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Virtue Ethics, Earnestness, and the Deciding Lawyer: Human Flourishing in a Legal Community

Michael S. McGinniss

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VIRTUE ETHICS, EARNESTNESS, AND THE DECIDING
LAWYER: HUMAN FLOURISHING
IN A LEGAL COMMUNITY

MICHAEL S. MCGINNISS*

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*Assistant Professor, University of North Dakota School of Law; J.D., College of William and Mary, Marshall-Wythe School of Law, 1993; B.A., Washington College, 1990. Law Clerk, Justice Randy J. Holland, Supreme Court of Delaware, 1993-94. Disciplinary Counsel, Office of Disciplinary Counsel of the Supreme Court of Delaware, 1998-2010. I am very grateful for the love and support of my parents, Daniel and Florence A. McGinniss, and for the practical wisdom they have shared with me throughout my life.

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I. INTRODUCTION: A TRIBUTE TO MART R. VOGEL, ESQUIRE

It is with a sense of great honor, privilege, and responsibility that I am with you today to present the 2011 Mart Vogel Lecture on Professionalism and Legal Ethics.¹ I have recently concluded my first year of teaching at the University of North Dakota School of Law, where I joined the faculty after twelve years of service to the Supreme Court of Delaware as Disciplinary Counsel and seventeen years as a member of the Delaware bar. Although Delaware calls itself the “First State” because it was the first American colony to ratify the United States Constitution, it is far from being first in size, either geographically or in population. Its legal community is a small one, but the hearts of its members swell with proper pride in the bar’s distinguished history and its rich traditions of professionalism, civility, and public service.

In settling in North Dakota last year with my family, I was very excited to begin learning more about the highly distinguished history and rich traditions of its bench and bar. The history of North Dakota’s legal community provides a treasure trove of lawyers and judges whose achievements and professionalism reflect the very best virtues and character of the American legal profession. Its bench has included such nationally renowned jurists as Chief Justice Gerald W. VandeWalle of the North Dakota Supreme Court, Myron H. Bright of the United States Court of

1. Michael S. McGinniss, Assistant Professor, Univ. of N.D. Sch. of Law, 2011 Mart Vogel Lecture on Professionalism and Legal Ethics (June 17, 2011). The body of this article, including its introductory tribute to Mart R. Vogel, Esquire, was originally presented as a lecture during the 112th Annual Meeting of the State Bar Association of North Dakota.

Appeals for the Eighth Circuit, and Ronald N. Davies of the United States District Court for the District of North Dakota. North Dakota's bar has included lawyers whose long and distinguished service to clients, to the courts, and to the public have set them apart as inspirational exemplars for other lawyers to follow. Mart R. Vogel, was such a lawyer, and it is to his memory that I dedicate today's presentation.

In 1911, Mart Vogel was born in Perham, Minnesota to Philip and Anne Marie Vogel.² In the 1870s, Mart's grandfather, Frederick, had settled in Ottertail County, Minnesota, and the Vogel family was among the first settlers in western Minnesota.³ Around the turn of the century, Philip and Anne Marie moved to Perham where they raised young Mart, along with his three older sisters and two older brothers.⁴ Beginning in 1934, he attended the University of North Dakota Law School for one year and then left for Washington, D.C. to work for the Resettlement Administration during the day and to attend George Washington Law School at night.⁵ After graduating from law school in 1938, he obtained a position in Minot as a North Dakota lawyer for the Federal Deposit Insurance Corporation and began a private law practice on the side.⁶ In 1939, he was appointed as an Assistant United States Attorney in Fargo, where he served until 1941, when he left to join a law firm and established a successful litigation and trial practice.⁷ His law firm "became and has remained the largest in North Dakota, and is now called the Vogel Law Firm."⁸

By the end of the 1950s, Mart Vogel had tried hundreds of criminal and civil cases in North Dakota and western Minnesota and had established an active appellate practice.⁹ "He handled many criminal cases for indigent defendants on a pro bono basis, or with minimal compensation, in both state and federal courts and was regularly called upon by the judiciary to handle cases no one else wanted to take."¹⁰ In the 1960s, he became one of the first lawyers in the region to handle product liability litigation, and he stayed current with developments in the law.¹¹

2. *Mart R. Vogel Biography*, NDCOURTS.GOV, <http://www.ndcourts.gov/court/news/mart/martbio.htm> (last visited Sept. 14, 2011).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* (citing *Johnson v. Int'l Harvester Co.*, 487 F. Supp. 1176 (D.N.D. 1980); *Stromsodt v. Parke-Davis & Co.*, 257 F. Supp. 991 (D.N.D. 1966); *Conrad v. Suhr*, 274 N.W.2d 571 (N.D. 1979)).

The Vogel Law Firm continued to thrive and grow through the 1960s.¹² Its lawyers included Myron Bright, John Kelly, and Kermit Bye, each of whom later served on the United States Court of Appeals for the Eighth Circuit.¹³ By the 1970s, Mart Vogel had become one of the most active trial lawyers in the state, having tried and handled appeals in virtually every category of case on behalf of both plaintiffs and defendants.¹⁴ He was a lawyer who was respected by other lawyers and by judges not only for his knowledge and talent as an advocate for his clients, but also for his candor and reliability.¹⁵ Very importantly, he served as a positive and highly influential mentor for young lawyers in his firm, teaching virtues of fairness and civility with opposing counsel and respect and care for clients.¹⁶ He was well-known for using the expression, “[n]ever hit anyone who is down.”¹⁷

In the 1980s, two of Mart Vogel’s sons, Nick and Dan, became lawyers and joined him in the firm.¹⁸ In his continued sterling reputation for excellent practice and professionalism, he was known as the “lawyer’s lawyer” and the “Dean of the North Dakota Bar.”¹⁹ In 1986, at the age of seventy-five, he represented clients in his last three trials, including a multi-week legal malpractice case he successfully litigated through appeal.²⁰ “I’ve had enough,” he said.²¹ Even after he retired from the active practice of law, however, he continued to go to his office until he was over 90 years old, sharing his knowledge and practical wisdom with other lawyers and supporting and strengthening the legal community.²²

In 1990, the State Bar Association of North Dakota recognized Mart Vogel’s outstanding legal career by awarding him the Association’s Distinguished Service Award, which is given as a special honor for a North Dakota lawyer’s long and exemplary service in the profession.²³ In July 2003, the American Inns of Court honored Mart Vogel with its

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* (citing *Herzog v. Yuill*, 399 N.W.2d 287, 287 (N.D. 1987); *Bohn v. Johnson*, 371 N.W.2d 781 (N.D. 1985); *Martinson Bros. v. Hjellum*, 359 N.W.2d 865 (N.D. 1985); *Phillips Fur & Wool Co. v. Bailey*, 340 N.W.2d 448 (N.D. 1983); *Sheets v. Letnes, Marshall & Fiedler, Ltd.*, 311 N.W.2d 175 (N.D. 1981)).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

Professionalism Award for the Eighth Circuit.²⁴ “The Circuit Professionalism Award is presented to honor a senior practicing judge or lawyer whose life and practice display sterling character and unquestioned integrity, coupled with ongoing dedication to the highest standards of the legal profession.”²⁵ In nominating him for the 2003 Circuit Professionalism Award, the North Dakota Supreme Court described Mart Vogel as a “model of civility, competence and ethical attitude in all things.”²⁶

I close this introductory tribute to Mart Vogel by offering the following observation, coming back full circle to my own journey from Delaware to North Dakota and learning more about the laudable history and proud traditions of the North Dakota bar. I was very pleased when I learned the 2003 Circuit Professionalism Award was presented to Mart Vogel by my own mentor in the law and a true hero in the American bench and bar, Delaware Supreme Court Justice Randy J. Holland, who was then President of the American Inns of Court.²⁷ I was honored to serve as the law clerk for Justice Holland from 1993 to 1994. During that year and in the years that followed, Justice Holland shared with me, by his words and by his example, what it means to live a life of virtuous character in the legal profession, along with the practical wisdom gained from his life full of experiences in making ethical and moral decisions. As reflected by his highly esteemed place in the proud history of the North Dakota bar and the recollections of his colleagues, friends, and family, Mart R. Vogel, Esquire, was likewise a lawyer of virtuous character and great practical wisdom, which he generously shared with others to help them flourish, as he had, in a life well-lived.

II. THE ETHICAL POSITION OF THE LAWYER

Over the past few decades, academic scholarship in the field of legal ethics has closely examined, and reached widely divergent conclusions about, the moral challenges lawyers face because of their ethical position as individuals owing competing professional duties to clients, the courts, and

24. Am. Inns of Court Found., *Mart Vogel Receives 2003 American Inns of Court Professionalism Award for the Eighth Circuit*, INNSOFCOURT.ORG (July 18, 2003), <http://www.innsocourt.org/Content/Default.aspx?Id=136>.

25. *Id.*

26. *Id.*

27. *Id.* On March 27, 2011, Justice Holland was sworn in for an unprecedented third twelve-year term on the Delaware Supreme Court. *Judicial Officers of the Delaware Supreme Court*, DELAWARE STATE COURTS, <http://courts.delaware.gov/supreme/justices.stm> (last visited May 18, 2011).

other persons who are affected by the actions of lawyers and their clients.²⁸ In addition, scholars have explored the moral challenges lawyers confront as persons ethically situated in law practices of varying natures (e.g., civil or criminal litigation, or transactional work) and settings (i.e., small or solo firm, government practice, or large firm).²⁹ In this article, I intend to take a step back from those issues and then endeavor to take a few steps forward, to examine the ethical position of the lawyer and a lawyer's decisions and conduct from the standpoint of moral philosophy. What does "good character" mean for a lawyer? What obstacles do lawyers, especially new ones, face in forming and maintaining a "good character" for the practice of law? What does it mean for lawyers in a particular geographic setting to live "in legal community," and how can this community promote human flourishing for its members amidst the moral hazards found in the daily decisions of law practice?

A. MORAL CHARACTER AND DUTIES TO CLIENTS

In a landmark 1976 article, Charles Fried framed the ethical tension between a lawyer's moral character and the lawyer's duties to clients bluntly with this question:

Can a good lawyer be a good person? The question troubles lawyers and law students alike. They are troubled by the demands of loyalty to one's client and by the fact that one can win approval as a good, maybe even great, lawyer even though that loyalty is engrossed by over-privileged or positively distasteful clients. How, they ask, is such loyalty compatible with that devotion to the common good characteristic of high moral principles?³⁰

28. Compare, e.g., DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 2 (2008) (arguing that "lawyers' professional obligations to behave in ways that would ordinarily be immoral are not simply the results of excessive or perverse partisanship," but instead are "deeply ingrained in the genetic structure of adversary advocacy"), with Monroe H. Freedman & Abbe Smith, *Misunderstanding Lawyers' Ethics*, 108 MICH. L. REV. 925 (2010) (reviewing Markovits' book and vigorously critiquing his conclusions).

29. See, e.g., Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 309 (2004) (providing results of empirical study of the ethical challenges solo and small firm lawyers most commonly confront in their practices); J. Nick Badgerow, *Walking the Line: Government Lawyer Ethics*, 12 KAN. J.L. & PUB. POL'Y 437, 437 (2003) (addressing ethical issues that frequently arise in the context of law practice in a government agency); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 871 (1999) (examining the serious challenges contemporary lawyers face to their professional and personal well-being, with a focus on problems relating to lawyers' practice in large law firms); see also William J. Wernz, *The Ethics of Large Law Firms—Responses and Reflections*, 16 GEO. J. LEGAL ETHICS 175, 175 (2002) (responding to Schiltz' critique of ethical problems in large law firm practice).

30. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 (1976).

The two criticisms to the “traditional conception of the lawyer’s role,” as Fried conceived them, are directed to “its ends and its means.”³¹ The “ends” critique calls into question the morality of a lawyer’s selection of clients and her loyalty to the chosen ones rather than to others perhaps more deserving.³² The second criticism, which is the focus in this article, is directed to problems of “the means which this [client] loyalty appears to authorize, tactics which procure advantages for the client at the direct expense of some identified opposing party.”³³ Fried proposed to resolve, or at least mitigate, these ethical tensions by analogy to the concept of “friendship”: a lawyer, in essence, is a client’s “limited-purpose friend . . . in regard to the legal system,” and thereby adopts the client’s interests as his own.³⁴ Although Fried’s “friendship” model does provide a measure of moral relief for lawyers in their choice and application of client loyalties, the model struggles most when it seeks to reconcile these duties with the use of legal but nevertheless “immoral” means to accomplish a client’s desired objectives.³⁵

B. THE TEMPTATIONS OF AUTHORITY AND AGENCY

In providing legal advice and taking actions in the representation of a client, the rules of professional conduct establish a bifurcation of client-lawyer responsibility for decision making as to the “objectives” for the representation as opposed to the “means” employed, with “objectives” being the sole province of the client.³⁶ Therefore, lawyers may not substitute their judgment as to the proper “objectives” for the representation of those clients, as long as those objectives are lawful.³⁷ As for the “means” to accomplish the objectives, the lawyer’s duty is generally to “consult” with the client about employing them, provided those means are not only lawful but also consistent with competent and reasonably diligent practice.³⁸ The lawyer’s role in representing a client is therefore, in many

31. *Id.* at 1061.

32. *Id.* at 1061-62.

33. *Id.* at 1062.

34. *Id.* at 1071-72.

35. *Id.* at 1082.

36. *See* MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2007). The language of each referenced ABA Model Rule of Professional Conduct has been adopted by the North Dakota Supreme Court without modification. *See* N.D. RULES OF PROF’L CONDUCT (2011).

37. *See* MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (prohibiting a lawyer from assisting a client in conduct “that the lawyer knows is criminal or fraudulent”).

38. *See id.* at R. 1.2(a); *see also id.* at R. 1.1 (stating a lawyer’s duty to provide a client with “competent representation”); *id.* at R. 1.3 (stating a lawyer’s duty to act with “reasonable diligence” in representing a client). The comment to Rule 1.2 cautions, however, that “[b]ecause of the varied nature of the matters about which a lawyer and client might disagree and because the

aspects, properly understood as that of an agent carrying out the directions of a principal, with discretion as to the details of how to comply with those directions.³⁹

Nevertheless, the lawyer also occupies a place of special authority with respect to the client's legal affairs. Not only does the lawyer have the already noted discretion as to the means to be considered and employed to achieve the client's objectives, but the lawyer generally possesses expertise and experience that makes his words highly influential on the client's decisions.⁴⁰ The rules of professional conduct endorse, and in some circumstances require, a lawyer to engage a client in discourse about moral and ethical matters that goes beyond "purely technical advice."⁴¹ While creating space and opportunities for the lawyer to act as a "friend" in Fried's sense and persuade the client to the "good," these kinds of conversations do pose some potential risks to the integrity of the client's own decision making.

The elements of authority and agency in the structure of the client-lawyer relationship may create moral temptations from the standpoint of the lawyer, as well. As to authority, a lawyer may be tempted to dominate the relationship by assuming (perhaps self-interestedly) that the client seeks solely or primarily legal or financial benefit from the litigation or transaction in question, without regard to the harm caused to other people or the

actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved." *Id.* at R. 1.2 cmt. It further notes that "[o]ther law . . . may be applicable and should be consulted by the lawyer," and that it is appropriate to "seek a mutually acceptable resolution of the disagreement" with the client. *Id.* Withdrawal from the representation by the lawyer, or discharge of the lawyer by the client, may become an appropriate option if a "fundamental" disagreement relating to means cannot be satisfactorily resolved by the client and lawyer. *See id.* at R. 1.16(a)(3), (b)(4).

39. "Lawyers are agents, not principals," said the late Abe Fortas, associate justice of the Supreme Court of the United States, "and they should neither criticize nor tolerate criticism based upon the character of the client whom they represent or the cause they prosecute or defend. They cannot and should not accept responsibility for the client's practices." THOMAS L. SHAFFER, *LAWYERS IN THE UNITED STATES OF AMERICA: A BRIEF MORAL HISTORY* 30 (1995).

40. *See, e.g.,* Reed Elizabeth Loder, *Integrity and Epistemic Passion*, 77 NOTRE DAME L. REV. 841, 865-66 (2002) ("Ethics literature explores dangers of paternalism in the lawyer-client relationship, even by those critical of client autonomy as a paramount value. Asymmetry of knowledge and power in the professional relationship aggravates risks of professional imposition.") (footnote omitted).

41. MODEL RULES OF PROF'L CONDUCT R. 2.1. "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." *Id.* at R. 2.1 cmt. "Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as costs or effects on other people, are predominant. Purely technical advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied." *Id.*

client's relationships with others.⁴² The lawyer's position of authority may also tempt the lawyer to make moral choices for the client and expect the client to follow, not through a genuinely reflective conversation and balanced persuasion, but instead through the exercise of dominance and perhaps emotional control in the relationship.⁴³

The temptation of agency, on the other hand, may arise in a lawyer's representation of a client, in two distinct ways. First, the lawyer may defer to client autonomy and control in the relationship to the extent the lawyer fails to engage the client in moral discourse about the adverse personal impact decisions, made in the course of representation, that may have an impact on others, or even on the client herself. The lawyer, in essence, has become a "hired gun," conceiving her role as being limited to ascertaining the client's stated legal objectives and then deferring without critique to the client's request to use any and all lawful means to accomplish them.⁴⁴ Second, a lawyer succumbs to the temptation of agency if she adopts an attitude of personal detachment and rationalizes lawful but morally questionable behavior because the client requested it or it was thought to benefit the client.⁴⁵

C. THE LIMITS OF ROLE-BASED LEGAL ETHICS

Thus, though helpful in certain respects in understanding the dynamics of the client-lawyer relationship and reconciling competing ethical

42. THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS AND MORAL RESPONSIBILITY* 8 (2d ed. 1994). This approach may also be described as the "lawyer as godfather," or "acquisitive paternalism." *Id.* at 7-8. "The godfather lawyer . . . resolves questions unilaterally in terms of the imputed ends of [client] selfishness." *Id.* at 8 (quoting William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 56 (1978)).

43. *See id.* at 30-32. This approach of making moral choices for clients may also be described as the "lawyer as guru," because "that is what gurus do: they tell their followers what to do." *Id.*; *see also* Loder, *supra* note 40, at 864 ("While a lawyer must not promote unlawful ends or engage in unethical conduct in representing a client, the value of client autonomy simultaneously cautions against paternalistic behavior and abuses of power in the professional relationship.") (footnotes omitted).

44. *See* SHAFFER & COCHRAN, *supra* note 42, at 16-20. "By its very nature, representing clients involves promoting the goals of others, whether or not the attorney would personally endorse or even accept those goals." Loder, *supra* note 40, at 864 (footnotes omitted) "Lawyers sometimes suspend their values to represent others, and this estrangement may cut straight to the heart of integrity. Even a lawyer with the fortune of a morally friendly practice faces difficult ethical choices of means." *Id.*

45. *See* Fried, *supra* note 30, at 1084 ("[M]y general notion is that a lawyer is morally entitled to act [a] formal, representative way even if the result is an injustice, because the legal system which authorizes both the injustice . . . and the formal gesture for working it insulates him from personal moral responsibility.").

concerns, role-based approaches to legal ethics have serious limitations.⁴⁶ As Benjamin Zipursky has observed:

[A] person who does work as an attorney cannot disclaim responsibility for all of the consequences of her conduct, merely by virtue of the fact that she is engaging in that conduct in the role of attorney. To put the point in Kierkegaardian dressing, attorneys should not suspend ethical judgment when acting as attorneys. Lawyers should engage in first-order moral judgment in many scenarios as lawyers, rather than casting off all moral judgment in order to more completely to adopt the role of the lawyer.⁴⁷

The problem extends beyond the temptations of control-associated with authority and of detachment-associated with agency. Lawyers are not just directors or actors in a real-life drama. They *are* professionals who have agreed to abide by rules governing their conduct in exchange for the privilege of practicing law, but they are much more than that. They are existing human beings, individual persons who have pasts and futures, and relationships with family, friends, and neighbors. As such, it is natural for lawyers to desire a meaningful life reflecting an existential coherence between their convictions and personalities both outside and inside the law office. Atticus Finch, the hero of Harper Lee's classic novel *To Kill a Mockingbird*, expressed this idea very succinctly when he said, "I can't live one way in town and another way in my home."⁴⁸

Nevertheless, the practice of law will entice some lawyers to live a morally divided existence. For some, the motivation will be a financial interest in professional success above all else; for others, the motivation is primarily competitive or egotistical; and for others still, the motivation will be a misguided understanding of what actions are acceptable, or even praiseworthy, based on loyalty to the interests of the client.⁴⁹ Robert Araujo has described one type of lawyer he calls "the victorious lawyer":

46. See, e.g., John T. Noonan, Jr., *Distinguished Alumni Lecture—Other People's Morals: The Lawyer's Conscience*, 48 TENN. L. REV. 227, 228 (1981) (addressing, as a "pervasive problem in morals: the question whether one has a different set of ethics when acting for someone else").

47. Benjamin Zipursky, *Regulation and Responsibility for Lawyers in the Twenty-First Century*, 70 FORDHAM L. REV. 1949, 1954-55 (2002) (footnotes omitted).

48. HARPER LEE, *TO KILL A MOCKINGBIRD* 315 (HarperCollins 1999) (1960); see also *id.* at 227 (Atticus' daughter, Scout, recalling Miss Maudie Atkinson's description of Atticus: "He's the same in the courtroom as he is on the public streets.").

49. Judge John T. Noonan, Jr. has described the phenomenon of lawyers' role-based shifting of ethical and moral responsibility to clients as "the carapace effect":

While I understand the attractiveness and even the inescapability of the catch phrase, "I'm doing it for my client," I also see the phrase functioning as a kind of carapace. The phrase functions as a defense against various moral claims, a defense against

[T]he victorious lawyer is not a corrupt individual who schemes and plots to violate laws and contemptuously flaunt ethical standards of conduct. He is, however, the lawyer who has only one goal: to win regardless of the cost and regardless of the compromises made with norms which lawyers and lay people alike regard as the requirements of participating in civil and courteous society. The victorious lawyer plays hardball as that term has been defined by various members of the profession [in recent years]. This lawyer takes pride in his arsenal of victory-oriented tactics which, while not strictly forbidden by the law, nonetheless keep him ever so close to the narrow line between proper and improper professional conduct. For example, the victorious lawyer knows how to wear the opposing lawyer and party down with lawful but unnecessary discovery requests. The victorious lawyer knows that the crushing financial burdens facing the opponent who is to comply with such discovery requests may prompt it to concede its case or to accept a compromise which would otherwise be deemed unreasonable in order to conclude litigation of an otherwise just case which it can no longer afford. Another tactic found in this storehouse is to file court documents at times known to be the most inconvenient or unreasonable for the other side. The victorious lawyer is scrupulous about not breaking the law. However, his *modus operandi* carries the hallmark of aggressively seeking all advantages and making no concessions—an identification which over time alienates the victorious lawyer from the bench, the bar, and opposing parties. In characterizing such a lawyer, the term “honorable” would not come to mind.⁵⁰

If ethical law practice requires only meeting role-based obligations to work hard, advocate zealously, be literally truthful, and provide loyal service to clients, then Araujo has painted a portrait of a lawyer worthy of modeling that role. But these traits are not all that is required to be a lawyer of good character, and the “victorious lawyer” in this sense is not a virtuous one. And perhaps the “victorious lawyer,” who rationalizes his callous professional behavior and diminished reputation with the bench and bar as the necessary cost of success in serving clients in a competitive legal world,

empathy with someone else’s feelings, a defense against responsibility. If a lawyer can utter this incantation and can take it seriously enough, responsibility and the feelings accompanying it are shifted to the client.

Noonan, *supra* note 46, at 230.

50. Robert Araujo, *The Virtuous Lawyer: Paradigm and Possibility*, 50 SMU L. REV. 433, 434 (1997) (footnotes omitted).

lives a life of exemplary virtue when he sets foot outside the office door. Yet one may agree that human experience rarely reveals the existence of persons so successfully divided.⁵¹ Good character thrives on wholeness and constancy, and withers in the face of repeated professional actions inconsistent with good and sound moral convictions.⁵²

All of that said, there is still a very important place in legal ethics for role-based considerations. A lawyer is not her client's keeper, responsible for each of the client's decisions and actions made possible by her legal advice or services. As Benjamin Zipursky has noted, "a moderate and tempered position is the key; lawyers should not necessarily act in avoidance of their role, and should not necessarily act as if the decisions in question were their own moral choices in their own lives."⁵³ I submit that a lawyer who merely fulfills role expectations and complies with the minimum required professional duties under the rules will not be a lawyer who flourishes as a human being. Nor will a legal community flourish if its ranks are dominated by lawyers meeting only the minimum standards for the ethical practice of law. What is essential for such individual and community flourishing in the legal profession is the development and support of generations of lawyers of strong and reliable good character who, while withstanding the temptations of authority and agency, lead virtuous lives worthy of emulation by their colleagues and descendants in the practice of law.

III. VIRTUE ETHICS AND THE PRACTICE OF LAW

How does one form the good character necessary to become a virtuous lawyer? And how does such a lawyer remain virtuous in the practice of law? In seeking answers to those questions, this section will draw on ethical concepts of "virtue" derived from the work of the ancient Greek philosopher Aristotle, as well as the ethics of decision and the concept of "earnestness" from the works of the nineteenth-century Danish philosopher Søren Kierkegaard.

51. "It is a delusion . . . to think that [lawyers] can separate their personal from their professional lives and their personal from their professional morality." Daniel R. Coquillette, *Professionalism: The Deep Theory*, 72 N.C. L. REV. 1271, 1272 (1994). "The current jargon refers to this dichotomy as 'role defined' ethics. It is true intellectual rubbish You cannot be a bad person and a good lawyer, nor can you be a good person and a lawyer with sharp practices." *Id.*

52. See *infra* notes 109-10 and accompanying text (discussing the virtue of integrity, including how its formation and cultivation in a lawyer's character provides the lawyer with "the fortitude to resist ethical invasions") (quoting Loder, *supra* note 40, at 845).

53. Zipursky, *supra* note 47, at 1955 (citing DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 144-47 (2000)).

A. ARISTOTLE'S *NICOMACHEAN ETHICS*: VIRTUE AND HUMAN FLOURISHING

Like other philosophical works passed down after Aristotle's death several centuries before Christ, *Nicomachean Ethics* is a summary of lectures he delivered while teaching in Athens.⁵⁴ They are so named because Aristotle's son Nicomachus is believed by many scholars to have edited and preserved these writings in the form we have them today.⁵⁵ Its aim was to provide an answer to the question: "[W]hat is the good life for man?"⁵⁶ At the outset of his work, Aristotle defines the "good" in terms of the specific aims toward which human actions are directed.⁵⁷ The course taken by an individual moral agent in life is directed toward a *telos*, or purpose, which is an expression of human nature.⁵⁸ For Aristotle, the ultimate *telos*, or supreme good, for human beings is *eudaimonia*, which is often translated from the Greek as "flourishing."⁵⁹

Aristotle described virtue in *Nicomachean Ethics*, as "qualities the possession of which will enable an individual to achieve *eudaimonia* and the lack of which will frustrate his movement toward that *telos* [or purpose]."⁶⁰ Moreover, as Jonathan Lear has explained, for Aristotle, "[t]he virtues are stable states of the soul which enable a person to make the right decision about how to act in the circumstances and which motivate him so to act."⁶¹ Among the moral virtues Aristotle identifies are justice, courage, and honesty,⁶² and among the intellectual virtues is *phronēsis*, usually translated as "practical wisdom."⁶³

54. ARISTOTLE, *NICOMACHEAN ETHICS* xii (Martin Ostwald trans., Bobbs-Merrill Co. 1962).

55. *Id.* at xii-xiii. "The *Nicomachean Ethics*—dedicated to Aristotle's son Nicomachus, says Porphyry; edited by him, say others—is the most brilliant set of lecture notes ever written." ALASDAIR MACINTYRE, *AFTER VIRTUE* 147 (3d ed. 2007) [hereinafter MACINTYRE, *AFTER VIRTUE*].

56. JONATHAN LEAR, *ARISTOTLE: THE DESIRE TO UNDERSTAND* 154 (1988).

57. ARISTOTLE, *supra* note 54, at 3; ALASDAIR MACINTYRE, *A SHORT HISTORY OF ETHICS: A HISTORY OF MORAL PHILOSOPHY FROM THE HOMERIC AGE TO THE TWENTIETH CENTURY* 57-58 (2d ed. 1998) [hereinafter MACINTYRE, *A SHORT HISTORY OF ETHICS*]; MACINTYRE, *AFTER VIRTUE*, *supra* note 55, at 148 ("Every activity, every inquiry, every practice aims at some good; for by 'the good' or 'a good' we mean that at which human beings characteristically aim.").

58. MACINTYRE, *AFTER VIRTUE*, *supra* note 55, at 148.

59. *Id.*; MACINTYRE, *A SHORT HISTORY OF ETHICS*, *supra* note 57, at 59; *see also* R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice,"* 82 NOTRE DAME L. REV. 635, 644 n.49 (2006) (identifying other possible translations of *eudaimonia* as "happiness" or "becoming an excellent human being").

60. MACINTYRE, *AFTER VIRTUE*, *supra* note 55, at 148.

61. LEAR, *supra* note 56, 164.

62. *See* Cassidy, *supra* note 59, at 647-48 (summarizing Aristotle's account of the virtues of "justice," "courage," and "honesty").

63. ARISTOTLE, *supra* note 54, at 152-54, 312.

Although Aristotle's philosophy is rooted in the classical humanist tradition, his concepts of the virtues had tremendous influence on the work of the great thirteenth-century theologian and virtue ethicist Saint Thomas Aquinas.⁶⁴ In the last thirty years, virtue ethics has experienced resurgence among moral philosophers such as Alasdair MacIntyre and others.⁶⁵ It has also influenced the thought of scholars writing about legal ethics,⁶⁶ as well as substantive issues in subject areas such as torts,⁶⁷ criminal law,⁶⁸ and business law.⁶⁹

How does a virtue ethicist go about making moral decisions? First, before asking "what should I do?," a person faced with a moral dilemma should ask "what kind of person should one be?"⁷⁰ For a virtue ethicist, the answer is that one should be a person of good and virtuous character whose actions are consistent with that character.⁷¹

With that moral predicate, the ethical decision should then be based on the response to the question, "what actions would be most consistent with a virtuous character?" Thus, the purpose, or *telos*, of human decisions and

64. See MACINTYRE, A SHORT HISTORY OF ETHICS, *supra* note 57, at 117-18 (discussing the similarities and differences between Aristotle's and Aquinas' accounts of the virtues; for Aquinas, "[t]he virtues are both an expression of and a means to obedience to the commandments of the natural law; and to the natural virtues are added the supernatural virtues of faith, hope, and charity"); Robert F. Blomquist, *The Pragmatically Virtuous Lawyer*, 15 WIDENER L. REV. 93, 96-97 (2009) (noting that Aquinas "saw a fundamental difference between virtues that humans seek to achieve through their own effort and supernatural 'theological virtues' that can be achieved only through God's grace") (footnote omitted). See generally 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICÆ (W.D. Hughes trans., McGraw-Hill Book Co. 1963) (1273) (synthesizing Aristotle's philosophy of ethics with Christian philosophical traditions).

65. See, e.g., MACINTYRE, AFTER VIRTUE, *supra* note 55; VIRTUE ETHICS (Stephen Darwall ed. 2003).

66. See Blomquist, *supra* note 64, at 94 (stating his thesis that "it is time for lawyers to return to the ancient philosophical pursuit of Plato and Aristotle, and the tradition of the other authors of the great books of western civilization who have had an ongoing conversation about the nature and dimensions of worldly virtue").

67. See Heidi L. Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431, 1433 (2000) (viewing the reasonable person standard in tort law through the lens of virtue ethics as an alternative to the usual utilitarian focus of contemporary scholarship which "displaces the sort of context-sensitive, deliberative evaluation of actions traditionally invited by the reasonable person standard").

68. See Cassidy, *supra* note 59 (applying principles of virtue ethics to decision making by criminal prosecutors).

69. See Marianne M. Jennings, *The Disconnect Between and Among Legal Ethics, Business Ethics, Law, and Virtue: Learning Not to Make Ethics So Complex*, 1 U. ST. THOMAS L.J. 995, 1020 (2004) ("Rather than training lawyers when to blow the whistle on a client, we should perhaps be training them in what moral courage means, when to exercise it, and how such exercise is often a life-defining moment.").

70. Cassidy, *supra* note 59, at 644 (citing Roger Crisp, *Modern Moral Philosophy and the Virtues*, in HOW SHOULD ONE LIVE? 1, 7 (Roger Crisp ed., 1996)).

71. See *id.* ("Virtue ethics makes the characteristics of a good person the focus of analysis, 'on the assumption that one who is good is likely to do the right thing in most situations.'") (quoting Loder, *supra* note 28, at 842 n.1).

actions for a virtue ethicist is that of becoming and remaining a good person, and thereby to promote individual human flourishing. In this regard, moral philosophy based in virtue ethics is quite distinct from consequentialist and deontological approaches.

Consequentialist philosophers, such as the nineteenth-century English utilitarians Jeremy Bentham⁷² and John Stuart Mill,⁷³ focus their ethical frameworks on attempting to measure and balance the outcome of human decisions, and generally seek to maximize happiness⁷⁴ and to minimize harm or suffering.⁷⁵ In moral decision making, their minds are fixed principally, if not solely, on external factors and results, rather than on concerns about violation of the actor's character or convictions.⁷⁶ Significantly, if the balance of social utility in the outcome favors a particular action, a pure consequentialist would be likely to support it even though it violates duties created by rules or violates the rights of others.⁷⁷

In contrast to virtue ethics and consequentialism, deontological ethicists, most notably the eighteenth-century German philosopher Immanuel Kant, focus on concepts of first principles, moral duties, and rules expressing axioms for right conduct.⁷⁸ The word "deontology" is derived in part from the Greek word *deon*, translated as "duty."⁷⁹ In Kant's deontological moral philosophy, for example, the moral truth of these first principles is deduced by asking whether one could reasonably will that one should live in a world where all persons followed the duty or rule proposed.⁸⁰

The categorical imperative, which he described in one of his works as "the moral law according to which one should act only on principles that

72. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION I (Hafner Publishing Co. 1963) (1789) ("Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do.").

73. See John Stuart Mill, in ETHICS: THE ESSENTIAL WRITINGS 225, 228-30 (Gordon Marino ed., 2010) (providing an introduction to Mill's moral philosophy of utility, or "the Greatest Happiness Principle," with accompanying excerpt from JOHN STUART MILL, UTILITARIANISM ch. II (1861)).

74. Consequentialist philosophers describe happiness as the most beneficial consequences for the greatest number. See *id.* at 225 ("Utilitarianism instructs that we ought to do that which promotes the greatest good for the greatest number of people.").

75. See Cassidy, *supra* note 59, at 641.

76. *Id.* at 644.

77. *Id.* at 641.

78. See generally IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS (Thomas K. Abbott trans., Macmillan Publishing Co. 1985) (1785).

79. See Larry Alexander & Michael Moore, *Deontological Ethics*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2008), available at <http://plato.stanford.edu/archives/fall2008/entries/ethics-deontological>.

80. KANT, *supra* note 78, at 30 (stating that "the will is nothing but practical reason").

one can accept everyone acting upon,”⁸¹ conclusively determines what action is “right,” regardless of human desires, needs, wants, or concerns about human flourishing.⁸² In such a system, the concept of the “right” comes before that of the good; “good outcomes will be achieved if everyone behaves according to their rights and responsibilities”—that is, if everyone acts in accordance with their duties.⁸³ For pure deontologists, adherence to duties and first principles is absolute, and overrides any consideration of particular positive or adverse consequences or concerns about consistency with the virtues.⁸⁴ Thus, a person achieves and maintains good character by always and without exception doing her duty in a manner consistent with the categorical imperative.

However, virtue ethicists are both “ontological” (derived from the Greek word for “being”)⁸⁵ and “teleological” (from the Greek *telos*, or purpose).⁸⁶ Their moral philosophy focuses on how a decision and action relates to the purpose for human beings, which is individual human flourishing and excellence.⁸⁷ For virtue ethicists, “[t]he concept of the good is prior to the concept of the right,” and “what is good is determined by intrinsic human excellence rather than external outcomes.”⁸⁸ Therefore, a virtue ethicist derives the rules of action for persons of good character from the virtues themselves,⁸⁹ rather than establishing a duty-based rule of action first and deciding whether a person is acting in good character solely by determining whether he has acted in conformity with the rule.

B. DUTY OR VIRTUE? OR BOTH?

Against this backdrop of philosophical approaches, this section turns to a question that challenges lawyers in many practice settings at various points of their professional lives: How do I reconcile my duties to my clients under the rules of professional conduct with the good and virtuous

81. Cassidy, *supra* note 59, at 641 (quoting Immanuel Kant, *Metaphysical Foundation of Morals*, in *THE PHILOSOPHY OF KANT* 154, 164-67 (Carl J. Friedrich ed., Carl J. Friedrich & James C. Meredith trans., 1993)).

82. See KANT, *supra* note 78, at 38 (“There is therefore but one categorical imperative, namely, this: *Act only on that maxim whereby thou canst at the same time will that it should become a universal law.*”).

83. Cassidy, *supra* note 59, at 641.

84. See Immanuel Kant, in *ETHICS: THE ESSENTIAL WRITINGS*, *supra* note 73, at 188, 188 (observing that “Kantians tend to be absolutists in the sense that there are certain actions that they regard as simply wrong—no matter what the consequences”).

85. *Ontology*, WEBSTER'S ONLINE DICTIONARY, <http://www.websters-dictionary-online.com/definitions/ontology> (last visited May 26, 2011).

86. See Cassidy, *supra* note 59, at 643.

87. See *id.*

88. *Id.*

89. See Aristotle, in *ETHICS: THE ESSENTIAL WRITINGS*, *supra* note 73, at 43, 44.

character I highly value and desire to maintain? For a lawyer, which takes priority when there appears to be a conflict? Is it duty or is it virtue?

Some commentators have noted that a lawyer overly preoccupied with virtue may be at risk of putting her personal interests ahead of the client's interests.⁹⁰ Others have said the "adversary ethic,"⁹¹ as it is often called, provides moral sanction for decisions and tactics in representing clients that would be considered repugnant under ordinary standards of goodness and decency.⁹² In response, I propose that, except perhaps in the most extraordinary circumstances, a lawyer can decide to act, and should act, *both* dutifully and virtuously.⁹³

90. See, e.g., Loder, *supra* note 40, at 872 ("Whereas the ordinary person is free to pursue personal commitments, an objector might persist that the professional has external duties that transcend duties to self. . . . In joining the profession and accepting its privileges, the objector might conclude that the lawyer renounces some luxuries of personal moral development.")

91. Thomas L. Shaffer has reviewed the post-Civil War development of American lawyers' "adversary ethic," which he describes as constituting a "claim by lawyers for a legal and moral dispensation from the ordinary morals of complicity." SHAFFER, *supra* note 39, at 30. He observes that "[i]t is ordinary morality, as well as ordinary law, that if you and I combine our efforts and talents, we are each legally and morally responsible for the result. American lawyers established . . . an immunity from that ordinary morality and from legal rules that trace to that ordinary morality." *Id.*; see also Robert Granfield, "It's Hard to Be a Human Being and a Lawyer": *Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice*, 105 W. VA. L. REV. 495, 512 (2003) ("Attorneys, as professionals, are granted freedom from being judged by the normative standards of common morality that is applied to the general public.")

92. For instance, Monroe H. Freedman, a well-known scholar in the field of legal ethics, has been described as "[t]he most prominent modern defender of the [adversary] ethic." SHAFFER, *supra* note 39, at 31.

[T]he attorney acts both professionally and morally in assisting clients to maximize their autonomy. . . . [T]he attorney acts unprofessionally and immorally by depriving clients of their autonomy, that is, by denying them information regarding their legal rights, by otherwise preempting their moral decisions, or by depriving them of the ability to carry out their lawful decisions.

MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 62 (3d ed. 2004)

Freedman's scholarship includes his highly controversial view that as long as the client's ultimate objective is lawful, a lawyer acts ethically and morally when he assists the client by using means that the lawyer believes to be immoral, or, in some cases, in violation of ethical duties to others. See SHAFFER & COCHRAN, *supra* note 42, at 26 (pointing to Freedman's positions "that a trial lawyer should help his client commit perjury; that an office lawyer should give his client information that will be used to commit crimes; and that a securities lawyer should keep his mouth shut about frauds on investors").

93. For this discussion, I will set to the side the related but distinct challenges of whether and in what circumstances "civil disobedience" on the part of lawyers is ethically and morally justified. See Araujo, *supra* note 50, at 464-70. In response to the question, "Does the Virtuous Lawyer Always Have a Duty to Obey the Law," Araujo has offered the conclusion that, "[t]he virtuous lawyer first of all understands the meaning of the law through the lenses of teleology, moral reasoning, and the virtues of courage, compassion, wisdom, prudence, and justice. Relying on this calculus, the virtuous lawyer's determination on whether the law is to be obeyed or not is guided by objective moral reasoning, the good for both the community and the individual, and application of the virtues." *Id.* at 470. See generally DANIEL R. COUILLETTE, R. MICHAEL CASSIDY & JUDITH A. MCMORROW, LAWYERS AND FUNDAMENTAL MORAL RESPONSIBILITY 189-270 (2d ed. 2010) (providing legal and philosophical analysis and collecting excerpts from works by authors including Martin Luther King, Jr., John Locke, and Henry David Thoreau).

The virtuous lawyer uses rules—the law itself—as the primary means to seek, on behalf of a client, the goal of the just result, which is itself the purpose at the heart of the rule of law and the American legal process.⁹⁴ Aristotle regarded justice as the “complete virtue” because it placed the individual in right relation with his neighbor.⁹⁵ In fulfilling duties to provide competent and diligent legal services, to communicate with and act as an advisor to the client, to preserve confidentiality, and to maintain a loyal relationship of trust with the client, the lawyer is *prima facie* acting virtuously to the extent that the American legal process itself is just.⁹⁶

These rules of professional conduct, as well as the oath of office a lawyer takes when admitted to the bar, are based on the understanding that a lawyer is expected to pursue justice for the client within ethical boundaries set by the courts, even if doing so creates moral difficulties for the lawyer.⁹⁷ Therefore, in the interest of promoting a just harmony between judicial policy and lawyer morality, courts should adopt and interpret the mandates of the rules, to the extent possible, so as to allow the lawyer to reconcile his professional conduct with the qualities of virtuous character.⁹⁸ What

94. See Araujo, *supra* note 50, at 446 (stating “the virtuous lawyer is concerned about acting ethically and morally in one’s attempt to bring peaceful resolution of disputes among citizens”).

95. ARISTOTLE, *supra* note 54, at 114; see Araujo, *supra* note 50, at 441. Aquinas, similarly, regarded the virtue of “justice” as a “good habit in which each person perpetually renders to the other person that which is due (i.e., the *sum cuique*).” *Id.*; see AQUINAS, *supra* note 64, at 123.

96. Although highly critical of ethical justifications of lawyer conduct on the basis of the adversary system, Daniel Markovits has also expressed that lawyers immersed in this system may develop “a distinctive facility (which others do not share) for assisting persons who cannot themselves speak in a way that engages the authoritative institutions of government to state their claims in an undistorted and yet effective fashion.” MARKOVITS, *supra* note 28, at 5. He calls this capacity “to give voice to the voiceless” the virtue of “fidelity,” distinct from client loyalty in so far as it “involves more than merely partisan partiality in favor of clients over others.” *Id.* Markovits believes that the virtue of fidelity offers lawyers “their best hope for ethical vindication of their professional lives.” *Id.*

97. See Blomquist, *supra* note 64, at 143-44 (“The attorney oath I have just quoted expects a lawyer to pursue justice for her clients but, in the process, to implicitly manifest deep generosity and friendship by abstaining from—and therefore counseling against—frivolous, vitriolic, vindictive, or malicious legal actions.”); see also MODEL RULES OF PROF’L CONDUCT R. 1.2 (lawyer as advisor); *supra* notes 36-38 and accompanying text. *But cf.* Granfield, *supra* note 91, at 512-13 (“[T]he codes do not tell lawyers how to reconcile conflicts between their personal sense of ethics and the rules Nor do the codes speak to the issue of how participating lawyers should act, as moral individuals, when they believe the system is flawed.”) (quoting Fred Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 228 (1993)); Vincent R. Johnson, *The Virtues and Limits of Codes in Legal Ethics*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 25, 44 (2000) (“[T]he Model Rules [of Professional Conduct] contain very little aspirational content and few, if any, statements of moral principle. The format of the Model Rules suggests that lawyers should be concerned with legality, not morality. Of course, that disconnection of ‘must’ and ‘ought’ makes it easier for lawyers to ignore the moral consequences of their actions.”).

98. “This argument [cautioning against a lawyer’s excessive concern with individual integrity] rightly acknowledges that sacrifices are necessary to serve clients well.” Loder, *supra* note 40, at 872. “Yet, it frighteningly implies that a trait as formative to moral identity as integrity

distinguishes the legal reasoning of a virtuous lawyer from those using other moral decision making approaches is that the virtuous lawyer will focus on “what is good?,” rather than solely or predominantly on “what do the rules require or allow?,” or even “what is right?”⁹⁹ Because there are so many facets of law practice where individual lawyer discretion is broad and supported (and even encouraged) by the rules, the virtuous lawyer has more freedom than is often recognized to practice law in a manner consistent with his moral convictions.¹⁰⁰

In addition to justice, there are many other virtues conducive to human flourishing in the practice of law. Robert Blomquist has recently proposed a list of these virtues, including balance, courage, idealism, compassion, creativity, energy, discipline, and perseverance.¹⁰¹ Along with these, a lawyer’s character should exhibit the virtues of honesty¹⁰² and reflect growth in what Aristotle called *phronēsis*, the intellectual virtue translated as “prudence”¹⁰³ or, more commonly, “practical wisdom.”¹⁰⁴

For Aristotle, the intellectual virtue of practical wisdom enables a person to recognize the good end and select the proper means for achieving it.¹⁰⁵ A person with practical wisdom is capable of discerning the proper or

may be a ‘cost’ of choosing to be a lawyer.” *Id.* “This view is debilitating if legal integrity encompasses virtues of justice Lawyers’ professional vows do not obligate them to forsake their own moral development, which distinctively includes ideals and skills for justice.” *Id.*

99. See Araujo, *supra* note 50, at 458 (noting the model provided by Judge Benjamin Cardozo “who argued that a conscientious lawyer-judge is like the ‘wise pharmacist’ who must balance and combine a variety of ingredients including logic, history, custom, and a sense of right in order to arrive at a just decision”).

100. See, e.g., *supra* notes 36-41 and accompanying text (discussing a lawyer’s discretion as to the means by which to accomplish a client’s objectives, and a lawyer’s discretion to provide candid advice that refers not only to the law but also to other considerations, including moral ones, that may be relevant to the client’s situation).

101. Blomquist, *supra* note 64, at 111 (identifying these virtues, along with integrity and justice, and ranking them as “the top ten pragmatic virtues for American lawyers”; integrity is ranked second and justice eighth).

102. See Cassidy, *supra* note 59, at 648-49 (explaining the virtue of honesty is important not only for self-assessment, but also for “an individual’s assessment of external facts,” and may be described in one of its aspects as a “tolerance for ambiguity”) (quoting Thomas L. Shaffer, *The Gentleman in Professional Ethics*, 10 *QUEEN’S L.J.* 1, 33 (1984)).

A person is honest if he is comfortable with incongruity, and is willing to accept circumstances and other people for the way they are, rather than feeling the need to make them consistent with his own predispositions. An honest person is thus open to evidence that discredits his own ideas or world view.

Id. at 648-49 (citing Loder, *supra* note 40, at 856).

103. See Araujo, *supra* note 50, at 443-44 (“If the virtue of justice prescribes the just goal or end, then prudence and compassion are the means to that end. Permeating prudence is the virtue of compassion which tempers the just end.”) (footnotes omitted).

104. Aristotle regarded *phronēsis*, or practical wisdom, as the “keystone of all virtue.” Cassidy, *supra* note 59, at 649 (quoting MACINTYRE, *A SHORT HISTORY OF ETHICS*, *supra* note 59, at 74).

105. See ARISTOTLE, *supra* note 54, at 163; Cassidy, *supra* note 59, at 649.

best choice among options for her actions by taking account of the individual facts and circumstances involved.¹⁰⁶ In essence, practical wisdom constitutes an ability to deliberate well toward good ends,¹⁰⁷ and involves the exercise of a “keen sense of moral judgment that comes from years of experience and repeated critical reflection on our own actions as well as the actions of others.”¹⁰⁸

Finally, there is the virtue of integrity, which I propose for your consideration as being the unifying virtue for the practice of law. Integrity has been described as a personal attribute incorporating the qualities of “wholeness” and “constancy,” as well as traits of “distinctiveness” and “strength.”¹⁰⁹ When properly formed and cultivated in a lawyer’s moral character, integrity provides the lawyer with the “fortitude to resist ethical invasions.”¹¹⁰ Section V of this article will examine the unifying virtue of integrity more closely.¹¹¹

C. GOOD HABITS: FORMING VIRTUOUS CHARACTER FOR THE PRACTICE OF LAW

Having sketched a portrait as to the virtues a lawyer should possess to flourish in the practice of law, it is proper now to turn to the question of how a student who aspires to become a lawyer, or a young lawyer new to the profession, should go about forming this virtuous character. According to Aristotle, the moral virtues are formed by habit, and we acquire them “by first having put them into action.”¹¹² Essentially, we learn to be virtuous by

106. See MACINTYRE, A SHORT HISTORY OF ETHICS, *supra* note 57, at 66 (“What is courage in one situation would in another be rashness and in a third cowardice. Virtuous action cannot be specified without reference to the judgment of a prudent man—that is, of one who knows how to take account of circumstances.”). Aristotle also “believed that practical wisdom was the key to discerning a proper course of action in those instances where the virtues might conflict.” Cassidy, *supra* note 59, at 649-50; see also *id.* at 649 n.110 (explaining that Aquinas, “unlike Aristotle, believed that the natural virtues were unified” and therefore would not conflict); see also MACINTYRE, AFTER VIRTUE, *supra* note 55, at 179-80, 200 (criticizing Aquinas’s account of the unity of the virtues because two virtuous actors, each employing practical wisdom, may reach different ethical outcomes without reflecting a defect in character).

107. See Cassidy, *supra* note 59, at 649 (citing Philippa Foot, *Virtues and Vices*, in VIRTUE ETHICS 105, 109 (Stephen Darwall ed., 2003)).

108. Lorie M. Graham, *Aristotle’s Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education*, 20 J. LEGAL PROF. 5, 49 (1996). Graham emphasizes that “law school is only the beginning of what constitutes a life-long education on the ‘ethics’ of law and law practice. However, without this beginning, we will never be successful in our attempt to recover the ‘human side’ of the profession.”

109. Loder, *supra* note 40, at 846.

110. See *id.* at 844-45; see also Blomquist, *supra* note 64, at 107 (referring to integrity as a “meta-virtue”).

111. See *infra* section V.B. and accompanying text.

112. ARISTOTLE, *supra* note 54, at 34.

acting virtuously.¹¹³ In the context of legal education, “a student comes to understand ‘ethics’ by acting like an ethical lawyer would act and by judging like an ethical lawyer would judge.”¹¹⁴ For this reason, law students benefit immensely from experiences during law school that offer them occasions to practice the lawyerly virtues and fortify their character for making good and moral decisions when they are ultimately admitted to the bar. Interactive classroom dialogue and simulated client problems, participation in law school clinical education classes, work performed in internships and externships, summer associate or law clerk positions, and other forms of experiential learning provide excellent opportunities for students to develop good habits for the practice of law.¹¹⁵

Because the student of virtue lacks experience and is not yet practically wise, Aristotle emphasized the importance of learning virtue by modeling one’s actions after those of others who possess practical wisdom.¹¹⁶ Judges and practicing lawyers may look for such models not only among their best colleagues in the bench and bar, but also in the rich tradition and history of the legal profession, both locally and nationally.¹¹⁷ This article will later

113. *Id.* (“For the things which we have to learn before we can do them we learn by doing: men become builders by building houses, and harpists by playing the harp. Similarly, we become just by the practice of just actions, self-controlled by exercising self-control, and courageous by performing acts of courage.”); see Graham, *supra* note 108, at 12 (“[A] student of virtue develops an ethical disposition by performing virtuous acts.”).

114. Graham, *supra* note 108, at 49.

115. See *id.* at 35-49 (recounting the history of law school clinical education and methodologies, and suggesting ways for law teachers to break down the barriers between theory and practice); see also Granfield, *supra* note 91, at 519 (discussing the importance of practice context for legal ethics instruction in law schools).

116. See ARISTOTLE, *supra* note 54, at 167; Graham, *supra* note 108, at 12-13.

117. In the landmark 1993 book *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION*, Dean Anthony Kronman painted a portrait of the “lawyer-statesman,” an ideal for excellence and a model of the honorable role lawyers have traditionally played in American society. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993). He urged his readers to draw on this ideal and its history as a means to inspire (and re-inspire) virtuous practice of law in an increasingly challenging social and economic environment:

[T]he ideal [of the lawyer-statesman] affirmed that a lawyer can achieve a level of real excellence in his work only by acquiring certain valued traits of character. Though linking professional achievement to character-virtue in this way undoubtedly made the first seem more remote and harder to attain, it also gave it greater value. It put the heroes of the bar high up beyond the point that most practitioners could reach, but at the same time endowed their achievements with a dignity and stature that no amount of technical know-how can confer.

The ideal of the lawyer[-]statesman was an ideal of character. This meant that as one moved toward it, one became not just an accomplished technician but a distinctive and estimable type of human being—a person of practical wisdom. And that was an ennobling thought, even for those who fell short of the ideal or found they had only limited opportunities in their own work to exercise the deliberative virtues that the lawyer-statesman exhibited to an exemplary degree.

Id. at 16-17.

discuss the importance of the good mentor for refining and sustaining a lawyer's virtuous character in the practice of law.

IV. EARNESTNESS AND THE PRACTICE OF LAW

St. Olaf's College in Northfield, Minnesota is the home to the Hong Kierkegaard Library, a repository for thousands of books and many other materials relating to Kierkegaard studies.¹¹⁸ This section introduces a few of the key ideas from Kierkegaard's ethical philosophy, including his concept of "earnestness." This section will also show how his insights may be helpful to a lawyer in making ethical decisions as an undivided professional and person.

A. KIERKEGAARD'S ETHICS OF DECISION

In *Either/Or*, published early in his authorship and pseudonymously as an "editor," Kierkegaard presents an extensive written dialogue between proponents of two divergent spheres of human existence, which he termed the "aesthetic" and the "ethical."¹¹⁹ The first author, "A," urges his readers to adopt the aesthetic way of life, which Kierkegaard characterizes as the attempt to lose oneself in the immediacy of present sense experience rather than willing oneself to make choices using moral criteria.¹²⁰ In response, the second author, Judge William, advocates the ethical way of life, predicated on committing oneself, by an act of resolute choice, to the formation and development of good character.¹²¹ Their debate provided the launching point for Kierkegaard's subsequent works of ethical and religious philosophy, leading to his becoming known years later as the "father of existentialism."¹²²

118. St. Olaf's College, *Kierkegaard Collection*, <http://www.stolaf.edu/collections/kierkegaard/about/collection.html> (last visited Sept. 16, 2011).

119. See generally SØREN KIERKEGAARD, *EITHER/OR* (Howard & Edna Hong trans., Princeton Univ. Press 1987) (1843) [hereinafter KIERKEGAARD, *EITHER/OR*].

120. See 2 *id.* at 169 (in the voice of Judge William, stating that "[r]ather than designating the choice between good and evil, my *Either/Or* designates the choice by which one chooses good and evil or rules them out."); see also MACINTYRE, *AFTER VIRTUE*, *supra* note 55, at 40 (observing that in *EITHER/OR*, "[t]he choice between the ethical and the aesthetic is not the choice between good and evil, it is the choice whether or not to choose in terms of good and evil").

121. See 2 SØREN KIERKEGAARD, *EITHER/OR*, *supra* note 119, at 261 ("The task the ethical individual sets for himself is to transform himself into the universal individual. Only the ethical individual gives himself an account of himself in earnest and is therefore honest with himself. . . .").

122. See William McDonald, *Søren Kierkegaard*, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta, ed., Summer 2009), <http://plato.stanford.edu/archives/sum2009/entries/kierkegaard/>.

Although there are many indications that Kierkegaard's ethics of decision were in fact influenced by both Aristotle¹²³ and Immanuel Kant,¹²⁴ his own contributions to moral philosophy were substantial and highly influential. For example, he insisted that an ethical self cannot be formed properly and authentically using only objective knowledge of moral rules or duties derived from pure reason. Instead, the formation of virtuous character requires subjective knowledge, or self-knowledge,¹²⁵ which transforms the self in being acted upon.¹²⁶

Kierkegaard was adamant that moral philosophy must be a passionate endeavor, viewed through the perspective of an existing person.¹²⁷ Although the exercise of reason and engaging in objective reflection are important, ethics cannot be properly understood nor moral decisions made fully at arm's length from oneself or by peering through the telescopic lenses of abstract systems to look for answers.¹²⁸ Intertwined with

123. See, e.g., Norman Lillgard, *Passion and Reason: Aristotelian Strategies in Kierkegaard's Ethics*, 30 J. RELIGIOUS ETHICS 251, 260 (2002) ("Kierkegaard's notion of an ethical life view . . . corresponds roughly to Aristotle's notion of an ethical *arche* [a notion of the highest good]. Both denote the governing factor in ways or patterns of thinking which are *engaged*, that is, bear on my daily activities and feelings and perceptions so as to give them a definite structure.").

124. See, e.g., John J. Davenport, *The Meaning of Kierkegaard's Choice Between the Aesthetic and the Ethical: A Response to MacIntyre*, in KIERKEGAARD AFTER MACINTYRE: ESSAYS ON FREEDOM, NARRATIVE, AND VIRTUE 75, 78-80 (John J. Davenport & Anthony Rudd, eds., 2001); MACINTYRE, AFTER VIRTUE, *supra* note 55, at 43 ("[I]t is . . . Kant's moral philosophy which is the essential background for Kierkegaard's treatment of the ethical.").

125. See 1 SØREN KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT TO PHILOSOPHICAL FRAGMENTS 351 (Howard V. Hong & Edna H. Hong trans., Princeton Univ. Press 1992) (1846) [hereinafter KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT] ("The subjective thinker's task is to *understand himself in existence*."); George J. Stack, *Aristotle and Kierkegaard's Existential Ethics*, 12 J. HIST. PHIL. 1, 1-2 (1974) ("The movement towards an ethical existence requires that the individual be subjectively concerned with his own possibilities for choice, decision, and action.")

126. See Stack, *supra* note 125, at 8 ("Kierkegaard agrees with Aristotle that one does not become just . . . by knowing what justice is, but by being just, by performing just actions.").

127. "What [Kierkegaard's pseudonym Johannes Climacus] does is to view every aspect of human existence from the first-person-present perspective—the perspective of an exister." C. STEPHEN EVANS, KIERKEGAARD'S FRAGMENTS AND POSTSCRIPT: THE RELIGIOUS PHILOSOPHY OF JOHANNES CLIMACUS 282 (1999). "He forcefully calls to our attention the fact that imagining, learning, communicating, morally committing oneself, worshipping, and believing are all personal activities, and that therefore one's ability to carry them out depends upon becoming a true person or self." *Id.*

128. See Robert C. Roberts, *Existence, Emotion, and Virtue: Classical Themes in Kierkegaard*, in THE CAMBRIDGE COMPANION TO KIERKEGAARD 177, 182 (Alastair Hannay & Gordon D. Marino eds., 1998) ("[Kierkegaard's] basic position is that *the mature self is a proper synthesis of passion and reflection*. Passion without reflection is immature, unformed, chaotic, and childish 'immediacy,' and reflection without passion is . . . personal emptiness.").

Kierkegaard's philosophy of passionate reason¹²⁹ was his ethical concept of "earnestness."

B. EARNESTNESS: ENGAGING THE HEART AND
AVOIDING SELF-DECEPTION

Among Kierkegaard's innovative contributions to moral philosophy and virtue ethics was his insistence on connecting the development and exercise of the virtues to the exercise of the individual will. Philosophy scholar John J. Davenport has observed that in contrast to Aristotle's focus on the role of habit in forming the virtues as dispositions to good conduct, Kierkegaard's existential virtue ethics emphatically regards the virtues as "*volitional* states of resolve that involve the exercise of libertarian freedom."¹³⁰ For Kierkegaard, *alvorlighed*, which is translated from Danish as "earnestness," constitutes the "basic proto-virtue of the will (the lack of which underlies the proto-vices of aestheticism)."¹³¹ He resisted offering a conceptual definition of "earnestness" because to do so would disconnect it from the "first-personal function that makes it earnestness, namely, the function of engaging the self wholeheartedly in some cause or purpose."¹³²

Like Aristotle's intellectual virtue of practical wisdom, "earnestness is related to an understanding of truth."¹³³ But, for Kierkegaard, earnestness carries all of the virtues, along with the singular truth for a person's

129. "Acts of willing play a role in [the] cultivation [of passions], and Kierkegaard regards the higher ethical and religious passions as things we are responsible to achieve." C. STEPHEN EVANS, *PASSIONATE REASON: MAKING SENSE OF KIERKEGAARD'S PHILOSOPHICAL FRAGMENTS* 134-35 (1992). "However, by and large, passions are formed on a long-term basis, and they are not simply willed into existence, but formed indirectly through a process of willing to do other things." *Id.* at 134-35.

130. John J. Davenport, *Towards an Existential Virtue Ethics: Kierkegaard and MacIntyre*, in *KIERKEGAARD AFTER MACINTYRE: ESSAYS ON FREEDOM, NARRATIVE, AND VIRTUE* 265, 277 (John J. Davenport & Anthony Rudd, eds., 2001).

131. *Id.*

Earnestness and disposition correspond to each other in such a way that earnestness is a higher as well as the deepest expression for what disposition is. Disposition is a determinant of immediacy, while earnestness, on the other hand, is the acquired originality of disposition, its originality preserved in the responsibility of freedom and its originality affirmed in the enjoyment of blessedness [*E*]arnestness can never become habit.

SØREN KIERKEGAARD, *THE CONCEPT OF ANXIETY* 148-49 (Reidar Thomte trans., Princeton Univ. Press 1980) (1844) [hereinafter *KIERKEGAARD, THE CONCEPT OF ANXIETY*] (emphasis added) (stating under the pseudonym Vigilius Haufniensis).

132. Davenport, *supra* note 130, at 277 ("In the *Concept of Anxiety*, Kierkegaard's pseudonym Haufniensis . . . uses love as an analogy for this aspect of earnestness: 'Whoever loves can hardly find joy and satisfaction, not to mention growth, in preoccupation with a definition of what love properly is,' since to love is to be focused actively on the good of what one loves.") (quoting *KIERKEGAARD, THE CONCEPT OF ANXIETY*, *supra* note 131, at 147).

133. *Id.*

decision and potential actions, through the bloodstream by the force of the first-personal freedom of the will.¹³⁴ Earnestness, then, “consists in *taking to heart* the relevant truth, or being ‘certain’ of it in the practical sense of being willing to *act* on it.”¹³⁵

To engage the heart in seeking the truth with earnestness, to engage the mind in thinking with passionate reason, and to exercise freedom of will in taking ethical responsibility for one’s decisions and then acting on them—these are the positive charges of Kierkegaard’s moral philosophy.¹³⁶ The most important negative charge of his moral philosophy is to avoid the natural human tendency to engage in self-deception.¹³⁷ As Kierkegaard scholar and St. Olaf’s College professor Gordon Marino has explained:

For Kierkegaard, wrongdoing is never the result of ignorance, or, if it is, it is an ignorance that you yourself produced. Indeed, Kierkegaard argued that when it comes to ethics it is not more knowledge that we need. As he put it: “And this is how perhaps the great majority of men live: they work gradually at eclipsing their ethical and ethical-religious comprehension, which would lead them out into decisions that their lower nature does not much care for.” Ethically speaking, the real challenge is to avoid self-deception, to avoid talking ourselves out of what we know.¹³⁸

Thus, Kierkegaard would disagree that ethical failures in any field of human endeavor, including law, are caused in any significant way by insufficiencies of information, knowledge, or analytical skills. Instead, in most cases, our consciences will show us the moral course of action. The moral task is to relate oneself “properly and passionately to that knowledge.”¹³⁹ The usual risk in such cases is that our desires and selfish interests motivate the will to defy our understanding and obscure our consciences, so that we convince ourselves we are acting ethically and morally rather than acknowledge we actually are doing what we know to be wrong and immoral.¹⁴⁰ This process of self-deception constitutes a failure of the will.

134. *See id.* at 293 (interpreting Kierkegaard’s counterpart to Aristotle’s *telos* of “holistic eudaimonia”—i.e., individual flourishing—as being individual “authenticity”).

135. *Id.* at 277; *see also* Gordon Marino, *An Ethics Consult with Kierkegaard*, 23 CRIM. JUST. ETHICS 2, 58 (2004) (“Kierkegaard insists that the proper mood for ethical contemplation is earnestness (*alvorlighed*) which for him means the ardent desire to eschew transgression.”).

136. *See supra* notes 130-35 and accompanying text.

137. *See* Marino, *supra* note 135, at 58.

138. *Id.* (quoting SØREN KIERKEGAARD, *THE SICKNESS UNTO DEATH* 94 (Howard V. Hong & Edna H. Hong trans., Princeton Univ. Press 1980) (1849) [hereinafter KIERKEGAARD, *THE SICKNESS UNTO DEATH*]) (footnotes omitted).

139. *Søren Kierkegaard*, in *ETHICS: THE ESSENTIAL WRITINGS*, *supra* note 73, at 299, 300.

140. *See id.* For this reason, Kierkegaard was concerned that once the good is known, excessive deliberation may contribute to self-deception and lead to ethical and moral failures:

C. PROFESSIONAL RESPONSIBILITY AS PERSONAL RESPONSIBILITY

Kierkegaard's ideas of "subjectivity," "existence," and "choice" emphatically do not connote ethical subjectivism or radical, criterionless choice on matters of moral decision.¹⁴¹ Rather, they constructively build on and refine the classical traditions of character formation and the development of the virtues as a member of a given society by re-orienting the moral perspective to more fully account for the concreteness, finitude, and inwardness of individual existence.¹⁴² Stated differently, we may be a citizen of Athens, or a citizen of Copenhagen, or a citizen of North Dakota, or a member of the bar of our profession, but each of us is also much more than that. In essence, we are constituted as persons by the sum and synergy of past and present decisions, including those impacting relations with others, and this existential reality should inform our ethical and moral judgments.¹⁴³

If willing does not agree with what is known, then it does not necessarily follow that willing goes ahead and does the opposite of what knowing understood (presumably such strong opposites are rare); rather, willing allows some time to elapse, an interim called: "We shall look at it tomorrow." During all this, knowing becomes more and more obscure, and the lower nature gains the upper hand more and more; alas, for the good must be done immediately, as soon as it is known . . . but the lower nature's power lies in stretching things out. Gradually, willing's objection to this development lessens; it almost appears to be in collusion. And when knowing has become duly obscured, knowing and willing can better understand each other; eventually they agree completely, for now knowing has come over to the side of willing and admits that what it wants is absolutely right.

KIERKEGAARD, THE SICKNESS UNTO DEATH, *supra* note 138, at 94.

141. Philosophy scholar Alasdair MacIntyre is well-known for his critique of Kierkegaard's ethics as based on "criterionless choice" between the aesthetic and ethical ways of life. See MACINTYRE, AFTER VIRTUE, *supra* note 55, at 40-43. In response to MacIntyre's account, several Kierkegaard scholars assembled a collection of essays to fortify the foundations for Kierkegaard's ethical rationality and its sources in the classical traditions. See generally KIERKEGAARD AFTER MACINTYRE: ESSAYS ON FREEDOM, NARRATIVE, AND VIRTUE (John J. Davenport & Anthony Rudd eds., 2001).

142. See Roberts, *supra* note 128, at 177 ("I shall read Kierkegaard more as a successor of Aristotle and Thomas Aquinas than as a predecessor of Sartre and Foucault. On this reading, 'subjectivity' and 'existence' will evoke the thought of *character* rather than *subjectivism* and *radical choice*."); see also 2 KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT, *supra* note 125, at 249 (declaring, in the voice of the pseudonym Johannes Climacus, his generation has "forgotten what it means to *exist* and what *inwardness* is").

143. Although he was inspired often by classical traditions in ethics (especially the thought of Socrates) and developed his own influential insights on moral philosophy, Kierkegaard's foremost philosophical concern was the relationship of the individual with the absolute, i.e., with God, in the religious sphere of existence. See KIERKEGAARD, THE CONCEPT OF ANXIETY, *supra* note 131, at 17 ("Either all of existence . . . comes to an end in the demand of ethics, or the condition [faith] is provided and the whole of life and of existence begins anew, not through an immanent continuity with the former existence . . . but through a transcendence."); SØREN KIERKEGAARD, FEAR AND TREMBLING 113 (Howard V Hong & Edna H. Hong trans., Princeton Univ. Press 1983) (1843) (in a "Dialectical Lyric" reflecting on the Biblical story of Abraham and Isaac, and under the pseudonym Johannes de Silentio, describing the "paradox" of existence: "Either the single individual as the single individual can stand in an absolute relation to the

For this reason, the wise lawyer understands that professional responsibility is not truly divisible from personal responsibility. What we as lawyers decide and do in the office and in the courts, and how we interact with clients, colleagues, parties, and adversaries, not only builds or tears down our reputations in the legal community, but also forms or deforms us, either in obvious or in subtle ways, in our interactions with family, friends, and others outside of the workplace.

V. THE DECIDING LAWYER—WHO AM I AND WHO WILL I BECOME?

A deciding lawyer, confronting an ethically and morally challenging circumstance in the practice of law, should begin with a search of his own personhood and his will to become and remain a person of virtuous character. The unifying virtue for the practice of law is integrity, which must be cultivated before entry into the legal profession, tended carefully in the life of a new lawyer, and maintained through repeated harvests of actions undertaken with integrity. Legal ethics scholar Reed Elizabeth Loder has expressed the lawyer's need for critical self-reflection as follows:

When lawyers are glibly loyal as part of “doing their job,” they risk corruption. They forego the personal engagement that characterizes an integral approach to decision making. “Am *I* the sort of person who could do this?” and “Could I face the mirror comfortably?” are questions crucial to moral identity that lawyers may suppress.¹⁴⁴

A. FIRST-PERSONAL DECISION MAKING: BECOMING A VIRTUOUS LAWYER

Virtuous first-personal decision making for a lawyer means resisting the urge to rationalize bad conduct by projecting responsibility one's decisions and actions onto one's role as a lawyer or by blaming them on other persons or on the situation itself.¹⁴⁵ It means taking care not to ask difficult ethical and moral questions with an emphasis on the form, “may a

absolute, and consequently the ethical is not the highest, or Abraham is lost”); *see also* SØREN KIERKEGAARD, *THE POINT OF VIEW FOR MY WORK AS AN AUTHOR* 15 (Benjamin Nelson ed., Walter Lowrie trans., Harper & Row 1962) (near the end of his life and without pseudonym, stating that he “is and was a Religious Author” from the beginning to the end of his authorship).

144. Loder, *supra* note 40, at 865.

145. *See* David Luban, *Integrity: Its Causes and Cures*, 72 *FORDHAM L. REV.* 279, 309 (2003) (“[S]ituations do not determine behavior, but merely alter the difficulty gradient, making it easier or harder to behave in certain ways [W]henver you find yourself blaming others for your actions, treat that as an alarm-bell, signaling that you may well be in the grips of the psychological forces of rationalization.”).

lawyer do this?,” but also to remember oneself as an existing person, to reflect on one’s character, and then ask the question, “should *I* do this?” Although concerned with the impact decisions and actions have on one’s character formation or deformation, first-personal decision making, properly understood and applied, is neither selfish nor self-centered.¹⁴⁶ A lawyer who loses sight of her virtuous character in the practice of law and forgets or refuses to ask the first-personal questions in challenging situations will become, over time, a lawyer morally adrift, who deprives her present and future clients of her fullest engagement, care and concern.¹⁴⁷ She risks forfeiting opportunities to display the virtue of courage by making good moral decisions and acting on them in the face of pressure from her colleagues or clients to act unethically or immorally.¹⁴⁸

B. INTEGRITY: A UNIFYING VIRTUE FOR THE PRACTICE OF LAW

I have identified integrity as the unifying virtue for the practice of law and as a personal attribute of wholeness and constancy.¹⁴⁹ The subject of integrity has been the focus of much recent attention from legal ethics scholars.¹⁵⁰ Integrity, it is said, “implies a stable and predictable character that narrates a person’s life. The person of integrity ‘can be counted on’ to behave in reliable ways. He is constant and ‘true to’ himself.”¹⁵¹

In its professional aspect for a lawyer, the essential significance of integrity was portrayed through the character Abraham Lincoln formed during his years practicing as a lawyer in Illinois before becoming the

146. See MARKOVITS, *supra* note 28, at 136 (stating that, for a lawyer, “insisting on integrity is not self-indulgent or frivolous,” and that if “the first-personal ideals and ambitions that establish the architecture of integrity are essential to the ethical personalities of creatures like us”). Markovits notes that “[i]f first-personal ambitions are not respected, and sometimes even held to outweigh impartial morality in all-things-considered practical deliberations, this attacks the very features of persons to which impartial morality latches on (and in particular their individual agency).” *Id.*

147. See Loder, *supra* note 40, at 886 (“Through nourishing reflective virtues like courage, humility, honesty, generosity, and care, lawyers can offer and receive gifts of moral wisdom. They can discover and tend the kind of people they will to be.”).

148. See Schiltz, *supra* note 29, at 912 (quoting MICHAEL J. KELLY, *LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE* 18 (1994)) (“After you start practicing law, nothing is likely to influence you more than ‘the culture or house norms of the agency, department, or firm’ in which you work.”).

149. See *supra* notes 109-10 and accompanying text.

150. In 2003, Fordham Law School hosted a symposium on the topic of “Integrity in the Law,” which included several scholarly contributions focused on the meaning of integrity in the context of legal ethics. See generally Mary C. Daly, *Teaching Integrity in the Professional Responsibility Curriculum: A Modest Proposal for Change*, 72 *FORDHAM L. REV.* 261 (2003); Luban, *supra* note 145; Burnele V. Powell, *The Limits of Integrity or Why Cabinets Have Locks*, 72 *FORDHAM L. REV.* 311 (2003).

151. Loder, *supra* note 40, at 846.

sixteenth President of the United States.¹⁵² “I am not bound to win,” he once said, “but I am bound to be true. I am not bound to succeed, but I am bound to live up to what light I have.”¹⁵³ Lincoln also exemplified the virtues of courage and practical wisdom, as the following story, told of his law practice days, reflects:

Mr. Lincoln, seated at the baize-covered table in the center of his office, listened attentively to a man who talked earnestly and in a low tone. After being thus engaged for some time Lincoln at length broke in, and I shall never forget his reply: “Yes,” he said, “we can doubtless gain your case for you; we can set a whole neighborhood at loggerheads; we can distress a widowed mother and her six fatherless children and thereby get for you six hundred dollars to which you seem to have a legal claim, but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you. You must remember that some things legally right are not morally right. We shall not take your case, but will give you a little advice for which we will charge you nothing. You seem to be a sprightly, energetic man; we would advise you to try your hand at making six hundred dollars in some other way.”¹⁵⁴

It is fruitful to pause for a moment and reflect upon Lincoln’s advice to his client that “some things legally right are not morally right.” Of course, the Model Rules of Professional Conduct encourage a lawyer to advise a client about moral concerns relating to the legal issues involved in a matter.¹⁵⁵ It is, however, important to bear in mind that a lawyer’s performances of “legal” reasoning and “moral” reasoning in the course of advising and representing a client are not always as distinct in function and

152. See Blomquist, *supra* note 64, at 114-15; see also WILLIAM LEE MILLER, LINCOLN’S VIRTUES: AN ETHICAL BIOGRAPHY (2002). Miller’s ethical biography identifies “prudence” as the mature Lincoln’s defining virtue, understood in the classical sense as the use of one’s “powers of observation and reasoning to take careful account of the real and concrete situation” and “adapt the appropriate moral claims and purposes, also carefully considered, to the real world.” *Id.* at 222-23. Miller also notes that Lincoln’s ethical world was composed of “collective undertakings . . . in which his decision and action must take account of the decisions, actions, and convictions of others.” *Id.* at xv. Like Lincoln, a lawyer exhibiting the virtue of prudence (or practical wisdom) will “take account” of specific facts, competing interests, and the rights of others, while still making decisions consistent with moral virtues and good character.

153. Blomquist, *supra* note 64, at 116 (quoting THE WIT AND WISDOM OF ABRAHAM LINCOLN: AN A-Z COMPENDIUM OF QUOTES FROM THE MOST ELOQUENT OF AMERICAN PRESIDENTS 103 (Alex Ayers ed., 1992)).

154. Graham, *supra* note 108, at 49 (quoting WILLIAM H. HERNDON & JESSE WILLIAM WEIK, HERNDON’S LINCOLN: THE TRUE STORY OF A GREAT LIFE 345-46 (1889)).

155. See MODEL RULES OF PROF’L CONDUCT R. 2.1; see also *supra* note 41 and accompanying text.

purpose as we typically believe them to be. Robert Araujo has framed the question in this way:

Must moral considerations play a role in the reasoning process of the lawyer as he seeks justice? The question takes on further significance as one ponders the statement made by Robert George: “Laws cannot make men moral. Only men can do that; and they can do it only by freely choosing to do the morally right thing for the right reason.”¹⁵⁶

This story from Lincoln’s law practice also illustrates another related aspect of integrity for lawyers, which is to provide “inspiration and . . . raw material for creative reasoning with clients and others about the law and its impacts.”¹⁵⁷ Integrity further manifests itself as “strength facing adversity,” and as a “sensitivity and aspiration to justice [which] is a distinctive, sustaining ideal” for the lawyer.¹⁵⁸ Lincoln’s own integrity was refined throughout his years as a practicing lawyer, and then made evident through his strength in the face of adversity in his leadership as President during the American Civil War.¹⁵⁹

C. REPETITION OF ETHICAL ACTION: REMAINING A VIRTUOUS LAWYER

Virtues for the practice of law in the life of a lawyer are sustained by repeated decisions to perform virtuous actions, whether they involve only routine matters in her daily work or the resolution of a difficult moral dilemma. Patrick J. Schiltz, who now serves as a judge on the United States District Court for the District of Minnesota, has explained the significance of cumulative decisions for the formation of a lawyer’s character and the subtlety of its influence on the lawyer’s actions:

156. Araujo, *supra* note 50, at 458 (quoting ROBERT GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 1 (1993)).

Ultimately, the virtuous lawyer sees that legal and moral reasoning are not separate enterprises. While some legal reasoning is not based on moral reasoning (particularly when the questions focus on technical matters such as general procedure), this does not automatically lead to the conclusion “that legal reasoning is impervious to moral reasons.” Although moral reasoning need not permeate the entire process of legal reasoning, neither is it completely absent from the process. Especially in those difficult cases where reasonable people credibly argue conflicting understandings about the meaning of the law, the virtuous lawyer concludes that what clarifies the meaning of the law in such a context is the background consideration of its moral justification.

Id. at 464 (quoting Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 RATIO JURIS 14 (1993)).

157. Loder, *supra* note 40, at 886.

158. *Id.*

159. See Blomquist, *supra* note 64, at 114-16.

The moral fabric of an attorney is stitched out in the dozens—hundreds—of decisions that she makes each day. It is stitched out in the tone of voice she uses when talking with others, out of her choice of adjectives while writing a letter, out of the care she takes in describing what she represents to be the truth of a matter. It is stitched out of one decision after another, each of which may be mundane in itself, but all of which combine to form the moral fabric of the attorney, and combine with like decisions of other attorneys to form the moral fabric of law firms and legal communities.

Not only are these decisions mundane, they are made almost instinctively. “Discernment is hard work; it takes time and emotional energy.” Busy lawyers have neither. When an attorney is asked a question by a client or judge or when she sifts through documents that have been demanded by her opponent, or when she fills out her time sheet before rushing out of the office, she will have fractions of seconds to make decisions. She will have little time to think, much less to seek the counsel of colleagues or texts. She will act almost instinctively. What she does will not reflect the quality of her mind as much as it will reflect the quality of her character; it will not reflect discernment as much as it will reflect habit.¹⁶⁰

In addition to drawing on a secure foundation of good character, and in order to remain a virtuous lawyer and to experience a flourishing life in the practice of law, a lawyer should look for ways to sustain her originality and passion for the exercise of the virtues in daily practice.¹⁶¹ This is Kierkegaard’s concept of “earnestness” as applied to the life of the deciding lawyer: She should engage her heart and return in freedom to each day’s work in advising clients, loyally and with integrity advocating or

160. Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, The Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 719-20 (1998) (footnotes omitted) (quoting STEPHEN L. CARTER, INTEGRITY 10 (1996)).

161. Kierkegaard warned of the risks of relying solely on “habit” to fortify one’s good character, and insisted that a quality of originality in one’s moral practices—that is, earnestness—was essential to the truly ethical life:

[A]s soon as originality is lacking in repetition, there is habit. The earnest person is earnest precisely through the originality with which he returns in repetition. It is said that a living and inward feeling preserves this originality, but the inwardness of the feeling is a fire that may cool as soon as earnestness no longer attends to it Earnestness alone is capable of returning regularly every Sunday with the same originality to the same thing.

KIERKEGAARD, THE CONCEPT OF ANXIETY, *supra* note 131, at 149; *see also id.* at 149 (“Earnestness can never become habit.”).

negotiating on their behalf and pursuing justice within the bounds of the law. In so doing, the lawyer not only fortifies herself for those days when the moral choices are not so instinctive but require a deeper searching of her character, but also shares her best moral self with clients, counsel, colleagues, and the courts.

VI. ETHICAL DECISION MAKING IN A LEGAL COMMUNITY: WHO ARE WE AND WHO WILL WE BECOME?

To this point, this article has focused on examining questions of Aristotelian virtue ethics, Kierkegaardian earnestness, and human flourishing for the deciding lawyer from the perspective of the individual person. The law, however, is by its very nature a collective, community-oriented enterprise.¹⁶² For many, the practice of law involves work performed among professional colleagues in law firms, corporations, or government agencies.¹⁶³ Lawyers who do not work in such settings, such as solo practitioners, create and value relationships with friends in other law practices, former colleagues, and with opposing counsel representing adverse or negotiating parties. The various United States bar associations, whether local, state, or national in scope, form concentric circles of legal community of which the individual members are both participants and constituents. Each geographically-defined legal community has a distinct ethical and moral climate, which may have similarities to its neighbors but which is still its own.¹⁶⁴

It is therefore not only appropriate but essential for the virtuous lawyer to go beyond asking “who am I?” and “who will I become?” when faced

162. See Benjamin Zipursky, *Institutional Professionalism for Lawyers: Realizing the Virtues of Civic Professionalism*, 109 W. VA. L. REV. 67, 78 (2006) (“[T]he very idea of a profession can only exist because individual professionals deliver their services within a broader framework of a larger collection of similar professionals who create a community of practitioners who together define the contours and meaning of the professional enterprise”) (citing WILLIAM L. SULLIVAN, *WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA* 181-82 (2005)).

163. See *supra* note 29 (citing law review articles addressing the ethical challenges for lawyers in various practice settings).

164. Judge Schiltz has described this phenomenon based on his observations while he practiced law in Minnesota:

Because I served as national counsel to several clients, and because I worked on several cases that were national in scope, I spent a lot of time on the road. I was struck by how each community I visited had an ethical climate that was as distinct as its meteorological climate. Two legal communities governed by precisely the same rules of professional conduct often differ dramatically in their ethics. Ethics in New Orleans bear little resemblance to ethics in Minneapolis. One does not practice law in Texas as one practices law in North Dakota. This is true even though the attorneys in all of these jurisdictions are governed by almost identical formal rules.

Schiltz, *supra* note 160, at 717.

with an ethical and moral decision in the practice of law.¹⁶⁵ As a responsible member of and good neighbor to the legal community in which he has chosen to associate,¹⁶⁶ the lawyer should also ask “who are *we*?” and “who will *we* become?”¹⁶⁷

A. LIVING IN LEGAL COMMUNITY WITH “FRIEND AND FOE”

“[D]o as adversaries do in law, strive mightily, but eat and drink as friends.”¹⁶⁸ In April 2011, Judge Eric F. Melgren of the United States District Court for the District of Kansas quoted this line from Shakespeare’s play *The Taming of the Shrew* as a sagacious piece of professionalism advice for counsel in a business dispute.¹⁶⁹ Over the vigorous and regrettably detailed objections of plaintiffs’ counsel, the court’s order granted defendants’ motion for a short continuance of a multi-week trial in Kansas City, Kansas based on counsel’s expecting the birth of his first child in Dallas, Texas.¹⁷⁰

In reaching its decision, the court offered the following pointed observations:

First, Plaintiffs make a lengthy and spirited argument about when Defendants should have known this would happen, even citing a pretrial conference occurring in early November as a time when Mr. Erman “most certainly” would have known of the due date of his child, and even more astonishingly arguing that “utilizing simple math, the due date for Mr. Erman’s child’s birth would have been known on approximately Oct. 3, or shortly

165. *See supra* section V.

Virtue ethics in moral theory rejects the Kantian emphasis on first principles, as well as the utilitarian focus on preference satisfaction. Instead, it recalls an older tradition which suggests that what makes for a good and fulfilling individual life is not so much getting what you want, or even living according to certain right rules. Instead, what conduces to happiness—what happiness perhaps even consists in—is being the right kind of person. What matters is character.

Sherman J. Clark, *Law as Communitarian Virtue Ethics*, 53 *BUFF. L. REV.* 757, 757 (2005).

166. Legal ethics scholar Andrew Perlman has offered a “career choice critique” of existing theories about ethical dimensions of client selection and legal strategies, based on the practice setting chosen by the lawyer. *See generally* Andrew M. Perlman, *A Career Choice Critique of Legal Ethics Theory*, 31 *SETON HALL. L. REV.* 829 (2001). His analysis and insights may also shed light on the ethical dimensions on a lawyer’s choice of a geographically-defined legal community in which to establish a law practice.

167. Clark, *supra* note 165, at 757 (“In addition to asking what a particular rule or practice will accomplish, and whether it is right or wrong, communitarian virtue ethics would ask a third sort of question. What kind of people will it help us to become?”).

168. WILLIAM SHAKESPEARE, *THE TAMING OF THE SHREW*, Act 1, Scene 2.

169. Order on Motion to Continue at 1, *Jayhawk Capital Mgmt. v. LSB Indus.*, No. 08-2561-EFM (D. Kan. Apr. 12, 2011).

170. *Id.* at 1-3.

thereafter.” For reasons of good taste which should be (though, apparently, are not) too obvious to explain, the Court declines to accept Plaintiffs’ invitation to speculate on the time of conception of the Ermans’ child.

....

Finally, Plaintiffs argue that surely Mr. Erman will have sufficient time to make it from the Kansas City trial to the Dallas birth, even helpfully pointing out the number of daily, non-stop flights between the two cities; and in any event complain of the inconvenience of this late requested continuance. Certainly this judge is convinced of the importance of federal court, but he has always tried not to confuse what he does with who he is, nor to distort the priorities of his day job with his life’s role. Counsel are encouraged to order their priorities similarly.

Defendants’ Motion is GRANTED. The Ermans are CONGRATULATED.
IT IS SO ORDERED.¹⁷¹

The lesson of this story is not that lawyers should never oppose motions for continuances, or always agree to requests made by their opposing counsel concerning scheduling. Its lesson is that a lawyer should commit himself to maintaining a compassionate perspective on the lives of other persons even when, and perhaps most of all when, he represents a client in an adversarial proceeding. A lawyer should exercise the virtue of compassion whenever doing so would not contravene his obligations under the rules of professional conduct. In the words of Mart Vogel, “[n]ever hit anyone who is down.”¹⁷² Mr. Vogel’s statement reflects a character having the virtue of compassion. The lawyer who is willing to act on that virtue, despite pressure from a client or a colleague to do otherwise, exhibits the virtue of courage.

Finally, the lesson of this story is never to lose sight of the fact that opposing counsel is an existing human person as well as a professional adversary.¹⁷³ The challenge and the necessity for flourishing within each

171. *Id.* at 2-3. The court’s order and its lessons on professionalism attracted considerable attention in the legal blogosphere. See, e.g., Iain Simpson, *A Life Lesson from the Bench*, THE APPELLATE LAWYER (May 4, 2011), <http://simpsonpc.com/blog/?p=174> (discussing the *Jayhawk Capital* order and its lesson of “putting human concerns ahead of legal ones and basic compassion ahead of gamesmanship”).

172. *Mart R. Vogel Biography*, *supra* note 2.

173. See *supra* section IV.C (discussing professional responsibility as personal responsibility).

legal community is for its members to live well with both “friend and foe,” by creating and sustaining a culture of civility and professional courtesy.¹⁷⁴

B. SHARING PRACTICAL WISDOM: MENTORSHIP AND LAWYER FLOURISHING

“Legal ethics involves a continuous search for a set of ethical principles which are based on the shared experiences and reflections of persons of practical wisdom.”¹⁷⁵ Where is the aspiring or new member of the legal profession to look for practical wisdom to learn how to become and remain a virtuous lawyer? I suggest the answer to this question is found in the long and worthy tradition of the good mentor. For the virtue ethicist, seeking advice from the good mentor is the proper choice for the deciding person searching for the ways of virtue.¹⁷⁶ Continuing the traditional culture of good mentorship in our profession is of paramount importance to this and future generations of human flourishing in the legal community.

Judge Schiltz has placed special emphasis on the impact a good mentor and a flourishing culture of mentoring have on ethical practice in a legal community:

[W]hether law is practiced ethically in any particular community depends not upon the community’s formal rules, but upon its

174. See Schiltz, *supra* note 160, at 718 (“Every lawyer, every law firm, and every legal community has its own moral fabric. Some lawyers and firms and communities are simply more ethical than others. They are more honest. They are more courteous. They treat others with more compassion and fairness. They live up to their word more often.”).

175. Graham, *supra* note 108, at 46.

176. Virtue ethicist Rosalind Hursthouse has observed that a person’s desire to act virtuously may influence the choice of whom she will seek out for advice:

It is worth pointing out that, if I acknowledge that I am far from perfect, and am quite unclear what a virtuous agent would do in the circumstances in which I find myself, the obvious thing to do is to go and ask one, should this be possible. This is far from being a trivial point, for it gives a straightforward explanation of an aspect of our moral life which should not be ignored, namely the fact that we do seek moral guidance from people who we think are morally better than ourselves. When I am looking for an excuse to do something I have a horrid suspicion is wrong, I ask my moral inferiors (or peers if I am bad enough), “Wouldn’t you do such and such if you were in my shoes?” But when I am anxious to do what is right, and do not see my way clear, I go to people I respect and admire—people who I think are kinder, more honest, more just, wiser, than I am myself—and ask them what they would do in my circumstance. How utilitarianism and deontology would explain this fact, I do not know; but, as I said, the explanation within the terms of virtue ethics is straightforward. If you want to do what is right, and doing what is right is doing what a virtuous agent would do in the circumstances, then you should find out what she would do if you do not already know.

Rosalind Hursthouse, *Normative Virtue Ethics*, in VIRTUE ETHICS 184, 189 (Stephen Darwell ed., 2003). The good mentor fills the role of the experienced “virtuous agent” from whom others seek advice when they want to act virtuously, rather than permission to do what they know or suspect is vicious.

culture [T]he culture of a legal community does not reflect “big” decisions that members of the community make about “big” problems, as much as it reflects the dozens of ordinary, mundane decisions that every attorney makes—and makes intuitively—every day. . . . [T]he intuition that guides these decisions is in large part a product of the mentoring received by the attorney. In sum, conduct is influenced by culture, culture by intuition, and intuition by mentoring.¹⁷⁷

. . . .

A novice attorney learns the value of a mentor either by having one or by not having one¹⁷⁸

. . . .

Most of those in the legal profession understand that mentors . . . play an important role in teaching novice lawyers how to practice law *well*. What is not widely understood is that, *as important as mentoring is in teaching young attorneys to practice law well, it is far more important in teaching them to practice law ethically*.¹⁷⁹

A lawyer’s early experiences in the practice of law often have a powerful impact on the direction his actions will take for the rest of his career.¹⁸⁰ In fact, one recent empirical study has shown when a lawyer has early experiences on how to handle an ethical issue arising in law practice, even if the “answer” is ethically wrong, the lawyer’s initial determination of an “answer” tends to guide the lawyer in all similar future situations.¹⁸¹ There is a natural human tendency to continue on a chosen course of action, either from a reluctance to acknowledge past actions were in fact ethically or morally wrong, or from simple expediency. This reality of human nature

177. Schiltz, *supra* note 160, at 713.

178. *Id.* at 720.

179. *Id.* at 721-22 (emphasis added). See generally Julie A. Oseid, *When Big Brother Is Watching [Out For] You: Mentoring Lawyers, Choosing a Mentor, and Sharing Ten Virtues From My Mentor*, 59 S.C. L. REV. 393 (2008) (examining the importance of mentoring in the legal profession and providing helpful recommendations about mentoring relationships, along with some of the “virtues” she learned from her mentor). Professor Oseid’s mentor is her older brother, Stephen D. Easton, who formerly practiced law in North Dakota and is now a member of the faculty of the University of Missouri School of Law. *Id.* at 394-95; see also American Inns of Court Foundation, *Warren E. Burger Prize* (2002), <http://www.innsofcourt.org/Content/Default.aspx?Id=309> (identifying Professor Easton as the first recipient in 2004 of the Warren E. Burger Prize for outstanding scholarship that “promotes the ideals of excellence, civility, ethics and professionalism within the legal profession,” and providing his professional biography).

180. See Levin, *supra* note 29, at 364-65.

181. *Id.* (footnote omitted) (“[O]ne young lawyer who self-described herself as a ‘good person’ and who claimed, ‘if something doesn’t feel right, I’m not going to do it,’ routinely looked the other way when cash was passed under the table in real estate transactions.”).

makes it all the more crucial for law students and new lawyers, as early in their careers as possible, to form and maintain successful relationships with good mentors of virtuous character in the practice of law.

Judge Schiltz has described the powerful impact his mentor, James Fitzmaurice, had on his own ethical and moral development as a lawyer:

Fitzmaurice did not teach me to practice law ethically through his words. I do not recall him ever saying, “This is what an ethical lawyer does.” Rather, he taught me through his deeds. He taught me by being a decent man who practiced law every day in a decent manner. Moral formation “rests on small matters, not great ones,” and what I recall most about Fitzmaurice are “the small matters”:

I recall how Fitzmaurice would take strident letters or briefs that I had drafted and tone them down. I recall how Fitzmaurice would run into an attorney who had treated him shabbily and greet the attorney warmly. I recall how Fitzmaurice would time and again refer clients and files to young lawyers in our firm who were having trouble attracting business. I recall how Fitzmaurice never blamed others for his mistakes, but often gave others credit for his accomplishments. I recall how often Fitzmaurice took the blame for mistakes that I and other young attorneys made. I recall how Fitzmaurice, at the conclusion of a trial or hearing, would walk over to the client of his adversary and say, “I just want you to know that your attorney did a terrific job for you.” In short, what I best recall about Fitzmaurice were not occasions of great moral heroism, but his “quiet, everyday exhibitions of virtue.” It was through such exhibitions that he helped shape my character and instill in me the habit of acting ethically.¹⁸²

The flourishing of a particular legal community also depends upon how well-anchored its members are to each other.¹⁸³ Thus, in addition to

182. Schiltz, *supra* note 160, at 738 (footnotes omitted).

183. *Id.* at 734-36. Judge Schiltz describes a lawyer’s “horizontal integration” as his anchoring “outward to those people about whom the lawyer cares.” *Id.* at 735. He suggests horizontal integration promotes ethical conduct in several ways: (1) it lessens the “sense of anonymity” and increases the “sense of accountability,” especially for new lawyers; (2) it “increases the cost of unethical behavior,” because unethical conduct then is understood as dishonoring those whom the lawyer cares about in addition to dishonoring himself; and (3) it creates a “feeling of ownership” in the legal community, a connection that leads the lawyer to “take better care of it than those who do not” have this anchoring. *Id.* at 735-36. He contrasts this with “vertical integration,” which is the lawyer’s sense of connection to “a great and worthy tradition” which has “inspired in her a devotion to the legal order.” *Id.* at 734. He questions whether “vertical anchoring to the past is common among attorneys today,” but downplays its importance by stating that “it is a rare lawyer who is inspired to do much of anything—much less anything that takes great courage—by devotion to something as abstract, remote, and bloodless as

establishing relationships with one or more mentors (or, with the advent of practice experience, as a mentor), lawyers should self-consciously cultivate the habit of conferring with other lawyers about ethical and moral decisions in the practice of law.¹⁸⁴ This is true whether the lawyer practices in a group setting or individually. In fact, because of the great benefits of information sharing and mutual accountability, it is perhaps even more important for solo practitioners to cultivate these habits.¹⁸⁵ Within a legal community, and particularly among those lawyers in the community experienced in the exercise of virtues for law practice, the deciding lawyer can seek practical wisdom and effective counsel so that she may then act in a manner consistent not only with rules and duties, but also with good moral conscience.

VII. CONCLUSION

In this article, I have proposed a framework for understanding the ethics of law practice through the Aristotelian moral philosophy of virtue ethics.¹⁸⁶ I have discussed examples of specific virtues important to the ethical practice of law, such as integrity, justice, courage, compassion, and honesty.¹⁸⁷ I have also emphasized how a lawyer may draw on the Kierkegaardian ethical concept of earnestness, as related to the responsible exercise of freedom of will and passionate reason, to fortify herself as a person and sustain herself as an individual practicing law with a strong and reliable moral compass.¹⁸⁸

I have, however, said much less about the vices in the practice of law. All lawyers are familiar with the vices with which the American legal profession has struggled over the course of its history. These vices have posed

‘the well-being of the law.’” *Id.* at 734-35 (quoting KRONMAN, *supra* note 117, at 145); *see also* MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 243, 83 (1994) (speaking of the common law tradition in the legal profession as “a vigorous conversation across generations about the goods embodied in our legal and political order,” which “helps to orient and reinforce each lawyer’s quest for a morally coherent professional life”). Although I agree with Judge Schiltz’ assessment that vertical integration is less common now than in decades past, I disagree with his perception of a modest role for ideals and exemplars drawn from the best aspects of the history of the legal profession in promoting the virtuous practice of law.

184. *See* William H. Simon, *The Past, Present, and Future of Legal Ethics: Three Comments for David Luban*, 93 CORNELL L. REV. 1365, 1374 (2008) (noting that “[g]roup decisions force participants to articulate and reflect on their notions in ways that they otherwise would not if they had made those decisions on their own”).

185. *See* Levin, *supra* note 29, at 328-32 (discussing the importance of “advice networks” for lawyers in solo and small firm practices). *But cf. id.* at 365-67 (noting evidence that experienced solo and small firm practitioners are more reluctant to seek ethical advice from other lawyers than are those who are less experienced).

186. *See supra* Section III.A.

187. *See supra* Section III.B-C.

188. *See supra* Section IV.A-C.

moral challenges, varying in their timing and depth across the generations back to the founding of our nation, and each has been substantial and troubling.¹⁸⁹ Speaking from my own experience, I have invested the majority of my legal career serving as a disciplinary counsel charged with evaluating, investigating, and prosecuting professional misconduct by lawyers. I have seen firsthand, on numerous occasions, the grave and bitter harm lawyers can inflict, on others and on themselves, when they fail to live up to their ethical and moral responsibilities in their law practices and in their lives outside of the office. However, the purpose of this article has been to share an ideal of virtue toward which lawyers may strive both individually and as members of a flourishing legal community. Law students and new lawyers can look to the best resources and exemplars of the legal profession's past and present to teach them and inspire them to practice virtuously. Drawing upon the practical wisdom and support of mentors and others, I believe they can find the courage to act with integrity and fulfill their ethical commitments to the best of their abilities.

As judges, lawyers, or teachers of law, we each can decide virtuously and earnestly to act in such a way as to inspire those who hear and see us each day in our professional and personal lives. By engaging our hearts and embracing these responsibilities, we can promote flourishing in the legal community and encourage our successors to do the same.

189. *See, e.g.*, STEVEN LUBET, *THE IMPORTANCE OF BEING HONEST: HOW LYING, SECRECY, AND HYPOCRISY COLLIDE WITH TRUTH IN LAW* (2008); LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 738-46 (2d ed. 2008) and SHAFFER, *supra* note 39, at 10-12, 14, 27, 38-39 (discussing the history of race, sex, and class discrimination in the legal profession); Schiltz, *supra* note 29, at 903-06, 915-16 (critiquing the negative impact of the vices of greed and envy on contemporary practice for lawyers in large law firms).