 2020).

62. Professor William H. Simon used the terms "partisanship" and "neutrality." William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 29 WIS. L. REV. 30, 36–37 (1978). Around the same time, Dean Murray L. Schwartz labeled these the "Principle of Professionalism" and the "Principle of Nonaccountability." Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 673 (1978). To the best of my knowledge, Deborah and I were the first to use the "Neutral Partisanship" label, in our casebook. Prior to that, some writers called it the "standard conception of the lawyer's role." Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980).

63. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 2 (1975).

64. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 (1976). Fried's answer, I should note, is yes. *See generally id.*

65. My first paper on the problem of role morality, *The Adversary System Excuse*, was in circulation as a working paper in 1982, and it appeared in print a year later in *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics*. David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 83 (David Luban ed., 1983), revised and reprinted in *DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY* 19 (2007). Deborah had read the paper when we met.

66. DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 148 (1992) (quoting ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* 61 (1975)).

whole arrangement of his life and of his family, and all his social and official interests, might all have been false.”<sup>67</sup>

A caution is in order here. The contrast between the self-in-a-social-role and the “real” self is metaphysically dubious because it assumes that there is a real self distinct from all the roles we play in life.<sup>68</sup> If you strip away every social role, however, little is left of the self beyond the bare consciousness of continuity over time—the minimalist Lockean concept of personal identity.<sup>69</sup> It is nothing like a self in any robust sense; perhaps that is why Deborah put scare quotes around “real self.”<sup>70</sup>

The correct contrast is not between an inauthentic and authentic self; it’s between a self that (over)simplifies its moral world and one that does not. On that much, Deborah and I agreed—but our concerns were actually quite different. I saw the discrepancy between role morality and common morality as a dilemma for rational moral deliberators facing contradictory demands—*which* morality do you follow?<sup>71</sup> For Deborah, the questions were less rationalistic and more Tolstoyan (and, I now think, deeper)—are professional roles enough to give shape to a good life? Her answer was no. She described her stance in a crucial 1985 essay on legal ethics: “[T]he refuge in role provides a deceptive haven, and one that extracts a considerable personal price. When professional action becomes detached from ordinary moral experience, lawyers’ sensitivity can atrophy or narrow to fit the constricted universe dictated by role.”<sup>72</sup> Neutral Partisanship “offers the illusion of freedom from responsibility, while in fact delimiting individuals’ moral autonomy.”<sup>73</sup>

In other respects, her arguments in this 1985 essay converged with mine. Both of us criticized Neutral Partisanship, if perhaps for different reasons. Both of us rejected the all-purpose appeal to the adversary system as

67. *Id.* (quoting LEO TOLSTOY, *The Death of Ivan Ilyich*, in *THE DEATH OF IVAN ILYICH AND OTHER STORIES* 152 (A. Maude trans., 1960)). Although I was the author of this short section of our casebook, it was Deborah who inserted the Unger and Tolstoy material. In later editions, we decided that this material might be too heavy for classroom discussion and dropped it, although all editions of the book discuss the problem of role morality. I should note that Professor Scott L. Cummings joined us as coauthor beginning with the sixth edition in 2012, and Professor Nora Freeman Engstrom joined the team beginning with the seventh edition in 2016. Professor Benjamin H. Barton will join us for the ninth edition.

68. So I argue in DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 111–16 (1988). One principal point is that the so-called “authentic” self might itself be nothing more than a performative role: that of the nonconformist. *See id.*

69. *See* JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING*, bk. 2, ch. 27, §§ 9–10 (Alexander Campbell Fraser ed., 1894) (c. 1689).

70. *See* RHODE & LUBAN, *supra* note 66, at 148.

71. LUBAN, *supra* note 68, at 128–37, 149–58 (proposing procedures for resolving professional dilemmas).

72. Rhode, *supra* note 48, at 626. She returned to these arguments in DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 52–65 (2000).

73. Rhode, *supra* note 48, at 626. She invokes Jean-Paul Sartre’s concept of “bad faith” in connection with treating the demands of a role as necessities rather than free choices. *Id.* (quoting JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS* 86–116 (Hazel E. Barnes trans., 1956)).

justification for an amoral ethical role.<sup>74</sup> And both of us shared the underlying intuition about what legal role morality leaves out: concern for nonclients.<sup>75</sup> Recall the passage from de Beauvoir that Deborah quotes in *Ambition: For What?*: “One’s life has value so long as one attributes value to the life of others.”<sup>76</sup> In *Lawyers and Justice*, I spoke of the *acknowledgment* of others, and wrote that “[u]ltimately, we reserve our autonomy from our stations and their duties so that we have the freedom to respond to persons *qua* persons—to obey what one may call *the morality of acknowledgment*.”<sup>77</sup> No doubt these points of convergence were why Deborah proposed that we write a textbook together. In her article *Ethical Perspectives*, she complained that “the recent discourse on professional responsibility has evolved in a vacuum, inadequately illumined by moral theory and sociological research.”<sup>78</sup> Our shared aim was to incorporate both.

#### IV. THE POINT IS TO CHANGE THE WORLD

Tolstoy and Singer were philosophical inspirations, but Deborah’s orientation was always practical more than philosophical; she would undoubtedly have agreed with Marx that philosophers only interpret the world, but the point is to change it.<sup>79</sup> Her approach in all her books is to identify institutional and psychological impediments to moral conduct and to propose reforms. The books are packed with reform proposals, and I stopped counting the number of times the words “reform” and “rethinking” appear in them.

Staying with a focus on legal ethics, the subtitle of *In the Interests of Justice* is “Reforming the Legal Profession.” To what end? Her answer is revealing: “The greatest source of discontent among today’s lawyers is their perceived lack of contribution to social justice. The challenge now is to enlist both the public and the profession in reforms that will reconnect the ideals and institutions of legal practice.”<sup>80</sup> Not all lawyers would agree that more of their professional lives should be devoted to social justice; for Deborah, I think, this flows naturally from adapting Singer’s moral sensibility to legal practice. It was the motivation for her books and dozens of articles on pro bono and access to justice.<sup>81</sup> It is also notable that Deborah’s two “Profiles

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74. See Luban, *supra* note 65; Rhode, *supra* note 48, at 595–612; RHODE, *supra* note 72, at 49–64.

75. RHODE, *supra* note 26, at 191–94.

76. *Id.* at 189.

77. LUBAN, *supra* note 68, at 127. My inspiration for the term was Professor Stanley Cavell’s powerful essay *Knowing and Acknowledging*, in *Must We Mean What We Say?*. STANLEY CAVELL, *Knowing and Acknowledging*, in *MUST WE MEAN WHAT WE SAY?: A BOOK OF ESSAYS* 220 (2d ed. 2015).

78. Rhode, *supra* note 48, at 590.

79. See Karl Marx, *Theses on Feuerbach*, in *KARL MARX & FREDERICK ENGELS, THE GERMAN IDEOLOGY* 170 (C. J. Arthur ed., 2000) (ebook) (see Thesis 11).

80. RHODE, *supra* note 72, at 213.

81. Many of the articles were coauthored, and on her Stanford faculty page, I saw nine different coauthors on these topics alone—who should be acknowledged here: Professors Benjamin H. Barton, Scott L. Cummings, Gillian K. Hadfield, and Kevin Eaton, Anna Porto,

in Character” chapters in *Character* set “The Pursuit of Social Justice” side by side with “Lives of Service.”<sup>82</sup> The pursuit of social justice is represented by Ida B. Wells, Mohandas Gandhi, Thurgood Marshall, and Nelson Mandela; Gandhi, Marshall, and Mandela were all lawyers.<sup>83</sup>

Of course, reforming the legal profession is easier to propose than to accomplish. During Deborah’s year as president of the Association of American Law Schools, one of her reformist goals was to persuade *U.S. News and World Report* to drop its rankings of law schools, which create well-known and perverse incentives to sacrifice important academic values to improve *U.S. News* metrics.<sup>84</sup> The editors understood the problem but remained unmoved—as Deborah reported grimly, it was like trying to persuade *Sports Illustrated* to drop its swimsuit issue. Her effort was prophetic: in the months since I wrote the first draft of this essay, a dozen law schools, including my own, have announced that they will no longer provide data to *U.S. News*.<sup>85</sup>

A more time-consuming project was writing a unique textbook: *Professional Responsibility: Ethics by the Pervasive Method*.<sup>86</sup> “Pervasive method” is a bit of jargon that means that every law school course will incorporate ethics teaching. The sad reality was (and is) that this ideal is mostly honored in the breach, and the phrase “we teach ethics pervasively” is sometimes an excuse for relegating ethics to the margins of legal education. Law professors often explain that they do not teach ethics in their doctrinal classes because they lack subject-specific ethics materials and would not know how to find them. But Deborah’s 1994 book aimed to remedy that lack by creating ethics modules for an array of standard doctrinal subjects in a single book.<sup>87</sup> Her idea was that if faculties agreed to coordinate on pervasive ethics teaching, students could purchase a single textbook for multiple courses. It was a great idea, and evidently the book was successful enough to go into a second edition in 1998. Unsurprisingly, though, no law faculty ever managed to coordinate in the way Deborah envisioned, and she reported sadly that even a renowned ethics scholar told her that he did not have space in his corporations syllabus for an ethics module. There was no third edition, and the book is no longer in print.

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Pablo Hernández Rivera, Lucy Buford Ricca, James Sokolove, and Jason Solomon. See *Publications: Deborah L. Rhode*, STAN. L. SCH., [https://law.stanford.edu/publications/?page=1&primary\\_author=Deborah%20L.%20Rhode](https://law.stanford.edu/publications/?page=1&primary_author=Deborah%20L.%20Rhode) [https://perma.cc/F4DY-7QQW] (last visited Feb. 6, 2023).

82. See RHODE, CHARACTER, *supra* note 46, at 138–54, 155–96.

83. See *id.* at 155–96. The lives of service, recall, are Jane Addams, Albert Schweitzer, and Mother Teresa. See *id.* at 138–54.

84. See, e.g., RHODE, *supra* note 1, at 6–9, 67–68.

85. See Nick Anderson & Susan Svrluga, *Law School Revolt Against U.S. News Rankings Gains Steam*, WASH. POST (Dec. 3, 2022, 7:00 AM), <https://www.washingtonpost.com/education/2022/12/03/law-schools-protest-us-news-rankings/> [https://perma.cc/X4SR-G83M].

86. DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (2d ed. 1998).

87. See generally *id.*

## V. THE MORAL LANDSCAPE

As I have mentioned, Deborah was a practical ethicist, not a moral theorist or conceptual analyst, though she certainly read her share of moral philosophy. When we were writing the introductory section on moral philosophy for the first edition of our casebook, she described herself as a “postmodernist” on moral theory. That alarmed me, because I understood the postmodernism of the 1970s and 1980s as a skeptical theory, and I was not, and am not, a moral skeptic. Neither was Deborah—if anything, she had an almost Victorian sense of moral duty. With relief, I came to realize that what Deborah meant by “postmodern” was not moral skepticism or fancy theory but a kind of pragmatic pluralism in which different moral approaches might be appropriate in different contexts, without any of them being the “One True Theory” (a point with which I agree).<sup>88</sup> That said, it is instructive (to me at least) to locate her sensibilities on the conventional map of moral theories.

*The Death of Ivan Ilyich* is a deeply Christian story, but Deborah’s writings on ethics are entirely secular. Peter Singer is, as mentioned earlier, a utilitarian and a proponent of effective altruism.<sup>89</sup> Now, Deborah’s outlook overlaps significantly with utilitarianism in two crucial ways: first, her reform proposals and moral exhortations always aim to increase human well-being and diminish harm and suffering; second, she firmly believed that diagnoses and proposals should be rigorously evidence based.

Her book on cheating is illustrative of the utilitarian strand in her thinking.<sup>90</sup> The introduction discusses the definition of cheating, the scope of cheating, the causes and dynamics of cheating, rationalizations for cheating, and the like<sup>91</sup>—but nowhere does it argue that cheating is wrong! Instead, the book meticulously documents the costs of cheating and the burdens that cheating imposes on others.<sup>92</sup> So, if the book condemns cheating (and really, it cannot be read any other way), it is on consequentialist, harm-reduction grounds.

On the other hand, most of her books focus not on utility but on justice and fairness, usually thought of as deontological values. The ideal pursuit of the legal profession, recall, is social justice.<sup>93</sup> Of course, injustice inflicts harms, so indignation at inequity is hard to pry apart from indignation at the harms it inflicts. Even so, in Deborah’s voluminous writings on gender and justice,

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88. See DAVID LUBAN, TORTURE, POWER, AND LAW 104–05 (2014) (defending moral pluralism).

89. These are distinct positions—you don’t have to be a utilitarian or consequentialist to accept Singer’s principles or those of EA. See Judith Lichtenberg, *Effective Altruism: A Consequentialist Case Study*, in THE OXFORD HANDBOOK OF CONSEQUENTIALISM 548 (Douglas W. Portmore ed., 2020); Jeff McMahan, *Philosophical Critiques of Effective Altruism*, PHILOSOPHER’S MAG., 2d Quarter 2016, at 92–99. Singer does not mention utilitarianism in *Famine, Affluence, and Morality*, and he points out that his principle does not differ much from one of St. Thomas Aquinas’s. See Singer, *supra* note 6, at 238–39.

90. See generally RHODE, CHEATING, *supra* note 46.

91. See *id.* at 1–18.

92. See generally *id.*

93. See RHODE, CHARACTER, *supra* note 46, at 155–96.

the rhetoric treats inequity as a harm in itself. So, to the extent that Deborah was a consequentialist, it would be in a more complex form than pure utilitarianism—a form that incorporates fairness in its catalogue of consequences worth pursuing, and places it at or near the top of the catalogue.

What about effective altruism, which some see as the logical conclusion of a utilitarian approach to ethics? According to Singer, “[e]ffective altruism is based on a very simple idea: we should do the most good we can.”<sup>94</sup> What makes the EA movement distinctive is its insistence on rigorously quantitative, data-driven decision-making about what will do the most good; as Professor William MacAskill, one of the founders of EA, puts it, “effective altruism consists of the honest and impartial attempt to work out what’s best for the world, and a commitment to do what’s best, whatever that turns out to be.”<sup>95</sup>

Singer’s and MacAskill’s injunctions can sound innocuous, as perhaps the authors intended them to. They are anything but—they have startling implications. MacAskill recalls that during a trip to Ethiopia, he visited a hospital treating obstetric fistulas, a condition that can cause permanent and humiliating incontinence in women, which often leads to social ostracism and a lifetime of misery.<sup>96</sup> Their condition is heartrending, and fistulas can be repaired easily and at a low cost. Yet MacAskill concluded that philanthropic dollars would be better spent on other things, specifically antimalarial mosquito nets,<sup>97</sup> for which his cost-benefit analyses prove the money would have greater impact.<sup>98</sup> For MacAskill, to give his money to treat fistulas “would be privileging the needs of some people over others merely because I happened to know them,” and it “was arbitrary that [he]’d seen this problem close up rather than any of the other problems in the world.”<sup>99</sup> Another implication, endorsed by both Singer and MacAskill, goes by the label “earning to give”—choosing high-paying careers with the intention of giving the money to EA-worthy causes, rather than pursuing more satisfying but less lucrative careers that may have lower humanitarian impact.<sup>100</sup> (Concretely, if you want to put your legal talents to work helping poor people, work in a large law firm rather than a legal aid office and give most of your salary or partnership draw away, but only to organizations that impartial calculations show will do the most good.) These are not innocuous conclusions.

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94. SINGER, *supra* note 43, at vii.

95. WILLIAM MACASKILL, DOING GOOD BETTER: HOW EFFECTIVE ALTRUISM CAN HELP YOU MAKE A DIFFERENCE 11 (2015).

96. *Id.* at 41.

97. *See id.* at 52–53.

98. *Id.* at 41–42.

99. *Id.*

100. *Id.* at 76–78; SINGER, *supra* note 43, at 4 (describing a talented young philosopher who switched careers to financial arbitrage in order to earn more money to give away). The website 80,000 Hours gives advice on how to choose a career that maximizes the good you can do. *See* 80,000 HOURS, <https://80000hours.org/> [<https://perma.cc/FT7W-HRQY>] (last visited Feb. 6, 2023).

More recently, EA has taken an unexpected turn, known as “longtermism.”<sup>101</sup> Consider that future generations have just as strong a claim on our moral regard as currently living people. If humanity can avoid extinction, the human race could go on for billions of years, even colonizing other solar systems when the sun burns out. EA authors MacAskill and Professor Hilary Greaves have calculated that if we play our cards right, over the long haul, as many as  $10^{24}$  human beings could inhabit the universe (their low-end estimate is  $10^{18}$ )—each of whom counts as much as the living.<sup>102</sup> It follows that EA today should focus heavily, if not exclusively, on the further future—specifically, on warding off extinction events, such as asteroids crashing into Earth, global pandemics, and rogue AIs that enslave and immiserate humanity.<sup>103</sup> Perhaps, then, AI safety and anti-asteroid weapons development should displace famine relief at the top of the philanthropic agenda, balancing the misery of the living against the happiness of  $10^{24}$  future people.

Conclusions like these can easily invite eyerolling responses, not to mention accusations of fanaticism.<sup>104</sup> (To the latter, Greaves and MacAskill unapologetically reply that “avoiding fanaticism might come at too high a price.”<sup>105</sup>) It is also no secret that the collapse of the cryptocurrency exchange FTX—a high-profile funder of effective altruism—has inflicted terrible collateral damage on the movement.<sup>106</sup> That is unfortunate—EA should be judged by its merits, not by its funding. My aim here is thus not

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101. See, e.g., Hilary Greaves & William MacAskill, *The Case for Strong Longtermism* (Glob. Priorities Inst., Working Paper No. 5-2021, 2021), <https://globalprioritiesinstitute.org/wp-content/uploads/The-Case-for-Strong-Longtermism-GPI-Working-Paper-June-2021-2-2.pdf> [<https://perma.cc/2S68-V6A4>]. MacAskill has developed this theme in detail in his best-selling book. See generally WILLIAM MACASKILL, *WHAT WE OWE THE FUTURE* (2022).

102. See Greaves & MacAskill, *supra* note 101, at 9.

103. See *id.* at 13–15; see also TOBY ORD, *THE PRECIPICE: EXISTENTIAL RISK AND THE FUTURE OF HUMANITY* (2020). Along with MacAskill, Toby Ord is one of the founders of the EA movement. On the threat of malevolent (from the human point of view) AI, see generally NICK BOSTROM, *SUPERINTELLIGENCE: PATHS, DANGERS, STRATEGIES* (2014).

104. For an example of a scornful response, see Amia Srinivasan, *Stop the Robot Apocalypse*, LONDON REV. BOOKS (Sept. 24, 2015), <https://www.lrb.co.uk/the-paper/v37/n18/amia-srinivasan/stop-the-robot-apocalypse> [<https://perma.cc/S2DT-58YK>].

105. Greaves & MacAskill, *supra* note 101, at 25.

106. See Nicholas Kulish, *FTX’s Collapse Casts a Pall on a Philanthropy Movement*, N.Y. TIMES, <https://www.nytimes.com/2022/11/13/business/ftx-effective-altruism.html> [<https://perma.cc/29LN-2ZT2>] (Nov. 14, 2022). FTX Future Fund, one of FTX’s philanthropic ventures, describes itself on its now-defunct website in longtermist terms: its goal is “improving humanity’s prospects of surviving and thriving over the long term” by supporting “ambitious projects in fields such as biosecurity and A.I. safety.” See *Future Fund*, FTX FOUND., <https://web.archive.org/web/20221111055803/https://ftxfuturefund.org/> (last visited Feb. 6, 2023). On the peril that FTX’s collapse poses for EA, see Jennifer Szalai, *How Sam Bankman-Fried Put Effective Altruism on the Defensive*, N.Y. TIMES, <https://www.nytimes.com/2022/12/09/books/review/effective-altruism-sam-bankman-fried-crypto.html> [<https://perma.cc/C7BT-FGPU>] (Dec. 13, 2022); Zeeshan Aleem, *How Sam Bankman-Fried’s Fall Exposes the Perils of Effective Altruism*, MSNBC (Dec. 3, 2022, 6:00 AM), <https://www.msnbc.com/opinion/msnbc-opinion/ftx-sbf-effective-altruism-bankman-fried-rcna59172> [<https://perma.cc/2F4W-CQ8E>]. That downfall “could contribute to the downfall of effective altruism—or at least do irreversible damage to its mainstream reputation as a virtuous movement.” *Id.*

to pile on, only to show how Singer's attractive premises, followed out logically, can lead to wildly unexpected places. With the exception of pandemic prevention, they are places that, for most people, are quite remote from whatever first attracted them to philanthropy.

Deborah was a philanthropist who contributed substantial amounts to multiple causes. I'll mention just one example, because it is now public knowledge, and it is quite relevant to legal ethics: her six-figure contribution to the International Association of Legal Ethics (IAOLE), an organization of which Deborah was also the founding president.<sup>107</sup> IAOLE's mission is "to promote teaching, research, vocational training programs, and policy initiatives concerning legal ethics" around the world.<sup>108</sup> Now, this is a worthy mission, but self-evidently, it does not compare in urgency with famine relief or pandemic prevention. By EA reasoning based on cost-effectiveness, it was money misspent.

Not all effective altruists think as austere and unsentimentally as MacAskill and Singer. Julia Wise, president of Giving What We Can and community liaison for the Centre for Effective Altruism, makes allowances for discretionary philanthropic spending on causes that may not be the most cost-effective.<sup>109</sup> Wise distinguishes between her "personal satisfaction" budget and her "make the world as good as possible" budget; only the latter requires her to "turn on that bright light of cost-effectiveness."<sup>110</sup> Perhaps, then, funding IAOLE, or philanthropic projects others of us might undertake, comes from the "personal satisfaction" bank account.

Deborah wrote in many places about the personal satisfaction that comes from doing good; it is a point of emphasis in her book on pro bono legal practice.<sup>111</sup> But there is something missing in the idea that all suboptimal forms of doing good are simply personal satisfactions. Wise likens her suboptimal donations to getting coffee with a friend—both come out of her "personal satisfaction" budget.<sup>112</sup> Isn't there more to it than that?

107. This information was never secret, but only a handful of people knew about the contribution, and Deborah did not want to publicize her donation. It was announced publicly at IAOLE's 2022 conference. On Deborah's role in founding IAOLE, see *History of IAOLE*, INT'L ASS'N LEGAL ETHICS, <https://iaole.org/conferences/history-of-iaole/> [https://perma.cc/U7UG-VHQB] (last visited Feb. 6, 2023). Full disclosure: I am a member of IAOLE's board of directors.

108. *Mission Statement*, INT'L ASS'N LEGAL ETHICS, <https://iaole.org/history-of-iaole/mission-2/> [https://perma.cc/UL6Q-YVCT] (last visited Feb. 6, 2023).

109. Julia Wise, *You Have More than One Goal, and That's Fine*, GIVING GLADLY (Feb. 19, 2019), <http://www.givinggladly.com/2019/02/you-have-more-than-one-goal-and-thats.html> [https://perma.cc/4P8Q-3SLR].

110. *Id.* This was not always the case with Wise—earlier in life, even buying a candy apple for herself drove her to tears when she thought about the life that the money could have saved by buying an antimalarial bed net instead. See Larissa MacFarquhar, *Extreme Altruism: Should You Care for Strangers at the Expense of Your Family?*, GUARDIAN (Sept. 22, 2015, 1:00 AM), <https://www.theguardian.com/world/2015/sep/22/extreme-altruism-should-you-care-for-strangers-as-much-as-family> [https://perma.cc/FH83-FHRW]. Wise came to realize that she "was going to lose her mind if she spent the rest of her life weighing each purchase in terms of bed nets." *Id.*

111. RHODE, PRO BONO IN PRINCIPLE, *supra* note 45, at 30.

112. See Wise, *supra* note 109.

I think there is, when the form that our good actions take comes from the entire shape of our life. EA treats the shape of our life as malleable, our goals as fungible, and our choices as largely under our conscious control. Our moral sentiments are just that: sentiments, not reasons. All this seems wildly unrealistic.<sup>113</sup> Which commitments matter to us and which talents we've cultivated are under our control only to a small degree. Our agency depends on contingencies—on the accidents of birth and health, on the friends and lovers and mentors and inspiring people we've met along the road, and on sheer luck. Our identity, not to mention our skill set, depends on earlier choices we've made that opened some pathways but closed off others—radical path dependency. As an ancient poet unforgettably put it, “[t]he virtue of each thing is a Triad: intelligence, strength, luck.”<sup>114</sup>

From an EA point of view, we can be faulted for not subjecting our uses of talent and money to a rigorous cost-benefit analysis that compares them with other uses of talent and money. Refusing to do so is irrational—we should always weigh the costs of forgone opportunities against the good of realized outcomes. But, as Professor Mark G. Kelman has argued, treating opportunity costs and realized goods as equivalent is by no means a self-evident fact about rationality.<sup>115</sup> The “desire to withdraw spheres of activity from the realm of marginalism and calculation” is not irrational: it allows us to finalize transactions psychologically, which “facilitates planning and the integration of the contingent self into a whole, willed personality.”<sup>116</sup>

Consider once again what Justice Marshall hoped would be his epitaph: “He did what he could with what he had.” The first half (“He did what he could”) is a moral ambition; the second half (“with what he had”) is an acceptance of our own particularity.

With these general reflections in mind, let's return to Deborah's commitments. They were not sentimental or irrational. Rather, they reflected her identity as a woman coming of age at the crest of second-wave feminism (and a member of the second class of women that Yale College admitted), as a lawyer, as a researcher, and as an educator. They also reflected her talents that were partly luck and partly the product of choices she made, such as going to law school, working in law school clinics, and clerking for Justice Marshall.<sup>117</sup> IAOLE was a natural vehicle given the

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113. See Judith Lichtenberg, *Peter Singer's Extremely Altruistic Heirs*, NEW REPUBLIC (Nov. 30, 2015), <https://newrepublic.com/article/124690/peter-singers-extremely-altruistic-heirs> [<https://perma.cc/SGE7-AQML>]. But see Richard Yetter Chappell, *Lichtenberg on Effective Altruism*, PHIL., ET CETERA (Dec. 3, 2015), <https://www.philosophyetc.net/2015/12/lichtenberg-on-effective-altruism.html> [<https://perma.cc/K93B-EDPM>].

114. KATHLEEN FREEMAN, *ANCILLA TO THE PRE-SOCRATIC PHILOSOPHERS* 70 (1983) (translating writings by Iōn of Chios).

115. See Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 689, 692–93 (1979).

116. *Id.* at 692–93.

117. Her lifelong interest in unauthorized practice came from experiences in a law school clinic. She also told a story about a clinic experience in which she represented an indigent tenant against a particularly nasty and callous slumlord. When the slumlord told her, in effect,

shape of Deborah's life. As a lawyer, she was committed to increasing the good that lawyers could do as agents of social justice. As an analyst of the legal profession, she concluded that promoting this good is a mission of legal ethics. As an educator, spreading this message internationally was a logical consequence of the cosmopolitan outlook that Singer embraces. As a talented and highly disciplined leader, she could make institutions like IAOLE happen. On a one-on-one level, Deborah was a stunningly generous mentor and promoter of aspiring scholars, especially women (but by no means only women). None of this was remotely like a decision to have coffee with a friend, and it was not only a matter of personal satisfaction.<sup>118</sup> This was the shape of a life.

Of course, identities and commitments can be rethought, as Ivan Ilyich discovered at the moment of his salvation.<sup>119</sup> In *Ambition*—Deborah's most confessional book—she includes a section titled “Turning Points,” in which she writes: “[W]orking on this book offered me a sobering personal reminder of the costs of misplaced ambitions. Those misdirected priorities are responsible for what I most wish I had done differently in my own life.”<sup>120</sup> I have no idea what she wished she had done differently, but I am certain that whatever it was would not have been radically shape-shifting. It would have come from within the contours of her life—doing what she could with what she had.

#### CONCLUSION: MAKING A VIRTUE OF VIRTUE

I've been comparing Deborah's moral sensibility with versions of utilitarianism and effective altruism, noting differences as well as similarities. But utilitarianism, like the broader notion of consequentialism, is only one part of the conventional map of moral philosophy. In our legal ethics book, we describe three standard approaches: those that focus on the consequences of action, those that emphasize the intrinsic rightness or wrongness of the action itself, and those that center on the character of the actor (virtue ethics).<sup>121</sup> I conclude by discussing the last of these.

In her 2019 book on character, Deborah is dismissive of virtue ethics on the ground that it doesn't yield determinate moral prescriptions—what she calls “the vice of virtue ethics.”<sup>122</sup> This is debatable, and I'm inclined to think that virtue ethics is no less determinate than competitor ethical

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to get lost, Deborah responded that she had two more years of law school and she would dedicate them to making his life miserable. He gave in.

118. I do not mean to diminish the moral importance of personal satisfaction. Aristotle argued that a large part of virtue consists in taking pleasure from virtuous actions. ARISTOTLE, *supra* note 55, at bk. II, ch. 3, at 23, \*1104b. Aristotle is right. See M.F. Burnyeat, *Aristotle on Learning to Be Good*, in *ESSAYS ON ARISTOTLE'S ETHICS* 69, 76–79 (Amélie Oksenberg Rorty ed., 1980).

119. TOLSTOY, *supra* note 5, at 108–09.

120. RHODE, *supra* note 26, at 187–91, 197.

121. See RHODE ET AL., *supra* note 52, at 7.

122. See RHODE, *CHARACTER*, *supra* note 46, at 7.

theories.<sup>123</sup> But more importantly, the Platonic and Aristotelian concern for the shape of one's whole life is not about getting determinate answers in particular situations. Deborah's book on character focuses on moral agents, not on moral rules or consequences. Some chapters warn that "good character" requirements in occupational licensing and criminal justice are riddled with abuse, bias, and reliance on squirrely metrics—which are salutary warnings. But at the same time, the working premise of the book is that character matters. And she includes chapters on role models because "role models who exemplify integrity and altruism play a crucial role in character development."<sup>124</sup> Her focus is squarely on virtues, and on whole lives. Indeed, both of Deborah's final two books, on character and ambition, adopt the whole-life perspective.

Recall Ivan Ilyich once again. In his final days, he comes to regret that he had suppressed "those scarcely perceptible impulses of his to protest what people of high rank considered good," and it dawns on him that those "vague impulses which he had always suppressed, might have been precisely what mattered."<sup>125</sup> The lives Deborah offers as role models are people who did *not* simply follow what was considered good by the most highly placed people. Neither did she.

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123. See ROSALIND HURSTHOUSE, ON VIRTUE ETHICS 25–31 (1999) (forcefully arguing that virtue ethics is no less determinate than other competing ethical theories). "Do what the virtuous do" is often *more* concrete and useful than "do whatever has the best consequences" and "do what correct moral rules or principles dictate." *Id.* In the face of hard choices, when consequences and probabilities are foggy and moral principles may conflict, I'm pretty sure that I have a better idea whose advice to seek than I have about what consequences to predict or which of two clashing moral rules applies.

124. See RHODE, CHARACTER, *supra* note 46, at 138.

125. TOLSTOY, *supra* note 5, at 108.