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# The Pragmatically Virtuous Lawyer?

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# THE PRAGMATICALLY VIRTUOUS LAWYER?

ROBERT F. BLOMQUIST\*

## TABLE OF CONTENTS

I. INTRODUCTION.....	94
II. CLASSICAL TEXTS ON VIRTUE AND VICE.....	94
<i>A. Overview.....</i>	94
<i>B. The Importance of Habits in the Formation of Virtues .....</i>	98
III. RECENT LEGAL SCHOLARSHIP ON VIRTUE ETHICS .....	103
<i>A. Background.....</i>	103
<i>B. Recent Legal Scholarship.....</i>	104
IV. TEN PRAGMATIC LAWYERLY VIRTUES .....	108
<i>A. What are Pragmatic Virtues?.....</i>	108
<i>B. Ten Virtues: A Ranking and Discussion .....</i>	111
1. Balance.....	111
2. Integrity .....	114
3. Idealism .....	117
4. Compassion .....	122
5. Courage .....	126
6. Creativity .....	131
7. Energy.....	136
8. Justice.....	139
9. Discipline .....	145
10. Perseverance.....	150
V. CONCLUSION .....	157

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## I. INTRODUCTION

Lawyers deal in a messy world involving flawed human beings, imperfect legal institutions, and the need to make a living. In recent years, a chorus of voices has arisen lamenting the disappearance of the lawyer-statesperson, satirizing the hundred million lawyer conversations that transpire every month discussing the corrupt state of American justice, warning lawyers and lawyers-to-be of the low state of legal ethics, and even wailing of the “death” of the honorable profession of being a lawyer.<sup>1</sup>

It is the thesis of this Article 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. This tradition should be pragmatically reexamined, resuscitated and reshaped—as some recent writers in the field of virtue ethics have started to do—to meet the needs of twenty-first century American lawyers.

The structure of the remainder of this Article is as follows. First, in Part II, I revisit, in summary fashion, some classical western writings on virtue and vice—from ancient times up to the present. This discussion will outline what philosophers and sages have argued about the nature of virtues, their relations among themselves and to non-virtuous states (often called vices), their place in our psychology, and their role in bringing about human felicity.<sup>2</sup> Second, in Part III, I examine some important recent legal scholarship on virtue ethics.<sup>3</sup> Third, in Part IV, I offer a ranking and discussion of what I contend are the ten most important virtues that lawyers and law students should pragmatically strive to perfect in their professional lives.<sup>4</sup> Finally, in Part V, I conclude with a few parting thoughts.<sup>5</sup>

## II. CLASSICAL TEXTS ON VIRTUE AND VICE

## A. Overview

In the tradition of classical literature, the scope of the terms “virtue” and “vice” is co-extensive with morality; or, in other words, with “the broadest consideration of good and evil in human life, with what is right and wrong for [humans] not only to do, but also to wish or desire, and even to think.”<sup>6</sup> Plato, in *The Republic*, classified four virtues as cardinal: courage, temperance, justice

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1. See *infra* notes 46, 76-79, 221-31 and accompanying text.

2. See *infra* notes 6-40 and accompanying text.

3. See *infra* notes 41-79 and accompanying text.

4. See *infra* notes 80-337.

5. See *infra* notes 338-40 and accompanying text.

6. Mortimer J. Adler, *Virtue and Vice*, in 3 GREAT BOOKS OF THE WESTERN WORLD 975, 975 (Robert Maynard Hutchins ed., 1952).

and practical wisdom (or as it is sometimes referred to, prudence).<sup>7</sup> Plato's pupil, Aristotle, in his writings divided all virtues into two major categories: (1) moral virtues (excellences of character) and (2) intellectual virtues (excellences of the mind).<sup>8</sup> Moreover, Aristotle subdivided the latter virtues into two further groupings: first, those attributes such as, "understanding, science, [and] wisdom" which involve "the possession of speculative insight and theoretic knowledge;" second, those talents like "art and prudence" which entail "skill in practical thinking or in the application of knowledge to production and action respectively."<sup>9</sup> Interestingly, "[b]ecause it is concerned with action, or moral conduct, the virtue of prudence is most closely associated with the moral virtues of justice, courage, and temperance."<sup>10</sup>

Augustine and Aquinas were influenced by the New Testament admonition of St. Paul in *First Corinthians*:

Though I speak with the tongues of men and of angels, and have not charity, I am become *as* sounding brass, or a tinkling cymbal.

And though I have *the gift of* prophecy, and understand all mysteries, and all knowledge; and though I have all faith, so that I could remove mountains, and have not charity, I am nothing.

And though I bestow all my goods to feed *the poor*, and though I give my body to be burned, and have not charity, it profiteth me nothing.

Charity suffereth long, *and* is kind; charity envieth not; charity vaunteth not itself, is not puffed up,

Doth not behave itself unseemly, seeketh not her own, is not easily provoked, thinketh no evil;

Rejoiceth not in iniquity, but rejoiceth in the truth;

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7. PLATO, *THE REPUBLIC* (Benjamin Jowett trans.), *reprinted in* 7 GREAT BOOKS OF THE WESTERN WORLD 295, 346-56 (Robert Maynard Hutchins ed., 1952). In *The Republic*, Plato quotes Socrates as comparing the harmony produced by virtue in the soul with the harmony of the parts in a healthy human body. Socrates claims that "good practices lead to virtue, and evil practices to vice," while "virtues of the soul . . . can be implanted by habit and exercise." Adler, *supra* note 6, at 977.

8. See generally ARISTOTLE, *NICOMACHEAN ETHICS* (W.D. Ross trans.), *reprinted in* 9 GREAT BOOKS OF THE WESTERN WORLD 339, 347-94 (Robert Maynard Hutchins ed., 1952) (discussing the classification of virtues and correlative vices); ARISTOTLE, *PHYSICAL TREATISES: PHYSICS* (R.P. Hardie & R.K. Gaye trans.), *reprinted in* 8 GREAT BOOKS OF THE WESTERN WORLD 259, 330 (Robert Maynard Hutchins ed., 1952) (enumerating and describing the intellectual and moral virtues).

9. Adler, *supra* note 6, at 975.

10. *Id.*

Beareth all things, believeth all things, hopeth all things, endureth all things.

Charity never faileth: but whether *there be* prophecies, they shall fail; . . . whether *there be* knowledge, it shall vanish away.

For we know in part, and we prophesy in part.

But when that which is perfect is come, then that which is in part shall be done away.

When I was a child, I spake as a child, . . . but when I became a man, I put away childish things.

For now we see through a glass, darkly; but then face to face: now I know in part; but then shall I know even as also I am known.

And now abideth faith, hope, charity, these three; but the greatest of these is charity.<sup>11</sup>

In *The City of God*, Augustine made a critical distinction about virtue: “What the Christians believe regarding the supreme good and evil, in opposition to the philosophers, who have maintained that the supreme good is in themselves.”<sup>12</sup> Citing the Apostle Paul’s paen to spiritual charity, Augustine contends that, for Christians, virtues of God’s grace are more important than humanly-forged virtues. Augustine observes that “the very virtues of this life, which are certainly its best and most useful possessions, are all the more telling proofs of its miseries in proportion as they are helpful against the violence of its dangers, toils, and woes.”<sup>13</sup> Making a distinction between the virtues of the world—which Augustine implicitly views as false—and the “true virtues” of the spiritual world yet-to-come, he claims:

For if these are true virtues—and such cannot exist save in those who have true piety—they do not profess to be able to deliver the men who possess them from all miseries; for true virtues tell no such lies, but they profess that by the hope of the future world this life, which is miserably involved in the many and great evils of this world, is happy as it is also safe.<sup>14</sup>

In *Summa Theologica*, Aquinas also saw a fundamental difference between virtues that humans seek to achieve through their own effort and supernatural

11. 1 *Corinthians* 13:1-13 (King James) (alteration in original).

12. SAINT AUGUSTINE, *THE CITY OF GOD* (Marcus Dods trans.) (1273), *reprinted in* 18 GREAT BOOKS OF THE WESTERN WORLD 129, 511 (Robert Maynard Hutchins ed., 1952) (alteration in original).

13. *Id.* at 513.

14. *Id.*

“theological virtues”<sup>15</sup> that can be achieved only through God’s grace. In Aquinas’s inimitable language:

Now man’s happiness is twofold . . . . One is proportionate to human nature, a happiness, namely, which man can obtain by means of the principles of his nature. The other is a happiness surpassing man’s nature, and which man can obtain by the power of God alone, by a kind of participation of the Godhead . . . . And because such happiness surpasses the proportion of human nature, man’s natural principles which enable him to act well according to his capacity do not suffice to direct man to this same happiness. Hence it is necessary for man to receive from God some additional principles, by means of which he may be directed to supernatural happiness, even as he is directed to his connatural end by means of his natural principles, although not without the Divine assistance. Such principles are called theological virtues: first, because their object is God, because they direct us rightly to God; secondly, because they are infused in us by God alone; thirdly, because these virtues are not made known to us except by Divine revelation, contained in Holy Writ.<sup>16</sup>

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15. THOMAS AQUINAS, *THE SUMMA THEOLOGICA* (1273), *reprinted in 20 GREAT BOOKS OF THE WESTERN WORLD* 1, 60 (Robert Maynard Hutchins ed., 1952).

16. *Id.* at 60. Julia Annas—a philosophy professor at the University of Arizona—has recently authored a book chapter which elucidates the profound impact that ancient philosophers made on virtue ethics. See Julia Annas, *Ancient Philosophy for the Twenty-First Century*, in *THE FUTURE FOR PHILOSOPHY* 25 (Brian Leiter ed., 2004). As Annas points out:

Ancient ethics begins from reflection on my life as a whole, and my attempts to live a good life, rather than one whose form is given by unreflective adherence to norms and priorities. Different ethical theories are seen as giving different answers to the question of how I can, in fact, live a good life, and ethics is thus seen as a struggle to come up with the right specification of my final end, the goal I am seeking in my life as a whole. Because this end is in ancient thought characterized as *eudaimonia* or happiness, this type of ethical theory is rightly called eudaimonist. Until the last decades, theories of this kind had been seen as being of very limited contemporary relevance, mainly because of crude and uncriticized conceptions of happiness. Aristotle’s theory, for example, was frequently dismissed as egoistic, the assumption being that happiness is enjoyment or some other desirable state of yourself which you are trying to bring about. Related problems of interpretation afflicted understanding of virtue in this kind of theory. It is clear just from looking at Aristotle’s theory, for example, that virtue, the activity of being a certain kind of good person, is a complex and multifaceted thing.

*Id.* at 38-39. As Professor Annas opines, modern ethical theory, through a renewed interest in virtue ethics, has returned to ancient insights:

And so, study of virtue and happiness over a wide range of theories has had two mutually supporting results. On the one hand, we now have a far better understanding of theories like those of Epicurus and the Stoics. Epicurus had been seen simply as a hedonist, and the Stoics as implausibly high-minded about virtue. Interpreting them in a rigorously philosophical way, and seeing their theories as attempts to produce differing defensible conceptions of living a good life, has revealed these theories to be far richer and more philosophically applicable. *On the other hand, our improved understanding of virtue and happiness in the ancient theories has fed into the modern revival of so-called ‘virtue ethics.’* For some

B. *The Importance of Habits in the Formation of Virtues*

The role of habit—the habitual doing or practicing of good deeds—has held a central part in classical texts on virtue and vice. Thus, going back to the Old Testament, we are told in Proverbs to “[t]rain up a child in the way he should go: and when he is old, he will not depart from it,”<sup>17</sup> and, by negative inference in Jeremiah: “Can the Ethiopian change his skin, or the leopard his spots? *then* may ye also do good, that are accustomed to do evil.”<sup>18</sup> Euripides, the ancient Greek playwright, reminds us of the importance of living a life of disciplined habit in the cultivation of human virtue in three of his plays: *The Suppliants*,<sup>19</sup> *Electra*,<sup>20</sup> and *Iphigenia at Aulis*.<sup>21</sup> Aristotle emphasizes the prominence of training and practice in causing good habits to be formed and, ultimately, virtuous character to emerge.<sup>22</sup> The ancient Roman emperor-philosopher, Marcus Aurelius, in his *The Meditations*, reaffirms this theme by opining: “Such as are thy habitual thoughts, such also will be the character of thy mind; for the soul is dyed by the thoughts.”<sup>23</sup> Aquinas, in *Summa Theologica*, devotes an extensive portion of his book to habits: the general momentousness of habits, how good habits lead to virtuous conduct, and how bad habits induce vice.<sup>24</sup> Writing in *Leviathan*, Thomas Hobbes stressed the point that virtue means “wit;” this “wit . . . is gotten by use only, and experience” and “consisteth principally in two things: *celerity of imagining* (that is, swift succession of one thought to another); and *steady direction* to some approved end.”<sup>25</sup> The sixteenth century French essayist, Michel de Montaigne, added his thoughts to the ever-growing body of thought on habits

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time virtue has become a prominent concept in ethical theory, but modern assumptions have limited the illumination that this can bring. Exploration of different kinds of ancient theory that base themselves on virtue and happiness has opened up the many different ways these concepts might figure in a modern ethical theory.

*Id.* at 39 (emphasis added) (footnotes omitted).

17. *Proverbs* 22:6 (King James).

18. *Jeremiah* 13:23 (King James).

19. EURIPIDES, *THE SUPPLIANTS* (Edward P. Coleridge trans.), reprinted in 5 GREAT BOOKS OF THE WESTERN WORLD 258, 266 (Robert Maynard Hutchins ed., 1952).

20. EURIPIDES, *ELECTRA* (Edward P. Coleridge trans.), reprinted in 5 GREAT BOOKS OF THE WESTERN WORLD 327, 330-337 (Robert Maynard Hutchins ed., 1952).

21. EURIPIDES, *IPHIGENIA AT AULIS* (Edward P. Coleridge trans.), reprinted in 5 GREAT BOOKS OF THE WESTERN WORLD 425, 429-30 (Robert Maynard Hutchins ed., 1952).

22. See ARISTOTLE, *LOGIC: CATEGORIES* (E.M. Edghill trans.), reprinted in 8 GREAT BOOKS OF THE WESTERN WORLD 5, 18 (Robert Maynard Hutchins ed., 1952); ARISTOTLE, *NICHOMACHEAN ETHICS*, *supra* note 8, at 333, 340, 348-51, 403, 423, 434-35; ARISTOTLE, *POLITICS* (Benjamin Jowett trans.), reprinted in 9 GREAT BOOKS OF THE WESTERN WORLD 445, 537, 539, 542 (Robert Maynard Hutchins ed., 1952).

23. MARCUS AURELIUS, *THE MEDITATIONS* (George Long trans.), reprinted in 12 GREAT BOOKS OF THE WESTERN WORLD 253, 271 (Robert Maynard Hutchins ed., 1952).

24. AQUINAS, *supra* note 15, at 1-204.

25. THOMAS HOBBS, *LEVIATHAN* (Nelle Fuller ed.) (1651), reprinted in 23 GREAT BOOKS OF THE WESTERN WORLD 39, 66 (Robert Maynard Hutchins ed., 1952).

as necessary antecedents of virtue. According to Montaigne, reflecting on the courage of Socrates in facing his death sentence from an Athenian jury, Socrates' courage was a result of a "perfect . . . habitude to virtue . . . turned to a complexion."<sup>26</sup> This Socratic "habitude to virtue," as understood by Montaigne, was:

[T]he very essence of [his] soul, its natural and ordinary habit; [he] ha[d] rendered it such by a long practise of philosophical precepts having lit upon a rich and fine nature; the vicious passions that spring in us can find no entrance into [him]; the force and vigor of [his] soul stifle and extinguish irregular desires, so soon as they begin to move.<sup>27</sup>

The Great Bard, in *Hamlet*, has the Prince of Denmark speak these memorable words to his mother, the queen, on the value of habit in creating virtue:

O, throw away the worser part of it, And live the purer with the other half. Good night; but go not to mine uncle's bed. Assume a virtue, if you have it not. That monster, custom, who all sense doth eat, Of habits devil, is angel yet in this, That to the use of actions fair and good He likewise gives a frock or livery, That aptly is put on. Refrain to-night, And that shall lend a kind of easiness To the next abstinence; the next more easy; For use almost can change the stamp of nature, And either master the devil, or throw him out With wondrous potency.<sup>28</sup>

Sir Francis Bacon, writing in 1605, agreed with Shakespeare's view—expressed in *Hamlet*—of moral practice, or habit as vital to shape a virtuous human being. As Bacon expressed the role of habit on value formation:

[T]he most notable and effectual [point] to the reducing of the mind unto virtue and good estate . . . is, the electing and propounding unto a [person's] self good and virtuous ends of his life, such as may be in a reasonable sort within his compass to attain. For if these two things be supposed, that a [person] set before him honest and good ends, and again, that he be resolute, constant, and true unto them; it will follow that he shall mould himself into all virtue at once. And this is indeed like the work of nature; whereas the other [step by step process] is like the work of the hand. For as when a carver makes an image, he shapes only that part whereupon he worketh; as if he be upon the face, that part which shall be the body is but a rude stone still, till such time as he comes to it. But contrariwise when nature makes a flower or living creature, she formeth rudiments of all the parts at one time. So in obtaining virtue by habit, while a

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26. MICHEL DE MONTAIGNE, *THE ESSAYS* II (1588), *reprinted in* 25 GREAT BOOKS OF THE WESTERN WORLD 159, 203 (Robert Maynard Hutchins ed., 1952).

27. *Id.* at 203.

28. WILLIAM SHAKESPEARE, *HAMLET* (William George Clark & William Aldis Wright eds.), *reprinted in* 2 GREAT BOOKS OF THE WESTERN WORLD 29, 56 (Robert Maynard Hutchinson ed., 1952) (alteration in original).



[person] practiseth temperance, he doth not profit much to fortitude, nor the like: but when he dedicateth and applieth himself to good ends, look, what virtue soever the pursuit and passage towards those ends doth commend unto him, he is invested of a precedent disposition to conform himself thereunto.<sup>29</sup>

The seventeenth century polymath, John Locke, starting with his student days at Oxford University and continuing in later years with the keeping of common-place books, pursued a wide assortment of intellectual projects ranging from chemistry to meteorology; from medicine to theology; from government to political philosophy. He frequently held informal meetings with friends and acquaintances to discuss various questions. At one of those gatherings a question arose concerning the “limits of human understanding.” Thereafter, Locke endeavored to pursue an answer, and what had “begun by chance, was continued by [e]ntreaty; written by incoherent parcels; and after long intervals of neglect, resumed again, as humour and occasions permitted” was ultimately published in 1689 as *An Essay Concerning Human Understanding*.<sup>30</sup> In a chapter entitled “Of Power,” Locke argued that, through discipline and the development of good habits, “[w]e can change the agreeableness or disagreeableness in things” and, therefore, that it was “in a [person’s] power to change the pleasantness and unpleasantness that accompanies” day-to-day living.<sup>31</sup> Alluding to eating habits as an example, Locke provides the following charming analysis:

[People] may and should correct their palates, and give relish to what either has, or they suppose has, none. The relish of the mind is as various as that of the body, and like that too may be altered; and it is a mistake to think that [people] cannot change the displeasingness or indifferency that is in actions into pleasure and desire, if they will do but what is in their power. *A due consideration will do it in some cases; and practice, application, and custom in most.*<sup>32</sup>

The great eighteenth century philosopher, Immanuel Kant, described a “duty of virtue” which consists of “a consciousness . . . of the *power* to become master of one’s inclinations,” such that “human morality in its highest stage can yet be nothing more than virtue” which, as he saw it, “is poetically personified under the name of the *wise man* (an ideal to which one should continuoually approximate).”<sup>33</sup> While Kant acknowledged the role of habit in

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29. FRANCIS BACON, ADVANCEMENT OF LEARNING (1605), *reprinted in* 30 GREAT BOOKS OF THE WESTERN WORLD 1, 80 (Robert Maynard Hutchins ed., 1952) (alteration in original).

30. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (1689), *reprinted in* 35 GREAT BOOKS OF THE WESTERN WORLD 85, 87 (Robert Maynard Hutchins ed., 1952).

31. *Id.* at 197 (emphasis omitted in first quote).

32. *Id.* (emphasis added) (alteration in original).

33. IMMANUEL KANT, PREFACE AND INTRODUCTION TO THE METAPHYSICAL ELEMENTS OF ETHICS (Thomas Kingsmill Abbott trans.) (1785), *reprinted in* 42 GREAT BOOKS OF THE WESTERN WORLD 365, 368 (Robert Maynard Hutchins ed., 1952).

virtue development, he emphasized the critical importance of mental preparation and a resolution to be a virtuous human being, noting in this regard:

Virtue, however, is not to be defined and esteemed merely as *habit*, and . . . as a long *custom* acquired by practice of morally good actions. For, if this is not an effect of well-resolved and firm principles ever more and more purified, then, like any other mechanical arrangement brought about by technical practical reason, it is neither armed for all circumstances nor adequately secured against the change that may be wrought by new allurements.<sup>34</sup>

In another work, *The Critique of Judgment*, Kant reiterated his view that virtuous behavior is a matter of voluntary choice and human reason and yet—like consulting the thoughts of admirable thinkers of the past—something that can be aided by trying to follow general precepts of virtuous predecessors. Kant pontificates on this idea in the following fascinating prose:

The fact that we recommend the works of the ancients as models . . . and call their authors *classical*, as constituting a sort of nobility among writers that leads the way and thereby gives laws to the people, seems to indicate *a posteriori* sources of taste . . . in each individual. But we might just as well say that the ancient mathematicians, who, to this day, are looked upon as the almost indispensable models of perfect thoroughness and elegance in synthetic methods, prove that reason also is on our part only imitative . . . . There is no employment of our powers, no matter how free . . . which, if each individual had always to start afresh with the crude equipment of his natural state, would not get itself involved in blundering attempts, did not those of others lie before it as a warning. Not that predecessors make those who follow in their steps mere imitators, but by their methods they set others upon the track of seeking in themselves for the principles, and so of adopting their own, often better, course. Even in religion—where undoubtedly every one has to derive his rule of conduct from himself, seeing that he himself remains responsible for it and, when he goes wrong, cannot shift the blame upon others as teachers or leaders—general precepts learned at the feet either of priests or philosophers, or even drawn from ones' own resources, are never so efficacious as an example of virtue or holiness, which . . . does not dispense with the autonomy of virtue

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34. *Id.* at 368. Remarkably, Kant provides an equation for virtue and vice: “To virtue = + *a* is opposed as its *logical contradictory* . . . the *negative lack of virtue* (moral weakness) = 0; but vice = - *a* is its *contrary*” while “it is not merely a needless question but an offensive one to ask whether great *crimes* do not . . . demand more strength of mind than great virtues.” *Id.* This is so, according to Kant, because “by strength of mind we understand the strength of purpose of a man, as being endowed with freedom, and consequently so far as he is master of himself (in his senses) and therefore in a *healthy* condition of mind.” *Id.* at 368-69.

Later in this book, Kant sets forth a chart describing the following schemata: “The Material Element of the Duty of Virtue,” “The Formal Element of the Duty of Virtue,” “Internal Duty of Virtue,” and “External Duty of Virtue”—synthesizing matters of morality, self actualization and legality. *Id.* at 374.

drawn from the spontaneous and original idea of morality (*a priori*), or convert this into a mechanical process of imitation.<sup>35</sup>

Georg Wilhelm Friedrich Hegel, writing in 1821 in the last major work published during his lifetime, *The Philosophy of Right*, linked education with habit and, ultimately, with being able to live an ethical life. In this regard, Hegel observed:

Education is the art of making [people] ethical. It begins with pupils whose life is at the instinctive level and shows them the way to a second birth, the way to change their instinctive nature into a second, intellectual, nature, and makes this intellectual level habitual to them. At this point the clash between the natural and the subjective will disappears, the subject's internal struggle dies away. To this extent, habit is part of the ethical life as it is of philosophic thought also, since such thought demands that mind be trained against capricious fancies, and that these be destroyed and overcome to leave the way clear for rational thinking.<sup>36</sup>

The monumental Russian author, Leo Tolstoy, conveys the value of ordered, habitual activity to the development of virtue through his gruff character, Prince Bolkónski, in the 1869 opus *War and Peace*. As Tolstoy described the prince: “He used to say that there are only two sources of human vice—idleness and superstition, and only two virtues—activity and intelligence.”<sup>37</sup> Later in the same novel, Tolstoy portrays a military officer, Rostóv, as having developed the virtue of courage under fire through dint of habit. Rostóv “was fearless, not because he had grown used to being under fire (one cannot grow used to danger), but because he had learned how to manage his thoughts when in danger.”<sup>38</sup>

Expressing his thoughts on the importance of habit formation in the then new language of psychology, William James, writing in 1890 argued:

The great thing, then, in all education, is to *make our nervous system our ally instead of our enemy*. It is to fund and capitalize our acquisitions, and live at ease upon the interest of the fund. *For this we must make automatic and habitual, as early as possible, as many useful actions as we can*, and guard against the growing into ways that are likely to be disadvantageous to us, as we should guard against the plague. The more of the details of our daily life we can hand over to the

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35. IMMANUEL KANT, *THE CRITIQUE OF JUDGMENT* (James Creed Meredith trans.) (1790), *reprinted in* 42 *GREAT BOOKS OF THE WESTERN WORLD* 461, 513-14 (Robert Maynard Hutchins ed., 1952).

36. GEORG WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF RIGHT* (T.M. Knox trans.) (1821), *reprinted in* 46 *GREAT BOOKS OF THE WESTERN WORLD* 1, 132 (Robert Maynard Hutchins ed., 1952) (alteration in original).

37. LEO TOLSTOY, *WAR AND PEACE* (Louise Maude & Aylmer Maude trans.) (1869), *reprinted in* 51 *GREAT BOOKS OF THE WESTERN WORLD* 1, at 47 (Robert Maynard Hutchins ed., 1952).

38. *Id.* at 369.

effortless custody of automatism, the more our higher powers of mind will be set free for their own proper work.<sup>39</sup>

James goes so far, in his discussion of the importance of cultivating good habits, as to claim that habitual good cheer can lead to a happy and kind disposition.<sup>40</sup>

### III. RECENT LEGAL SCHOLARSHIP ON VIRTUE ETHICS

#### *A. Background*

As discussed in Part II, classical virtuous thinkers talked about abstract and universal human qualities important to living a good life.<sup>41</sup> Philosophers during recent decades, however, have tried to reconceptualize virtue ethics by emphasizing the “cultivat[ion] [of] virtues in concrete human individuals” and in concrete human situations.<sup>42</sup> This modern turn to concrete virtue ethics,

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39. WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* (1890), *reprinted in* 53 *GREAT BOOKS OF THE WESTERN WORLD* xiii, at 80 (Robert Maynard Hutchins ed., 1952).

40. *Id.* at 751-52.

41. *See supra* notes 6-40 and accompanying text.

42. *THE BLACKWELL COMPANION TO PHILOSOPHY* 763 (Nicholas Bunnin & E.P. Tsui-James eds., 1996). According to one chapter authored in this book, virtue theory is not a favored type of ethical theory for analytic philosophers:

Moral theories are standardly presented as falling into three basic types, centring respectively on *consequences*, *rights* and *virtues*. The first are unsurprisingly called ‘consequentialist,’ and the last ‘virtue theories.’ The second are often called ‘deontological,’ which means that they are centred on duty or obligation . . . .

Another way of understanding the division into three is in terms of what each theory sees as most basically bearing ethical value. For the first type of theory, it is *good states of affairs*, and right action is understood as action tending to bring about good states of affairs. For the second type, it is *right action*; sometimes what makes an action right is a fact about its consequences, but often it is not—its rightness is determined rather by respect for others’ rights, or by other obligations that the agent may have. Virtue theory, finally, puts most emphasis on the idea of a *good person*, someone who could be described also as an ethically admirable person. This is an important emphasis, and the notion of a virtue is important in ethics. However, once the types of theory are distinguished in this way, it is hard to see them as all in the same line of business. Consequentialist and rights theories aim to systematize our principles or rules of action in ways that will, supposedly, help us to see what to do or recommend in particular cases. A theory of the virtues can hardly do that: the theory itself, after all, is going to say that what you basically need in order to do and recommend the right things are virtues, not a theory about virtues. Moreover, virtuous people do not think always, or usually, about the virtues. They think about such things as good consequences or people’s rights, and this makes it clear that ‘virtue theory’ cannot be on the same level as the other two types of theory.

Bernard Williams, *Contemporary Philosophy: A Second Look*, in *THE BLACKWELL COMPANION TO PHILOSOPHY*, *supra*, at 33-34.

therefore, departs, somewhat, from philosophers like Leslie Stevenson, for example, who writes in his popular book, *Ten Theories of Human Nature*, about human virtue in a more traditional, abstract, and universalized style.<sup>43</sup>

Notable work by philosophers in the modern virtue ethics tradition include books by Philippa Foot, Alasdair MacIntyre, Martha Nussbaum, Gabriele Taylor and Bernard Williams.<sup>44</sup>

### B. Recent Legal Scholarship

During the 1980s and 1990s a handful of legal scholars interested in legal ethics wrote about the personhood of lawyers and specific risks to lawyers' character and moral development by the decisions they made (or failed to

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43. LESLIE STEVENSON & DAVID L. HABERMAN, *TEN THEORIES OF HUMAN NATURE* (3d ed. 1998). Thus, this book discusses, by way of illustration, *Confucianism* (premised on the belief that "all human beings have the capacity to cultivate virtue and bring themselves into harmony with the Decree of Heaven"), *id.* at 28; the *Judeo-Christian tradition* (which "puts the emphasis on human goodness, and this is something that is open to all, and independent of intellectual power"), *id.* at 76; *Platonism* (which holds that in spite of "the messy reality of human beings in actual situations" there, nevertheless, "are absolute standards of value set for us by the ethical Forms"), *id.* at 94-95; and *Sartre's existential theory of radical freedom* (arguing that "[w]e must accept our responsibility for everything about ourselves—not just our actions, but our attitudes, our emotions, our dispositions, and our characters"), *id.* at 182.

44. See generally PHILIPPA FOOT, *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* (1978); ALASDAIR C. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981); MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* (1986); GABRIELE TAYLOR, *PRIDE, SHAME, AND GUILT: EMOTIONS OF SELF-ASSESSMENT* (1985); and BERNARD WILLIAMS, *MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980* (1981). University of Michigan philosophy professor, Peter Railton, traced the neglect of virtue ethics during most of the twentieth century and a renaissance of renewed interest in recent years in a book chapter. See Peter Railton, *Toward an Ethics That Inhabits the World*, in *THE FUTURE FOR PHILOSOPHY* 265 (Brian Leiter ed., 2004). According to Railton:

Dissatisfaction with the limited conception of moral action available to duty-based approaches to moral practice, and with the relative impoverishment of prevalent philosophical treatments of the role of emotion and motivation in a moral thought, helped stimulate a revival of interest in virtue theories toward the end of the twentieth century. Virtue theory had been influential in moral philosophy from ancient times into the early modern period, but it nonetheless suffered neglect in the twentieth century, partly because of incompletely-formulated doubts about whether such theories could really "add" anything to a proper account of moral obligation. It was felt that moral virtue either was a matter of *possessing* "non-cognitive" motivations or feelings not under conscientious voluntary control—"being brave", say—and therefore outside the scope of a properly moral "ought", or it was a matter of *striving conscientiously toward* developing such valuable motivations or feelings or acting in accord with them—"trying to be brave" or "trying to act bravely", say—in which case a theory of obligation could already incorporate it.

*Id.* at 271.

make),<sup>45</sup> by the ideals they cultivated (or failed to cultivate),<sup>46</sup> and by the moral responsibility they exercised (or neglected to exercise).<sup>47</sup>

A symposium, published in 2002 by the *Notre Dame Law Review* in honor of the writings of Professor Thomas Shaffer, did a particularly commendable job of elucidating the virtue ethics theory and the law.<sup>48</sup> Two articles published as part of this symposium are quite worthwhile. The first article, by Professor Marie A. Failinger, encapsulates the function of virtue ethics as “center[ing] on the organic formation of dispositions or traits of character in response to situations arising in a concrete community from which the description of those virtues arises.”<sup>49</sup> Failinger makes the penetrating observation that literary conceptions of worthy and essential virtues for an individual to acquire, cultivate and perfect—from Homer to Jane Austen—have always been linked with what she calls “fittedness:” such “that the virtues allow one to take one’s place in some naturally well-organized community,”<sup>50</sup> whether it be a bricklayer in ancient Athens<sup>51</sup> or a “well-bred young woman” in Victorian England.<sup>52</sup> Grafting fittedness onto the virtuous responsibilities of the modern American lawyer, Failinger describes Shaffer’s work as consistent with this tradition. As she explains:

Consistently with situational virtue theories, Tom Shaffer’s narrative work, which locates the good lawyer in a particular place and time, relationship and role, similarly suggests an organic understanding of obligation. Shaffer takes great pains to reiterate, time and again, that even the most stalwart and independent of Shaffer’s narrative heroes, Atticus Finch, derives his identity not from any choice or self-construction but from the town of Maycomb where he has grown up, lived, and worked: he cannot be what he is other than out of interaction with those with whom he has lived. As a character in community, a

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45. See, e.g., RAND JACK & DANA CROWLEY JACK, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* (1989).

46. See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

47. See, e.g., THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994).

48. Symposium, *Propter Honoris Respectum*, 77 NOTRE DAME L. REV. 705 (2002).

49. Marie A. Failinger, *Is Tom Shaffer a Covenantal Lawyer?*, 77 NOTRE DAME L. REV. 705, 720 (2002).

50. *Id.*

51. *Id.* at 720:

In its Homeric form, virtue ethics posited almost a perfect correspondence between individual character and community cohesion, focusing on the development of those habits which would fit one for the social position in which one found oneself by virtue of birth, so that a bricklayer’s sons would be expected to develop different virtues than a patrician’s child.

*Id.* (footnote omitted).

52. *Id.* at 721 (discussing Jane Austen’s description of the virtues of the well-bred young woman) (footnote omitted).

good lawyer or professional comes from a family, comes from a church, and has a town. He would not be who he is if it were not for his sturdy ... ancestors and the other people of background from whom he came.<sup>53</sup>

Professor Failing goes on to reflect on Shaffer's argument against the lawyer "becoming a godfather, guru, or hired gun, either putting the client at her mercy or being at the mercy of the client."<sup>54</sup> Failing observes that virtue ethics must be modified by an appreciation that a covenantal relationship "protects the client's moral freedom from the lawyer as guru"<sup>55</sup> and "gives the client not only the right but also the responsibility to make moral choices that arise in representational situations."<sup>56</sup> Failing, it seems, argues that a lawyer who obsesses with unmodified virtue ethics is, unpragmatically, making perfect the enemy of the good. As she writes:

Virtue ethics, at least as it has been incorporated into legal ethics, continues to hold onto the security of the present while moving toward the future: it points the way toward what is desirable but not existing, which is not now but could be. In a sense, the virtue ethicist is shielded from acknowledging his present failures because he can distinguish between what he is now and what he could be: perfect virtue is an aspiration, something to work for, but so long as a person is on the path toward virtue, he is to be admired for his effort rather than castigated for his failure.<sup>57</sup>

The second article in the aforementioned *Notre Dame Law Review* symposium is by Professor Reed Elizabeth Loder.<sup>58</sup> Loder's article, firmly ensconced in the field of virtue ethics, insists on "consider[ing] lawyers' moral character more closely."<sup>59</sup> Indeed, "[t]he character trait of integrity as a moral and legal resource"<sup>60</sup> is the focus of her essay. In Loder's view, "[i]ntegrity is a key component of moral personality," with "moral development" and "knowledge" inextricably intertwined.<sup>61</sup> She sees vital connections between "moral integrity" and "intellectual integrity" and "virtuous habits of thought."<sup>62</sup> Moreover, she contends that lawyers "face some extra demands" of integrity: lawyers must move beyond mere "reflection" on what is virtuous, what is good, and what is appropriate;<sup>63</sup> for them, "legal integrity involves

53. *Id.* at 721-22 (internal quotation marks omitted) (footnotes omitted).

54. *Id.* at 729.

55. Failing, *supra* note 49, at 729 (internal quotation marks omitted) (footnote omitted).

56. *Id.* at 730.

57. *Id.* at 751.

58. Reed Elizabeth Loder, *Integrity and Epistemic Passion*, 77 NOTRE DAME L. REV. 841 (2002).

59. *Id.* at 842.

60. *Id.*

61. *Id.* at 843.

62. *Id.* (footnote omitted).

63. *Id.*

relentless scrutiny of ends and means;<sup>64</sup> for them, “the most insidious problem [to avoid] is ethical bareness, which [she] call[s] ‘ethical winter.’”<sup>65</sup> Professor Loder points out that among the “[v]aried [m]eanings of [i]ntegrity in [e]veryday [l]ife”<sup>66</sup> for lawyers are the following: “wholeness;”<sup>67</sup> “the ecology of values, beliefs, judgments, and traits that compose a person’s unique ethical character;”<sup>68</sup> “[w]ithstanding or overcoming odds;”<sup>69</sup> “[e]xhibiting strength;”<sup>70</sup> “the fortitude to resist ethical invasions;”<sup>71</sup> and “follow[ing] an impractical and difficult path rather than degrad[ing] [one’s] moral personality.”<sup>72</sup>

Loder makes some useful observations about “[v]irtues and [v]ices [s]upporting [i]ntegrity.”<sup>73</sup> In general, “[v]irtues dispose a person to act well and develop her character in fruitful ways,” while “[s]pecific vices, on the other hand, are characteristics that make a person prone to ethical deficiencies” that “tend to diminish integrity.”<sup>74</sup> Key supporting virtues for the meta-virtue of integrity, according to Loder, are courage, constancy, humility, adaptability, honesty, authenticity, and candor, with their opposite characteristics constituting vices.<sup>75</sup> Loder cuts to the heart of the twenty-first century malaise affecting many American lawyers when she describes life in modern law firms as “barren places” to exercise virtuous lawyerly behavior.<sup>76</sup> She writes:

Many modern firms discourage unethical behavior to avoid disciplinary actions, legal sanctions, and loss of reputation. Yet, misbehavior is less a problem in many firms than the problem of ethical winter. This is a kind of hibernation of the soul. In the throes of winter, a person is estranged from the affective apparatus that spurs moral reflection. She loses the moral motivation to reflect even though she retains the necessary cognitive powers. Her moral imagination shrivels because she is drained of an erotic passion to test morally difficult situations by glimpsing the world of others, particularly those affected by her acts. Her empathy atrophies. She avoids confronting moral ambiguity . . . even as she wallows in its legal counterparts. Moral anguish no longer accompanies complex decisions, although the residue of suppressed distress may fill her amorphous disaffection and even self-contempt.

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64. Loder, *supra* note 58, at 843-44.

65. *Id.* at 844.

66. *Id.*

67. *Id.*

68. *Id.* at 845.

69. *Id.*

70. Loder, *supra* note 58, at 845.

71. *Id.*

72. *Id.* at 846.

73. *Id.*

74. *Id.*

75. *Id.* at 846-48.

76. Loder, *supra* note 58, at 875.



In a world of law firm accouterments and comforts, where time is scarce, and the young and the bright are enticed, one may wonder whether the very capacity for moral wisdom evaporates. Those who inhabit this world may never do wicked things, and they may even contribute to societal good, in pro bono work for example. But even good works have their price if they invite ethical complacency. Authentic ethical reflection must arise from an ever-searching heart. The longing for personal betterment fades without tending.<sup>77</sup>

The danger of a lawyer inhabiting “ethical winter” is that the lawyer “can fall prey to a kind of self-loathing.”<sup>78</sup> Loder claims, in this regard, that “[w]hat was at first professional inauthenticity slips into a newly authentic, lesser self. Self-loathing emerges because squelching the moral self leaves lingering guilt and regret.”<sup>79</sup>

#### IV. TEN PRAGMATIC LAWYERLY VIRTUES

##### A. *What are Pragmatic Virtues?*

My chief inspiration for the conception of *pragmatic* lawyerly virtues is the wonderful account tendered by Richard A. Posner in describing the western origins of the “pragmatic mood” in the character traits of the protagonist, Odysseus, in the ancient Greek poem *The Odyssey*.<sup>80</sup> I think the pragmatically virtuous modern lawyer would possess, and seek to continually perfect, the coping skills of Odysseus. In Posner’s inimitable sketch:<sup>81</sup>

[*The Odyssey*] opens with Odysseus living on a remote island ruled by a nymph who offers him immortality if he will remain as her consort. A bit surprisingly to anyone steeped in the orthodox Western religio-philosophical-scientific tradition, he refuses, preferring mortality and a dangerous struggle to retain his position as the king of a small, rocky island and be reunited with his son, aging wife, and old father. He turns down what the orthodox tradition says we should desire above all else, the peace that comes from overcoming the transience and vicissitudes of mortality . . . . Odysseus prefers going to arriving, struggle to rest, exploring to achieving—curiosity is one of his most marked traits—and risk to certainty. . . .

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77. *Id.* at 875-76 (footnotes omitted).

78. *Id.* at 876.

79. *Id.*

80. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 26-28 (2003).

81. Posner is not only a gifted writer of scholarly books about the law, but also an artful composer of stylish judicial opinions. See, e.g., Robert F. Blomquist, *Judge Posner’s Dissenting Judicial Oeuvre and the Aesthetics of Canonicity*, 36 N.M. L. REV. 161 (2006); Robert F. Blomquist, *Dissent, Posner-Style: Judge Richard A. Posner’s First Decade of Dissenting Opinions, 1981-1991—Toward an Aesthetics of Judicial Dissenting Style*, 69 MO. L. REV. 73 (2004); Robert F. Blomquist, *Playing on Words: Judge Richard A. Posner’s Appellate Opinions, 1981-82—Ruminations on Sexy Judicial Opinion Style During an Extraordinary Rookie Season*, 68 U. CIN. L. REV. 651 (2000).

Another thing that is odd about the protagonist, and the implicit values, of the *Odyssey* from the orthodox standpoint is that Odysseus is not a *conventional* hero, the kind depicted in the *Iliad*. He is strong, brave, and skillful in fighting, but he is no Achilles . . . or even Ajax; and he relies on guile, trickery, and outright deception to a degree inconsistent with what we have come to think of as heroism or with its depiction in the *Iliad*. *His dominant trait is skill in coping with his environment rather than ability to impose himself upon it by brute force*. He is the most intelligent person in the *Odyssey* but *his intelligence is thoroughly practical, adaptive*. Unlike Achilles in the *Iliad*, who is given to reflection, notably about the heroic ethic itself, *Odysseus is pragmatic*. He is an instrumental reasoner rather than a speculative one.<sup>82</sup>

Professor James Boyd White—the Hart Wright Professor of Law and Professor of English at the University of Michigan—shares Richard Posner’s enthusiastic embrace of the *coping skills* of Odysseus and the relevance of these skills to the life of a lawyer. White, however, interprets the Odyssean skill in grappling with and coming to terms with the challenges of his journey in slightly different pragmatic terms—what White explains as “ways of imagining himself and [his] world, ways that will make possible coherent thought and action on the new conditions in which he finds himself, and to a large degree he succeeds in fashioning them.”<sup>83</sup> Interestingly, Professor White adds two quintessential American pragmatists<sup>84</sup> to his pantheon of masters of coping, Henry David Thoreau and Huckleberry Finn. White explains the linkage between these pragmatically virtuous characters:

When Thoreau withdraws from Concord to Walden to spend two years living in a hut in the woods, what is he seeking? Not money, not fame in the usual sense, but a different kind of existence, more fully attuned to the natural world and to his own imaginative capacities. He has found the ways of thinking of the world and himself that are offered by what he calls “Concord” to be inadequate, dead, in a deep way intolerable; and he sets himself the task of fashioning another. Walden will be his world elsewhere. Or consider Huckleberry Finn, telling us the story of his life as a marginal figure, living half in the woods with Pap, half in town with the Widow, none of it making sense to him. When he escapes to the life on the raft with Jim, he finds an existence full of value and significance, for a crucial part of which—his friendship with Jim—he has almost no explicit language and with which the language he does have, of slavery and race, is totally incompatible. As Huck lives this life and tells us about it he desperately seeks to understand his natural and social worlds—to make sense of them and to define himself in relation to them—in a way that will reflect his own

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82. POSNER, *supra* note 80, at 26-27 (footnotes omitted) (emphasis added).

83. JAMES BOYD WHITE, *THE EDGE OF MEANING* 9 (2001).

84. *Cf.* ROBERT SAMUEL SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982).

experience: the experience of his own mind and feelings, his experience of Jim. In this he never succeeds. Or take Odysseus . . . .<sup>85</sup>

For Posner and White, then, pragmatists search, trying to find meaning in their lives (through language and through ineffable insight), and sometimes succeed and sometimes fail. But, they *keep trying* on the road to enlightenment. As Karen Armstrong explains, Siddhartha Gotama—the Buddha—kept trying to find practical, skillful ways to engage the world.<sup>86</sup> According to Armstrong:

The Buddha had no time for doctrines or creeds; he had no theology to impart, no theory about the root cause of [suffering], no tales of an Original Sin, and no definition of the Ultimate Reality. He saw no point in such speculations. Buddhism is disconcerting to those who equate faith with belief in certain inspired religious opinions. A person's theology was a matter of total indifference to the Buddha. To accept a doctrine on somebody else's authority was, in his eyes, an "unskillful" state, which could not lead to enlightenment, because it was an abdication of personal responsibility. He saw no virtue in submitting to an official creed. "Faith" meant trust that [*Nirvana*] existed and a determination to prove it to oneself. The Buddha always insisted that his disciples test everything he taught them against their own experience and take nothing on hearsay. A religious idea could all too easily become a mental idol, one more thing to cling to, when the purpose of the [truth] was to help people to let go.<sup>87</sup>

A final insight on what I am trying to sketch as the pragmatic mood of the virtuous American lawyer comes from a book on the ancient Sumerians by Samuel Kramer.<sup>88</sup> According to Professor Kramer, the ancient Sumerians were remarkable for "their ideas, ideals, and values."<sup>89</sup> They were "[c]lear-sighted, levelheaded, [and] took a pragmatic view of life and, within the limits of their intellectual resources, rarely confused fact with fancy, wish with fulfillment, or mystery with mystification."<sup>90</sup> Indeed, the pragmatically virtuous lawyer that I have in mind would approach her role in a clear-sighted and levelheaded fashion—striving to do good, but well aware of the rough and tumble demands of the legal profession.

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85. WHITE, *supra* note 83, at 8-9.

86. KAREN ARMSTRONG, *BUDDHA* (2001).

87. *Id.* at 100-01.

88. SAMUEL NOAH KRAMER, *THE SUMERIANS: THEIR HISTORY, CULTURE, AND CHARACTER* (1963).

89. *Id.* at 4.

90. *Id.*

*B. Ten Virtues: A Ranking and Discussion*

With the pragmatic mood in mind,<sup>91</sup> how might we articulate the top lawyerly virtues and how would these virtues be ranked? My impetus for this challenging undertaking is a book, by Michael H. Hart, that ranked and discussed the 100 “[m]ost [i]nfluential [p]ersons [i]n [h]istory.”<sup>92</sup> Yet, my purpose in writing about the top ten lawyerly virtues goes beyond mere parlor games or intellectual sport. First, I hope to stir up interest in the legal profession concerning virtuous traits for lawyers. Second, I seek to motivate law students and lawyers to reflect on how they can improve their lives as attorneys and provide greater value to their clients. Third, I aspire to improve the pursuit of justice, consistent with American ideals, by encouraging the nearly one million American lawyers to think about how individual lawyerly virtues can add to (or take away from) our highest principles as a nation.<sup>93</sup>

As I explain in the remainder of this Article my list of the top ten pragmatic virtues for American lawyers is as follows:

1. Balance
2. Integrity
3. Idealism
4. Compassion
5. Courage
6. Creativity
7. Energy
8. Justice
9. Discipline
10. Perseverance<sup>94</sup>

The discussion is tentative and a work-in-progress; it is a *précis* for a book length treatment of the subject that I am in the process of writing.

1. Balance

Balance connotes harmony and proportionality. This harmony involves giving each demand in our lives its appropriate due. It also encompasses counteracting or neutralizing the weight or importance that you have been giving to something in the past (measured in time, money, effort, attention,

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91. *See supra* notes 80-90 and accompanying text.

92. MICHAEL H. HART, *THE 100: A RANKING OF THE MOST INFLUENTIAL PERSONS IN HISTORY* (1978).

93. For a powerful discussion of the importance of American principles as part of American statecraft, see GARY HART, *THE FOURTH POWER: A GRAND STRATEGY FOR THE UNITED STATES IN THE TWENTY-FIRST CENTURY* (2004).

94. *See infra* notes 95-336 and accompanying text.

and concern) with the realization that you need to devote more resources to something else. This “something else” might be an existing claim or a brand new claim.

Psychological and spiritual teachings increasingly suggest that a healthy individual is one who is able to balance his or her *personal life* (health, lover, children, family, friends) with his or her *professional life* (money, competence, achievement, colleagues, advancement) and with something less concrete than these concerns: *spiritual life*. Spirituality might involve one’s religious faith—attending weekly services involving meaningful rituals; meditations and prayers that resonate with our heritage or supernatural beliefs. Spirituality might also, or alternatively, focus on contemplation—soaking up the sights and sounds and fragrances of nature, reading philosophically edifying books, or the giving of yourself to a morally rewarding activity (like serving donated food to the poor or advancing the rights of the unpopular).

Being balanced is not quite the same thing as being organized. Being organized is a good place to start, however, because it is a bit easier to think about. Turning to the matter of law school and the importance of organizing an exam answer, consider what Professors Helene and Marshall Shapo have to say. They contend:

[T]he reader of an exam will appreciate it if she discerns a logical framework for your answer. That does not mean that the professor will not dig out the analysis if it is there. It does mean that between two answers that arrive at the same analytical conclusion, the one that shows its process of reasoning more clearly will receive the better grade. If that somehow seems unjust to you, ask yourself a couple of questions. Don’t you think judges would value a logical progression of argument in briefs? Don’t you think that clients would value organization in their lawyers’ memoranda?<sup>95</sup>

So being organized as a law student, as a practicing lawyer, as a judge—as a human being—is something that other people in the world whom we value think is important. Why is this so? Two answers suggest themselves. First, being organized helps other people understand us better. Language being an imperfect means of communication, when someone is disorganized in the way he talks or writes, other people must try to interpret exactly what he means, precisely where he is coming from. This creates excessive uncertainty. Second, disorganization tends to make people ill at ease. Whether the disorganization is in the clutter of a room, in the chaos of a letter, or in the disjointedness of spoken words, a lack of order will usually make others uncomfortable because, from an aesthetic standpoint, humans appreciate symmetry and structure.

Balance, though, is a quality that goes beyond being organized. It is poise. It is self control of one’s emotions, one’s work, one’s time, and one’s

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95. HELENE SHAPO & MARSHALL SHAPO, LAW SCHOOL WITHOUT FEAR: STRATEGIES FOR SUCCESS 177 (2d ed. 2002).

thoughts. It is imperturbability and unruffledness that conveys a fundamental attitude that Rudyard Kipling alluded to in his famous poem, “If:” keeping your head when all around you others are losing theirs.<sup>96</sup> It is a frame of mind that communicates in a non-verbal way: “*I know* that I know;” “*I care* about you enough to tidy up a bit;” “I am *glad* that I have this opportunity to create some harmony in both of our lives.”

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96. See RUDYARD KIPLING, *If*, in GREAT ENGLISH POETS: RUDYARD KIPLING 49 (Geoffrey Moore ed., 1992). Kipling’s poem is a mediation (albeit somewhat dated and sexist) on the deep meaning of the virtue of balance:

If you can keep your head when all about you  
Are losing theirs and blaming it on you,  
If you can trust yourself when all men doubt you,  
But make allowance for their doubting too;  
If you can wait and not be tired by waiting,  
Or being lied about, don’t deal in lies,  
Or being hated, don’t give way to hating,  
And yet don’t look too good, nor talk too wise:

If you can dream—and not make dreams your  
master;  
If you can think—and not make thoughts your  
aim;  
If you can meet with Triumph and Disaster  
And treat those two imposters just the same;  
If you can bear to hear the truth you’ve spoken  
Twisted by knaves to make a trap for fools,  
Or watch things you gave your life to, broken,  
And stoop and build ‘em up with worn-out tools:

If you can make one heap of all your winnings  
And risk it on one turn of the pitch-and-toss,  
And lose, and start again at your beginnings  
And never breathe a word about your loss;

If you can force your heart and nerve and sinew  
To serve your turn long after they are gone,  
And so hold on when there is nothing in you  
Except the Will which says to them: ‘Hold on!’

If you can talk with crowds and keep your virtue,  
Or walk with Kings — nor lose the common touch,  
If neither foes nor loving friends can hurt you,  
If all men count with you, but none too much;  
If you can fill the unforgiving minute  
With sixty seconds’ worth of distance run,  
Yours is the Earth and everything that’s in it,  
And — which is more — you’ll be a Man, my  
son!

*Id.* at 49-51. Apologies to twenty-first century women; hopefully one can imagine a modern version talking about being a “woman, my daughter!”

Without balance there can be little accomplishment.

## 2. Integrity

Integrity has a twofold definition today. First, integrity means to be *upright*—to exhibit decency, honor, principle, morality, and goodness. A secondary meaning of integrity, however, relates to *wholeness*. Integrity, in this sense, is defined as totality, completeness, unity, oneness, togetherness, coherence, consistency and validity.

In being upright, a lawyer or law student exhibits wholeness. Without an unwavering commitment to being good, decent, and honest, legal professionals become fractured and two-faced. They gain notoriety, in such circumstances, for manipulation and dissembling.

To begin to appreciate the importance of integrity to the ultimate success of a law student or a lawyer, a brief explanation of Aristotle's *Theory of Rhetoric* may be instructive.<sup>97</sup> According to Aristotle, the persuasiveness of any speech is dependent on a combination of three essential elements that must be blended into a single whole: *logos*, *ethos* and *pathos*. *Logos* encompasses the logical force of an argument—the facts and figures; the inferences and deductions to be drawn from the evidence. *Ethos* is fashioned by the reputation of the advocate—his or her renown for good deeds, truth-telling, and honest dealing. *Pathos* involves the emotional force of the argument—the human drama of conflict and tragedy; of suffering and striving. To Aristotle's way of looking at advocacy, the success or failure of a pleader of causes depends on the unity of logic, reputation, and emotion leading to an unshakable conviction that the champion of an argument is a person of upright character.

Aristotle's illuminating theory of persuasion through integrity—rightly understood as the *gravitas* or substance that occurs when the sum of logic, emotion and reputation turns out to be greater than the sum of the parts—applies to *everything* a lawyer does: to the advice given a wealthy client on drawing up an estate plan that will be equitable and just; to a demand letter written on behalf of an injured person to a corporation allegedly liable for the client's losses; to an address directed at a local planning board, seeking a variance from a zoning code for a developer.

The importance of integrity to a lawyer or law student's ultimate success in the legal profession can be further understood by plumbing the essential details of the way Abraham Lincoln studied and practiced law while leading the life of an upstanding citizen. In this regard, I strongly urge all lawyers and lawyers-to-be to read and study Professor William Lee Miller's masterful book, *Lincoln's Virtues*.<sup>98</sup> Moving to Springfield, Illinois as a young,

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97. For an excellent short book on Aristotle's theory of rhetoric, see MORTIMER J. ADLER, *HOW TO SPEAK, HOW TO LISTEN* 29-45 (1983).

98. WILLIAM LEE MILLER, *LINCOLN'S VIRTUES: AN ETHICAL BIOGRAPHY* (2002).

uneducated man, Lincoln borrowed *Blackstone's Commentaries* from his lawyer-friend, John T. Stuart, and studied these tomes. Lincoln had the integrity to take whatever case came into the three partnerships that he served in during his twenty-four year career as a practicing lawyer—throwing the whole weight of his intelligence, wit, and ingenuity into the matter.<sup>99</sup> During his long career as a trial lawyer he argued cases “about ‘malicious mischief’ and fraud and ‘ejectment’ and foreclosure and murder and bastardy and divorce and slander and adultery and ‘gaming’ and desertion and manslaughter, and assumpsit and replevin and mandamus, and the trespass of cattle and the payment for arresting a horse thief”<sup>100</sup> graduating to cases which dealt with the infringement of a water wheel patent, land disputes, railroad right of way disputes and winning tax exempt status for what was to become his most lucrative client—the Illinois Central Railroad.

Perhaps the most striking example of Lincoln’s integrity was the way that he handled a snub in the course of defending a patent infringement case brought in 1854 by Cyrus McCormick against John Manny of Rockford, Illinois. McCormick claimed that Manny had violated one of McCormick’s patents for his reaper. Lincoln had been brought in as part of the defense team by the Philadelphia and Washington, D.C. lawyers heading up the case and was to act as local counsel because the matter was set to be tried in the United States District Court for the Northern District of Illinois in Chicago. Lincoln took the initiative in investigating the facts of the case by making a trip to inspect his client’s reaper in Rockford, performing legal research, and writing out a long legal argument.

Yet, the lead eastern lawyers in the case—deciding secretly that they wanted to retain a more impressive and formally educated local counsel, Edwin M. Stanton—intentionally kept Lincoln in the dark: they ignored his correspondence, they failed to notify him that the case had been transferred to Cincinnati, Ohio, and they purposefully refrained from sending him the pleadings in the litigation. Undeterred, Lincoln found out, through direct communications with the client, of the new venue and trial date for the case and took the trouble to travel by train to Cincinnati for what, he thought, would be his participation in the defense of *McCormick v. Manny*. To add insult to injury, Stanton and his colleagues from Philadelphia and Washington, D.C. refused to walk with Lincoln from the Cincinnati railroad platform (where Lincoln had, by chance, met his fellow lawyers) to their hotel; refused to have him sit at counsel table with them; refused to invite him to dinner during the trial; and refused to even look at the written argument Lincoln had prepared for the case. Lincoln chose to listen closely to the arguments made

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99. Lincoln practiced law in three partnerships: first as a junior partner with John T. Stuart from 1837-41; second as a junior partner with Stephen T. Logan during 1841-44; and, finally, heading up his partnership with William H. Herndon during 1844-61. See generally JOHN P. FRANK, *LINCOLN AS A LAWYER* (2nd ed. 1963).

100. MILLER, *supra* note 98, at 226.



by the lawyers in the case to learn more about law and advocacy by watching the full blown, multi-day trial.

Ultimately, Lincoln refused the agreed-upon legal fee that he had been promised when the Washington lawyer sent him a check in the mail, writing back that because he had made no actual argument in the case he did not deserve any fee beyond the original retainer that he had received when first approached about the case by the eastern lawyers. What is even more amazing—and telling of Lincoln's integrity—is that seven years later, in 1862, when he, as the President of the United States, needed to replace his original Secretary of War, he decided to turn to *Edwin M. Stanton* who (despite his and his colleagues' outrageously rude treatment of Lincoln some ten years before and Stanton's attacks on Lincoln during the presidential campaign of 1860) had gained the reputation of being an able government administrator, albeit as a Democrat, and not a Republican like Lincoln. Lincoln did not succumb to understandable vindictiveness. Lincoln did the best that he was able to do in 1854 and 1855 after being retained as local counsel. Lincoln swallowed his personal pain and injury and magnanimously returned the check for legal fees because he thought that he had not earned the extra money. Lincoln, as President, put the Nation's interests over his own bruised ego in choosing to appoint Stanton as the Secretary of War. Indeed, a glimpse of Lincoln's inner thoughts on the importance of integrity—as a lawyer, as a statesman, as a human being—can be achieved by considering his own words: “I am not bound to win, 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;”<sup>101</sup> “I desire so to conduct the affairs of this administration that if at the end, when I come to lay down the reins of power, I shall at least have one friend left, and that friend shall be down inside me;”<sup>102</sup> “If you are resolutely determined to be a lawyer, the thing is more than half done already;”<sup>103</sup> “Discourage litigation. Persuade your neighbors to compromise whenever you can . . . . As a peace maker the lawyer has a superior opportunity of being a good [person]. There will still be business enough.”<sup>104</sup>

Following the path of integrity in the practice of law also involves making sure that one makes and takes the time to contribute—free of charge—to the public interest. In a way, therefore, taking time to sit on the board of directors of a local non-profit nursing home, or representing, *pro bono*, in a private nuisance lawsuit, a farm family who suffers involuntary exposure to pesticides from downwind drift coming from a mixing station on a neighboring agricultural cooperative's land, or volunteering to serve on a county hospital's citizen advisory board, or offering to distribute campaign literature for a candidate for state senate—all contributions of time, talent and

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101. 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).

102. *Id.* at 44.

103. *Id.* at 115.

104. *Id.*

*integrity* to the public interest—also implicate the first lawyerly virtue of *balance*, discussed above.<sup>105</sup>

In sum, therefore, seeking integrity is a necessary secondary virtue of being a good lawyer or law student because, without integrity, one will—sooner or later—fail to persuade, fail to attract new clients, and fail to live up to the lofty expectations that the American people harbor for the legal profession.<sup>106</sup>

### 3. Idealism

Idealism is the fuel that powers acts of lawyerly service and sacrifice. Every act of idealism—quixotic, romantic, optimistic, starry-eyed, or visionary advocacy for a cause, a person, or an institution—expresses a lawyer's highest self. And, every missed opportunity to be idealistic diminishes a lawyer's opportunity to make a difference in his or her chosen profession.

Lawyerly idealism is similar to idealism as a philosophical concept in that both emphasize the importance of “spirit” or “consciousness” in viewing the world.<sup>107</sup> Thus, both the idealistic lawyer and the philosopher of idealism would agree that it is possible to transcend the here and now. In particular, the virtue of idealism allows the lawyer to contend with injustice and bone-headed laws for as long as it takes to reverse a client's misfortune. Moreover, the idealistic lawyer and the philosopher of idealism would probably join with one another in the Hegelian belief that the universe is governed by a dialectical invisible hand such that even bad can be transcended to produce good.

A proper understanding of idealism for a law student or a lawyer requires, first, a facility for shrugging off defeat—for being able to continue to fight the good fight. As explained by the late Robert F. Kennedy—a lawyer, U.S. Attorney General, U.S. Senator, and candidate for President of the United States until his brutal assassination in 1968—this requires perspective:

We should, I believe, beware of the pitfalls described by Taine: Imagine a man who sets out on a voyage equipped with a pair of spectacles that magnify things to an extraordinary degree. A hair on his hand, a spot on the tablecloth, the shifting fold of a coat, all will attract his attention; at this rate, he will not go far, he will spend his day taking six steps and will never get out of his room.

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105. See *supra* notes 95-96 and accompanying text.

106. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 272-80 (Everyman's Libr. ed., 1994). Indeed, according to De Tocqueville, “[a]s the lawyers form the only enlightened class whom the people do not mistrust, they are naturally called upon to occupy most of the public stations.” *Id.* at 279.

107. For a brief discussion of the importance of spiritual values in law, see Robert F. Blomquist, *Law and Spirituality: Some First Thoughts on an Emerging Relation*, 71 UMKC L. REV. 583 (2003).

We have to get out of the room.<sup>108</sup>

Second, the virtue of lawyerly idealism demands that the accumulation of riches not be the focus of a career in the law. In words that should have a special resonance with lawyers and lawyers-to-be, Robert F. Kennedy also observed, in this regard, that another great task “is to confront the poverty of satisfaction—a lack of purpose and dignity—that inflicts us all. Too much and too long, we seem to have surrendered community excellence and community values in the mere accumulation of material things.”<sup>109</sup>

In the third place, idealism in the law requires a youthful attitude: “This world demands the qualities of youth: not a time of life but a state of mind, a temper of the will, a quality of the imagination, a predominance of courage over timidity, of the appetite for adventure over the love of ease.”<sup>110</sup>

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Idealism’s sister is Hope. Whether or not our hopes involve justice for a favored cause, the compensation for an injured client, or the vindication of a cherished belief, hope is a foundation that makes idealism socially attractive and worthwhile. As explained by a modern Englishman:

Hope is a virtue independently of its [realization]; it is an intrinsic value, an end in itself, allied to courage and imagination, a positive attitude full of possibility and aspiration. For that reason you discover more about a person when you learn about his hopes than when you count his achievements, for the best of what we are lies in what we hope to be.<sup>111</sup>

Idealism’s brother is Change. An idealistic lawyer knows that, to paraphrase the words of Roscoe Pound, while law needs to be stable, it cannot stand still; it always must change—sometimes dramatically, sometimes interstitially—and this change can be exciting and worthwhile.<sup>112</sup> As former educator and U.S. Secretary of Health, Education and Welfare, John W. Gardner, wrote in his vital book, *Self-Renewal*:

For men and women who have accepted the reality of change, the need for endless learning and trying is a way of living, a way of thinking, a way of being awake and ready. Life isn’t a train ride where you choose your destination, pay your fare and settle back for a nap. It’s a cycle ride over uncertain terrain, with you in the driver’s seat, constantly correcting your balance and determining the

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108. MAKE GENTLE THE LIFE OF THIS WORLD: THE VISION OF ROBERT F. KENNEDY 74-75 (Maxwell Taylor Kennedy ed., 1998) (internal quotation marks omitted).

109. *Id.* at 79.

110. *Id.* at 82.

111. A.C. GRAYLING, MEDITATIONS FOR THE HUMANIST: ETHICS FOR A SECULAR AGE 36 (2002).

112. ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (Harold Dexter Hazeltine ed., Peter Smith 1967) (1923).

direction of progress. It's difficult, sometimes profoundly painful. But it's better than napping through life.<sup>113</sup>

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Fortunately, we can look to paragons of idealism in the practice of law. One type of idealistic lawyer is known as a cause lawyer. "Cause lawyering is a concept that brings together a number of modes of legal practice (public interest lawyering, civil rights and civil liberties lawyering, feminist lawyering, poverty lawyering, and the like under a single terminological umbrella)."<sup>114</sup> The common purpose of cause lawyers is to advance social or political causes that they believe in. By way of illustration, a cause lawyer may be employed by an organization—such as the NAACP Legal Defense Fund, the Environmental Defense Fund, the National Organization of Women, or Amnesty International—to pursue, on a full-time basis, the cause of a specific organization (for instance: civil rights, environmentalism, feminism, or human rights). Alternatively, some lawyers who work for private law firms may devote a portion of their time to specific causes, while earning fees from individual or corporate clients to help subsidize the cause lawyering.

Another type of idealistic lawyer is a volunteer to community non-profit organizations that may require legal expertise in the running of their organizations. The range of non-profit lawyering activities is broad. Some examples include the following:

counsel to a local United Way organization facing questions of improprieties in paying the compensation package of the full-time executive director;

legal advice to a community advocacy group for mentally retarded individuals regarding state law standards and procedures for assuming legal guardianship of disabled adults;

legal services for a church in crafting a parking lot compact with a local business that provides for the sharing of scarce parking spaces for both the for-profit and the church.

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One legal commentator, James Coleman, Jr., wrote that "[w]hat sculpture is to marble, idealism is to the legal profession."<sup>115</sup> We should take special note of Coleman's perspective on the rewards of being a lawyer; he contends that "despite the bad apples and the fact a lot of idealism seems to have faded, the underlying thrust of being a lawyer has given me joy, enthusiasm, and

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113. JOHN W. GARDNER, *SELF-RENEWAL: THE INDIVIDUAL AND THE INNOVATIVE SOCIETY*, at xii (rev. ed. 1981).

114. Stuart A. Scheingold, *Cause Lawyers*, in *THE OXFORD COMPANION TO AMERICAN LAW* 88 (Kermit L. Hall ed., 2002).

115. James Coleman, Jr., *A View From the Center: Professionalism Within the Profession*, 65 *TEX. B.J.* 926, 929 (2002).

relationships I could not find in any other occupation or profession.”<sup>116</sup> Moreover, he argues that: “I truly like lawyers (most of them) — their intellectual stimulation, their wide range of interests, their willingness to defend some of the most obscure causes, and their overall humanity”<sup>117</sup> in pursuing their profession.

Yet, some in the legal community are concerned that idealism is no longer taught in law school as a virtue worth cultivating. Shin Imai puts it this way: “As lawyers, we are taught from the moment we enter law school to temper our emotionalism, quash our idealism.”<sup>118</sup> Michael B. Keating, a former President of the Boston Bar Association, expresses the problem in the following language:

I worry about the future of our profession. Not that our services will be less important or less economically self-sustaining. I worry that we are losing the idealism that made practicing law a great profession. By idealism I mean the belief that practicing law is a calling to service — to our clients, to our community and to our system of justice. That idealism is what should give value to the endeavor because it shapes what we do with opportunity. I am particularly concerned that this idealism is no longer advanced to the younger generation of lawyers as an important part of our profession and — equally important — their development as lawyers. I do not think this bodes well for the future of the profession.<sup>119</sup>

What is the problem? Why does idealism suffer in the practice of law in America in the early twenty-first century? What is to be done? Perhaps, Professor Thomas L. Shaffer has a point when he argues that the most serious ethical issue facing American lawyers is their love for excessive amounts of money in remuneration for their services.<sup>120</sup> Maybe law schools should teach law students “to do good”—to be concerned about representing the poor.<sup>121</sup> As part of this new curriculum of idealism, it might be a good idea to explain that time is a precious commodity for a lawyer and that taking time to meditate “in a less pressured environment, where there is an opportunity for reflection” often yields a “less self-serving” and “more idealistic” vision of one’s professional role.<sup>122</sup> Moreover, to pursue idealism in his or her life, a lawyer should try to avoid “dual personalities;” to realize that like the attorney-

116. *Id.*

117. *Id.*

118. Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering*, 9 CLINICAL L. REV. 195, 206 (2002) (attributing Patricia Williams).

119. Michael B. Keating, *Is it Too Late to Preserve our Idealism?*, BOSTON B.J., May-June 2002, at 2, 2.

120. Thomas L. Shaffer, *Jews, Christians, Lawyers, and Money*, 25 VT. L. REV. 451 (2001).

121. See Stephen Wizner, *Can Law Schools Teach Students to Do Good? Legal Education and the Future of Legal Services for the Poor*, 3 N.Y. CITY L. REV. 259 (2000).

122. See Eleanor W. Myers, “Simple Truths” *About Moral Education*, 45 AM. U. L. REV. 823, 853-54 (1996) (quoted in Calvin G.C. Pang, *Eyeing the Circle: Finding a Place for Spirituality in a Law School Clinic*, 35 WILLAMETTE L. REV. 241, 271 n.75 (1999)).

protagonist, Atticus Finch, in Harper Lee's novel, *To Kill a Mockingbird*,<sup>123</sup> "she can't live one way in town and another way in her home;"<sup>124</sup> to fathom the wisdom, however, that sometimes a lawyer looking for answers in his or her quest for idealism needs to change jobs, seek a smaller firm, or seek a less-harried lifestyle.<sup>125</sup> Indeed, for law schools to inculcate the need for law students to pursue idealistic goals in their chosen profession, learning to "think like a lawyer," as explained by Yale Clinical Professor of Law Stephen Wizner, might not be enough.<sup>126</sup> Wizner trumpets the advice given to new law students by Abraham Lincoln in 1850:

There is a vague popular belief that lawyers are . . . dishonest . . . . [But] . . . [l]et no [one] choosing the law for a calling . . . yield to the popular belief—resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.<sup>127</sup>

Idealism, in sum, is a destabilizing virtue. It undercuts one's enemies. It attracts energy and good fortune. It does not depend on cognitive activity, but mixes well with creativity. Ultimately, I believe that idealism is suffused with generosity. The Australian writer, Stephanie Dowrick, speaking of generosity in the following passage was, also, speaking of idealism:

If every one of our lives is to be worth living, and if we are to come to realise in time that our planet is worth saving, it will be because we have allowed ourselves to discover the radiant power and ease, magic and beauty of generosity: the spaciousness of it, the joy of it, the colour and wonder of it; the immensity of it, the infinity of it.

*It is in giving that we receive/It is in pardoning that we are pardoned; and/It is in dying that we are born to eternal life.*<sup>128</sup>

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123. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

124. Hon. Bernard E. Boland, *A New Professional Identity for Bench and Bar: Pour Rambo et Snidely un Kepi Blanc*, 25 WM. MITCHELL L. REV. 117, 133 (1999) (internal quotation marks omitted) (citations omitted).

125. *Id.*

126. See Stephen Wizner, *Is Learning to "Think Like a Lawyer" Enough?*, 17 YALE L. & POL'Y REV. 583 (1998).

127. *Id.* at 583 (quoting Abraham Lincoln, *Fragment: Notes for a Law Lecture*, July 1, 1850, in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 82 (Roy P. Basler et al. eds., 1953)).

128. STEPHANIE DOWRICK, *FORGIVENESS AND OTHER ACTS OF LOVE* 233 (1st Am. ed. 1997).

#### 4. Compassion

According to the Once-ler, a character in my favorite Dr. Seuss book, *The Lorax*, as he surveys a landscape of denuded trees brought about by his own avarice:

“But *now*,” says the Once-ler, “Now that *you’re* here, the word of the Lorax seems perfectly clear. UNLESS someone like you cares a whole awful lot, nothing is going to get better. It’s not.”<sup>129</sup>

Michael N. Dolich, a young Pennsylvania lawyer who has embraced the concept of being a “holistic lawyer,” seems to mirror the Lorax’s credo of *caring*. According to Dolich, holistic lawyers understand how their thoughts and actions impact others and the whole world.<sup>130</sup> Holistic lawyers learn that “the quality that elevates us from being a great lawyer and moves us into the next level is *simply caring*.”<sup>131</sup> Dolich came to his insight after a period of travel, study, and reflection, triggered when he quit his lucrative personal injury law practice, sold his home, and stored all of his possessions in his friend’s basement. He made the following startling assertion which, at its heart, emphasizes the importance of lawyerly compassion as a professional virtue:

Most of us are not aware of how meaningful our job really is. I am not writing about an intellectual exercise in how the legal system impacts our culture, for all we know that it does. The new challenge facing our profession is finding a way to experience, in a fully conscious way, how our actions and thoughts impact each and every other person in the never-ending web of relationships called life. In essence, I am referring to the conscious evolution [lawyers must go through] from intellectually knowing our work has meaning into the actual experience and feeling of such meaning. When this happens our work [as lawyers] becomes joyful.<sup>132</sup>

Professor Leonard L. Riskin, in a recent article, picked up on the holistic lawyer approach advocated by Dolich by cataloguing a number of “new” approaches to law school and lawyering.<sup>133</sup> According to Riskin, these new approaches focus on “the need for a special kind of ability to deliberate, which includes both compassion and detachment.”<sup>134</sup> These approaches:

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129. DR. SEUSS, *THE LORAX* (1971).

130. Michael N. Dolich, *Finding Joy in the Practice of Law*, PA LAW, Jan.-Feb. 2003, at 34, 34.

131. *Id.* at 38 (emphasis added).

132. *Id.* at 34.

133. Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002).

134. *Id.* at 19 (citing ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 72 (1993)).

[B]ear names such as therapeutic jurisprudence; preventative law; holistic lawyering; interest-based negotiation (sometimes called problem-solving, collaborative, or integrative); collaborative law; lawyering with an ethic of care; affective lawyering; the lawyer as problem solver; the lawyer as healer; transformative mediation or facilitative-broad mediation; and [r]estorative [j]ustice.<sup>135</sup>

Riskin goes on to argue that these various types of “[m]indfulness mediation” can “help a lawyer deal with selfish needs . . . by helping the lawyer develop a sense of compassion for and connection with other people, especially his clients and others affected by him (including those sitting across the table).”<sup>136</sup> In the final analysis, however, for Riskin, the lawyerly virtue of compassion is an instrumental means of helping to achieve the ultimate lawyerly goal of “clarity and delicate balance essential for making wise choices.”<sup>137</sup>

Steven Keeva, author of a book on “transforming” the practice of law,<sup>138</sup> has pointed out how lawyers’ lack of compassion and empathy for their clients often gets in the way of their ability to render appropriate legal advice and care. As he wrote in a recent article:

Among the complaints the non-lawyer public makes about lawyers, many suggest a sense that they tend to put process above people. In fact, this complaint seems to be emblematic of a whole range of grievances that describe a profession populated by practitioners who are more concerned with the case—that is, an artificial construct—than with the person sitting across the desk. . . .

My impression . . . is that what troubles so many [former clients] is a sense that certain mindsets and attitudes stand between them and the lawyers they hire. Several implied questions are clear, including: why can’t they (i.e., lawyers) just talk to me like normal human beings? What is it about practicing law that makes people so unreal, so detached from the rhythms and concerns of everyday life? I believe that research suggesting that non-lawyers see lawyers as *dominant and aggressive professionals who are lacking in caring and compassion*, supports my impression, since real people let their guards down now and then and do not frame every situation in dry, legalistic terms. *They understand that people who came to them in need, often at moments of great suffering, can use a strong, but also caring hand.*<sup>139</sup>

Indeed, Keeva advocates the ambitious goal of lawyers and law students of realizing their “fullest flowering as . . . compassionate, conscious human

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135. *Id.* at 19-20 (footnotes omitted).

136. *Id.* at 56 (footnote omitted).

137. *Id.* at 66.

138. STEVEN KEEVA, *TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE* (1999).

139. Steven W. Keeva, *Practicing from the Inside Out*, 7 HARV. NEGOT. L. REV. 97, 101-02 (2002) (emphasis added) (internal quotation marks omitted) (footnotes omitted).



being[s].”<sup>140</sup> Perhaps the potential for the practice of compassionate lawyering has undergone a sea change as a result of September 11, 2001, which has induced many Americans, including lawyers, “to re-examine their lives, their relationships, values and purposes on this earth.”<sup>141</sup> A compassionate lawyer, looking at the big picture of a client’s overall interests as opposed to the limited context of a specific dispute, chooses to “take more time with a client to understand the client’s life and lifestyle and the client’s business, going beyond the immediate facts of the proposed deal or the perceived conflict.”<sup>142</sup> In structuring a transaction or a dispute settlement, a compassionate lawyer can meet his or her basic obligation to a client while providing healing advice that can address not only the client’s immediate problem but, perhaps, prevent it from happening again in a different form.<sup>143</sup> The experience of an environmental lawyer, Tom Lynch, who represented a corporate client with a pollution problem at one of its facilities, is instructive of the power of being a compassionate attorney:

The company prudently took immediate damage-control measures to address the contamination problem quietly and efficiently. For several years, on Tom’s advice, it avoided communication with the media and its neighbors out of fear that disclosing past problems might lead to litigation. When a company representative had to appear at a public meeting as part of the process to upgrade its treatment system, Tom was chosen to speak. He had just finished reading *Seeing Law Differently, Views From a Spiritual Path* by Alain Reid, a Canadian lawyer, and the book gave him an inspiration. At the meeting, he apologized to the community for having advised his client to maintain a low profile. Instead, he and his environmental consultant disclosed precisely what had been done to remediate the problem and invited the community to participate in plant tours during which the state-of-the-art environmental clean-up equipment could be examined. The community’s concern and anger dissipated by this cathartic event, and the community has worked with the company since then. Expensive litigation was avoided, and the relationship between the company and the community was significantly improved. This approach was consistent with the basic premise and major tenets of holistic and compassionate lawyering. Compassion, information sharing, cooperation and understanding on both sides encouraged community and commonality of purpose. There was no call for blame and no need for the waste of resources in litigation.<sup>144</sup>

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140. *Id.* at 105 (footnote omitted).

141. Robert P. Borsody, *A New Paradigm for Lawyers?*, 74 N.Y. ST. B.J., Mar.-Apr. 2002, at 54, 54.

142. *Id.*

143. *Id.* at 54.

144. *Id.* at 54-55. See also Jason S. Marks, *Legally Blind? Reevaluating Law School Admissions at the Dawn of a New Century*, 29 J.C. & U.L. 111, 146-47 (2002) (“Law schools, regardless of selectivity, rightly look for candidates who have proven academic ability and higher reasoning skills — surviving law school and thriving as a lawyer requires discipline, stamina and

This account of compassionate lawyering brings to mind the need to overcome fear in the process of finding our professional style. It reminds me of the marvelous Albert Brooks film, *Defending Your Life*.<sup>145</sup> In that movie, the protagonist finds himself at an intermediate waystation, called Judgment City, after he dies, charged with the task of justifying the life he lived on earth. If he “wins” he goes onto a heavenly afterlife; if he loses, he gets sent back to earth to have another go at living. During the course of a trial-like proceeding, taking several days in Judgment City, Brooks’ character is confronted with multiple times during his life (all mysteriously “recorded” and played back in the courtroom on a big screen) when he experienced *fear*: fear of standing up to a schoolyard bully; fear of expressing his affection for the woman he loved; fear of the unknown. The lesson of this great movie, applied to the law, is that while we do not really know what will greet us on this side of life, or how we will ultimately be held to account, we should have the courage and fortitude to go against the grain; to practice our craft as lawyers in a deeply compassionate way—being mindful of the long-range, important interests of our clients and ourselves.

The virtue of compassion in the law, therefore, is related to the virtue of courage in the law—which will be discussed next.<sup>146</sup> The virtue of lawyerly compassion, moreover, is also related to the cognate virtue of integrity, discussed above.<sup>147</sup> As poignantly and beautifully expressed by Professor Loder:

The good news is nonetheless considerable for lawyers who do nurture integrity. Each temptation is at once an occasion for growth. Each caution is a call to conscientious reflection. A lawyer reaching for moral wisdom has unusual opportunities to enlarge perspective through exploring the moral personalities of others. Over time, this can enhance altruistic motivations and respect for the intrinsic worth of every person. In consciously trying to appreciate new perspectives to improve legal effectiveness, the conscientious lawyer regularly exercises moral skills like empathy, imagination, and critical judgment. These personal and interpersonal skills build fruitful relationships, and they also heighten sensitivity toward injustice in ways that can be legally as well as morally helpful. *Ideally, connecting with clients promotes sympathy and compassion* that propel the lawyer motivationally, and thus sustainably, toward *helping action*. The lawyer can incorporate the ability to recognize and correct injustice into her distinctive

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intellectual mettle. But being a good lawyer requires many other equally if not more valuable traits: integrity and ethics; empathy and the ability to listen; compassion and the capacity to recognize injustice and inequity; good temperament, patience and perseverance; creativity and the willingness to find ‘win-win’ rather than ‘win-lose’ solutions to controversies.”); Carrie Menkel-Meadow, *Can They Do That? Legal Ethics in Popular Culture: Of Characters and Acts*, 48 UCLA L. REV. 1305, 1310 (2001) (the good lawyer is one who is, among other things, “self-sacrificing” and “compassionate”).

145. *DEFENDING YOUR LIFE* (Geffen Pictures 1991).

146. See *infra* notes 149-74 and accompanying text.

147. See *supra* notes 97-106 and accompanying text.

integrity. On all but the most positivist notions of justice, this perceptual and affective equipment is invaluable.<sup>148</sup>

In sum, the virtue of compassion tugs on our consciences to go the extra mile, implores our better angels to forgive a past slight or injustice, summons our character to face a parade of horrors—to move on, declare victory, and realize that life is good.

### 5. Courage

Every law student and practicing lawyer will likely face moments when he is called upon to face fears, stand up for what is right, or dig down deep to find the mystic fuel of courage to do what must be done. Courage is a lawyerly virtue of great importance because lawyers are frequently called upon to represent unpopular clients or causes. And, sooner or later a lawyer will have to argue for acceptance of a novel legal argument before a court, legislature, or administrative agency.

We are blessed in our efforts to try to think about courage in a lawyer's professional life because there is a rich assortment of source material on the subject—in works on philosophy, in historical writings, in imaginative literature, in memoirs and letters of prisoners, soldiers, and adventurers.<sup>149</sup>

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148. Loder, *supra* note 58, at 869 (emphasis added) (footnote omitted).

149. One of my favorite books—in the genre of prison letters—is DIETRICH BONHOEFFER, *LETTERS AND PAPERS FROM PRISON* (Eberhard Bethge ed., 1971) (1970). In explaining the enormous courage that Bonhoeffer exhibited—leading up to his imprisonment by the Nazis—Professor J. Rufus Fears observed:

[T]o the puzzlement of his parents and others, he chose not to go into the academic side of theology, but became a pastor . . . developing a broad interest in the ecumenical church movement. So he came to America, and in New York of 1939, when it was clear the developments that Germany was going to undergo could not be stopped, he was urged by American friends to stay on, to become a member of something like the World Council of Churches and to pursue his interests in safety in America.

But he said, “No.” In a way, very much like Socrates, deciding to go to what he knew might be danger and death. He sailed back to Germany, and he said—again, reminiscent of Socrates, whom he so admired—“As soon as I was on that boat, my spirit became quiet, for I knew that I was doing what I was destined to do.”

1 J. RUFUS FEARS, *BOOKS THAT HAVE MADE HISTORY: BOOKS THAT CAN CHANGE YOUR LIFE*: 10-11 (2005).

Bonhoeffer—convicted of treason against Hitler's Third Reich—was executed by hanging on April 9, 1945, a few days before the end of the war in Europe.

The last thing that Bonhoeffer did before he was led to the scaffold was to take his book of Plutarch, which had been the last book sent to him at

A good book to start with is a work by a University of Michigan law professor, William Ian Miller, *The Mystery of Courage*.<sup>150</sup> This meditation on courage starts off with an introduction entitled “The Good Coward.”<sup>151</sup> Drawing upon a battlefield memoir by a Union soldier during the Civil War, Miller notes that those who have discussed the meaning of courage “place it either first among virtues” or close to the top.<sup>152</sup> He observes, in this regard, that “[c]onstrued narrowly as the capacity to face death in feud or war, courage was frankly granted to be necessary to defending self, family, and one’s own against external threat, and thus absolutely crucial to securing the space in which other virtues could develop.”<sup>153</sup> Moreover, Miller reflects that courage “[c]onstrued more broadly as fortitude . . . denote[s] a certain firmness of mind, a necessary component”<sup>154</sup> of all virtues. Miller realizes that it is important in thinking about courage to try to sketch out a psychology of courage. He poses a number of incisive questions on the subject:

[Courage] is clearly intimately connected with fear, but how? Does true courage mean possessing a fearless character, being a person who “don’t scare worth a damn,” as one soldier said of Ulysses S. Grant; or does it require achieving a state of fearlessness by overcoming fear so as to send it packing by whatever feat of consciousness or narcotic that can do the trick? Or does overcoming fear mean never quite getting rid of it, but just putting it in its proper place so that it doesn’t get in the way of duty? Or does it mean being gripped by fear, feeling its inescapable oppressiveness, its temptations for flight and surrender, yet still managing to perform well in spite of it?<sup>155</sup>

Miller goes on to note that while “[a]ll virtues have histories and sociologies,” the virtue of courage and its corresponding vice, cowardice, are “more at the mercy of social and cultural context than some of the simpler virtues and vices.”<sup>156</sup> Thus, while the simple virtue of temperance boils down to “don’t have more than *x* drinks, don’t eat until you get sick or fat, [and] don’t fornicate with more than one loved one and then not too much,”<sup>157</sup> the complex virtue of courage cannot be so easily mapped out. Using military metaphors that are potentially applicable to the practice of law, Miller makes the following argument in favor of acknowledging the complexity of courage:

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his request, and wr[ote] his name, Dietrich Bonhoeffer, on the front page, on the middle page, and on the back page.

*Id.* at 10.

150. WILLIAM IAN MILLER, *THE MYSTERY OF COURAGE* (2000).

151. *Id.* at 1.

152. *Id.* at 5.

153. *Id.*

154. *Id.* (internal quotation marks omitted).

155. *Id.* at 6 (footnote omitted).

156. MILLER, *supra* note 150, at 7.

157. *Id.*

The courage of aggression, the courage of offense, for instance, makes very different behavioral and psychological demands from the courage of defense; storming a wall requires a different kind of mustering of will and guts than enduring interrogation in an Argentinean prison or internment in a gulag or death camp. *There is a courage of dishing it out and a courage of taking it.* Not all that infrequently the same action can with justice be described as an example of courage or of cowardice: thus suicide and the problem of the good coward. And cowardice, which as an initial matter seems easier to get a grip on than courage, suffers from courage's complexity. What is the status of retreat? Of surrender? Of trickery and cunning? Of guerrilla warfare? Of politeness and good manners, tolerance and prudence?<sup>158</sup>

Political courage is analogous to the courage a practicing lawyer may have to endure, thus John F. Kennedy's *Profiles in Courage*<sup>159</sup> is also a worthwhile book for attorneys to peruse. The book is instructive not only because it portrays an assemblage of politicians who were trained as lawyers (such as John Quincy Adams, Daniel Webster, George Norris and Robert A. Taft), but also because it discusses the kinds of cases and controversies that practicing lawyers—by dint of their representation of controversial clients or unpopular causes—sooner or later get involved with. Indeed, the late President Kennedy summed up his book in language that should offer hope and inspiration for lawyers everywhere:

[T]he same basic choice of courage or compliance continually faces us all, whether we fear the anger of constituents, friends, a board of directors or our union, whenever we stand against the flow of opinion on strongly contested issues. For without belittling the courage with which [people] have died, we should not forget those acts of courage with which [people] . . . have *lived*. The courage of life is often a less dramatic spectacle than the courage of a final moment; but it is no less a magnificent mixture of triumph and tragedy. A [person] does what he must—in spite of personal consequences, in spite of obstacles and dangers and pressures—and that is the basis of all human morality.<sup>160</sup>

To be courageous, according to JFK, “requires no exceptional qualifications, no magic formula, no special combination of time, place and circumstance. It is an opportunity that . . . is presented to us all. Politics merely furnishes one arena which imposes special tests of courage.”<sup>161</sup> Thus, “[i]n whatever arena of life one may meet the challenge of courage, whatever

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158. *Id.* (emphasis added). For a recent novel (and now film) illustrating the complexities of courage and cowardice in wartime, see CHARLES FRAZIER, *COLD MOUNTAIN* (1997) (describing the odyssey of a wounded Confederate soldier leaving his military hospital where he was recuperating from war wounds and choosing to walk hundreds of miles home to western North Carolina).

159. JOHN F. KENNEDY, *PROFILES IN COURAGE* (1955).

160. *Id.* at 245-46.

161. *Id.* at 246.

may be the sacrifices he [or she] faces if he [or she] follows his [or her] conscience—the loss of his [or her] friends, his [or her] fortune, his [or her] contentment . . . each [person] must decide for himself [herself] the course he [or she] will follow.”<sup>162</sup>

In the realm of lawyerly courage, judges face a unique challenge. As explained by Professor Charles Fried, “[u]nlike lawyers who advocate for one party, unlike [law] professors who . . . kibitz on the sideline, the judge has to take a decision” and “live with the (internal) consequences of his decision.”<sup>163</sup>

At times, lawyers must stand up to their clients and exercise moral courage in giving advice. Professor Robert F. Cochran, Jr. makes an interesting distinction, in this regard, between weak and powerful clients, on the one hand, and weak and powerful lawyers, on the other hand. Cochran argues:

There are two factors that should influence the level of intensity with which the lawyer engages the clients: the balance of power between the lawyer and client and the danger that the actions being considered pose to other people. When the [predominance] of power [is] primarily on the lawyer’s side, the lawyer should hesitate to exercise power over the client. When the determinants are equal or primarily on the side of the client, the lawyer is unlikely to overcome the client and can feel freer to express opinions about the decisions that must be made. . . . If the lawyer is to involve the client in moral discourse and not dominate the client, she may need to act against her instincts. The powerful lawyer may need to work to respect the dignity of the weak client; the weak lawyer may need courage to confront the powerful client.<sup>164</sup>

Courage, according to Dean Bruce R. Jacob, is “[o]ne of the most important character traits of outstanding lawyers,” which, in his view, is “[c]losely related [to] the trait of independent-mindedness.”<sup>165</sup> As more fully explained by Jacob:

A lawyer must not be one who always runs with the crowd or feels pressured by society to conform to the common mold. He or she must have the intellectual integrity to make decisions independently and the fortitude to abide by them even in the face of hostility from others. For example, a criminal defense lawyer may be spat upon by outraged citizens while walking through the corridors of a courthouse on his or her way to defend an especially unpopular client. Immense personal courage is necessary in such a situation if one is to provide the best possible defense. Similarly, a lawyer who becomes aware of the fact that the officers of a client corporation, to assure a large profit, are making a decision which will result in unconscionable pollution of the environment, must

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162. *Id.*

163. Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J. L. & PUB. POL’Y 807, 826 n.59 (2000) (internal quotation marks omitted) (quoting J.H.H. Weiler, *On Being a Judge – Jethro’s Lesson*, 2 GREEN BAG 291, 297 (2d ed. 1999)).

164. Robert F. Cochran, Jr., *The Rule of Law(yers)*, 65 MO. L. REV. 571, 595-96 (2000).

165. Bruce R. Jacob, *Developing Lawyering Skills and the Nurturing of Inherent Traits and Abilities*, 29 STETSON L. REV. 1057, 1058 (2000).

be sufficiently independent-minded to determine that his client's decision is wrong, and must have the courage to advise the officers against making such a decision. The attorney must do so even though the attorney knows that in so advising he or she may lose that corporation as a client and may lose the fee income generated from that client.<sup>166</sup>

Erica Bose chronicled a case of courageous lawyering in a 1999 law review article.<sup>167</sup> Ms. Boise pointed out that “[f]rom the late 1940s to the early 1960s very few attorneys had the courage and conviction to oppose [Congress] ... but some did and such courage merits acknowledgment.”<sup>168</sup> Sadly, however, the courageous attorneys paid a high price in personal stress, professional ostracism, and financial loss for their brave actions, but such is the nature of the practice of law. Resolving to “do the right thing”—and then doing it with energy and gusto—is what lawyers are challenged to do every day that they go to work.<sup>169</sup> American lawyers have a rich tradition of courage at the bar going all the way back to attorney John Adams of Massachusetts. Adams exercised courage on numerous occasions throughout his legal career: in helping to draft the Braintree Resolutions contesting heavy-handed British taxation in the American colonies;<sup>170</sup> in defending four American sailors “charged with murder for the death of an English naval officer who had boarded an American vessel seeking to seize sailors and press them into service in the British Navy” before the American Revolution;<sup>171</sup> and, most famously, in representing Captain Preston and the other British soldiers under his command in the Boston Massacre case of 1770.<sup>172</sup>

Former Yale Law School Dean Anthony T. Kronman sees a relationship between a lawyer's love for the law and the ability to exercise lawyerly courage. Kronman wrote: “the more a lawyer values the well-being of the law, the more likely he is to be able to summon such courage when needed. . . . This internal anchorage of his devotion to the law in the good lawyer's craft gives it a strength and resilience it would not otherwise have.”<sup>173</sup>

In sum, for lawyers courage is a cardinal virtue. Courage is closely related—and sometimes analogized—to integrity, because to be whole as a legal professional one must stand up for what is right and oppose what is wrong regardless of the personal consequences. A lawyer who is balanced in

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166. *Id.*

167. Erica Bose, *Three Brave Men: An Examination of Three Attorneys Who Represented the Hollywood Nineteen in the House Un-American Activities Committee Hearings in 1947 and the Consequences They Faced*, 6 UCLA ENT. L. REV. 321 (1999).

168. *Id.* at 322.

169. See, e.g., Richard Pena, *What Would Atticus Do?*, 62 TEX. B.J. 14 (1999).

170. Hon. John C. Godbold, “Lawyer”—*A Title of Honor*, 29 CUMB. L. REV. 301, 311 (1999).

171. *Id.*

172. *Id.* at 311-13.

173. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 145-46 (1993).

the practice of his or her chosen profession and in the living of his or her life will also value courage as a way to achieve integrity. And, to be courageous as a lawyer—instead of doing the safe or profitable thing—entails the exercise of both idealism and compassion for others.

Lawyers can gain strength from the biblical injunction: “Be strong and of a good courage; be not afraid, neither be . . . dismayed . . . .”<sup>174</sup>

## 6. Creativity

The virtue of creativity for lawyers and law students is critically important. Yet, for at least three reasons, lawyerly creativity is under-appreciated. One reason is that some view the law as an inherently restraining craft—rather than a capacious discipline—that necessarily stifles innovation. Second, many observers contend that the need for specialization and sub-specialization (to manage the torrent of complex new statutes, developing case law, and voluminous revised regulations) compels a narrowness of focus that inhibits inventiveness and originality. A third reason for the conventional professional wisdom that severely discounts the role of creativity in the practice and learning of law concerns the time pressures faced by every law student and lawyer in America just to keep up and stay current: If one needs to run just to stay in place, as this line of thinking goes, it is unrealistic to expect those who must deal with the law to be creative.

If we shift our perspective a bit, however, the limitations of the law, the need for professional specialization, and time pressures can be viewed as forces that should encourage lawyerly creativity. In this regard, the practice of law can be analogized to the ancient art of rhetoric. Both law and rhetoric involve the study and mastery of the available means of persuasion in a given case. The good lawyer and the good law student must learn, therefore, how to navigate amid the constraints posed by the audience and the situation while remaining ready to take advantage of tactical opportunities for persuasion that present themselves.

Indeed, being able to “think like a lawyer”—a core value of legal professionalism—implicitly assumes the mastery of the virtue of creativity in making arguments regarding the interpretation of the law. Professor Wilson Huhn touches on this subject in his marvelous book, *The Five Types of Legal Argument*:

It is true that in law school students dedicate thousands of hours to the job of memorizing the holdings of cases and preparing course outlines, and that this is no easy task. But memorizing case holdings and course outlines is only half of what students must learn in law school, and it is the easy half.

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174. *Joshua* 1:9 (King James).



The truly hard part of law school, and the part that makes a legal education truly useful, is mastering the art of legal analysis. Students must learn not only the rules of law, the case holdings and course outlines, but must also learn how courts interpret the law and create it. It is not enough to know what the law has been; it is also necessary to develop the [creative] ability to predict what it may become. Students must master this skill because it is basic to representing clients competently.

The purpose of legal education is to teach students “how to think like lawyers.” Students must learn how to make arguments for a favorable interpretation of an existing rule of law, or for the adoption of a new rule of law. To do this students must be able to recognize the different types of legal arguments, and understand the strengths and weaknesses of each type of argument.<sup>175</sup>

As Huhn explains in his book, it requires creativity and inventiveness to comprehend and to use the five basic types of legal argument, applicable across the board in every field of law from admiralty to zoning, which include: (1) *text*-based arguments, (2) claims based on *intent*, (3) *precedent*-focused contentions, (4) arguments rooted in *tradition*, and (5) *policy analysis*.<sup>176</sup> Professor Huhn points out in this regard that because “[t]he law is not smooth and pure like distilled water,” but, rather, is like a “wild river” that is “fed by tributaries which arise from myriad wellsprings;” in order to “master the law” we must imaginatively “trace each and every legal argument to its source.”<sup>177</sup> Utilizing creativity, himself, Huhn provides an alternative image of the law as consisting of “different voices.”<sup>178</sup> He asserts that “the greatest challenge we face in studying the law is to recognize and understand each of the voices of the law, and to express ourselves with every voice.”<sup>179</sup>

When we discuss the interaction of creativity with the law, reference to historian Daniel J. Boorstin’s classic, *The Creators*, is both instructive and inspirational.<sup>180</sup> Reviewing three thousand years of artistic achievements—from the Egyptian pyramid builders to Picasso—Boorstin portrays the outstanding individuals and cultures that have given us our legacy of enriching architecture, painting, sculpture, music, drama, dance and literature. At the start of a part of his book called “Creator Man,” Boorstin quotes Paul Valéry who said: “The artists’s whole business is to make something out of

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175. WILSON HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* 11-12 (2002).

176. See *generally id.* at 13-16 (Huhn points out that the five types of legal argument arise from “different sources of law,” function as “rules of recognition,” are “[r]ules of [e]vidence for [d]etermining [w]hat the [l]aw [i]s,” and “[e]mbody the [u]nderlying [v]alues of [o]ur [s]ystem of [l]aws”).

177. *Id.* at 3.

178. *Id.*

179. *Id.*

180. DANIEL J. BOORSTIN, *THE CREATORS* (1992).

nothing.”<sup>181</sup> Then, probing the origins of the human instinct to *create*, Boorstin observes:

Man’s power to make the new [merged with] the power to outlive himself in his creations. He found the materials of immortality in the stone around him or the artificial stone that he could make. He flexed his muscles of creativity in structures whose purpose would remain a mystery, and in temples of community. He dared to make images of himself and of the life around him. He made his words into worlds, to relive his past and reshape his future.<sup>182</sup>

So too, lawyers must never forget that they are artists—of language, of argumentation, of persuasion. In exercising the virtue of creativity, lawyers should draw upon their life experiences and insights about human relations. This is the beginning of the Valéryian process of making “something out of nothing.” But, the creative process applied to the law also requires the hard-edged attributes of habit and knowledge, labor and logic, and memory and imagination. As to habit and knowledge, every lawyer remembers their fledgling experience as a new law student being confronted with their first set of examinations; he or she learned how to draw upon the knowledge of legal concepts imparted in casebooks and by law professors, and to put this learning into a form that has been referred to by pithy acronyms such as “ILAC”—issue, law, analysis and conclusion or “IRAC”—issue, reasoning, application and conclusion. This was not easy, at first, but with practice, feedback, and comparison with model answers of course, “honor papers” resulted and the taker’s knowledge was improved and strengthened.

As to labor and logic, a good lawyer comes to learn that a modicum of mental, physical, and emotional pain is required in writing briefs, drafting wills and contracts, and composing opinion letters for clients. Litigators, to be sure, routinely face the rigors of sleepless nights, severe time pressures, and high stake contests. But, even non-litigating, transactional lawyers are called upon to endure similar kinds of pain in the process of legal creativity. In metaphysical terms, logic enters the picture of lawyerly creativity by acting as an aid to labor: like a pilot that steers the lumbering ship of a daunting case or assignment into harbor. Thus, approaching a law-related project in a logical fashion allows the lawyer to break the big jobs into smaller, more manageable, parts. And, framing a legal problem with the logic of human limits allows one to rest easy in the realization that no lawyer *ever* has all the time he or she wished to research an issue or to compose an argument.

As to the role of memory and imagination in lawyerly creativity, the teaching of Socrates in the *Meno* is apt. Socrates informed Meno that what we call learning is really only a process of recollection.<sup>183</sup> While Socrates might

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181. *Id.* at 71.

182. *Id.*

183. Mortimer J. Adler, *Memory and Imagination*, in 3 GREAT BOOKS OF THE WESTERN WORLD 133, 137 (Robert Maynard Hutchins ed., 1952).

have been pressing the matter a bit too far, the point is this: creativity beckons us to review our common sense experiences, concepts, and knowledge. And, with the addition of the magic ingredient of imagination—what some have referred to as “lateral thinking,” what others have called “vision,” and others dubbed “unorthodoxy”—new and original ways of thinking about a problem become apparent.

By way of illustration, Professor Monroe Freedman vividly discusses the creativeness imperative for good lawyering in an article about lawyers and death penalty cases.<sup>184</sup> Freedman expresses, in this regard, three key insights about law and creativity. First, “[t]he law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law’s ambiguities and potential for change.”<sup>185</sup> Second, “[a] lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society.”<sup>186</sup> Third, “new wisdom . . . [can be acquired by] discard[ing] old ignorance.”<sup>187</sup> Freedman applied these three principles to the difficult task of representing a criminal convict facing the prospect of the death penalty. He argued that lawyers need not fear judicial sanctions if they can find a way of making novel arguments or claims in a good faith effort to change the law. While the distinction between a “good faith” and “bad faith” effort to modify law is probably, in large measure, in the eyes of subjective judges, I think that what Freedman was getting at is the need for lawyers to show how their creative arguments are linked to mainstream legal arguments—found in the text of a constitution or statute, the intent of a legislature or administrative agency, existing precedent, civilized traditions, or wise social policy. In seeking to be creative, therefore, lawyers should not ignore existing law, but should find new and insightful ways to build on this foundation to demonstrate what *law can become*.

While there are a variety of tactics and strategies to be creative in the practice of law, the following practical pointers may be useful.

1. *Seek Clarity.* In many areas of the law, existing doctrines of principles are murky. By showing a court how a new legal wrinkle (which incidentally helps your client’s cause) could clarify the particular area of law at bar (e.g., environmental law, patent law, tort law), an advocate is likely to make a court more receptive to considering a novel argument.<sup>188</sup>

2. *Think Ahead.* Instead of reacting to events, litigators, as well as, transactional lawyers should take time in every matter that they are handling to imagine and plan for future contingencies. For example, a business lawyer might bring up the possible impact of a corporate client’s record retention

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184. Monroe H. Freedman, *The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases*, 31 HOFSTRA L. REV. 1167 (2003).

185. *Id.* at 1167 (footnote omitted) (alteration in original).

186. *Id.* (footnote omitted) (alteration in original).

187. *Id.* (footnote omitted) (alteration in original).

188. See Victoria Vron, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Civil Procedure*, 71 GEO. WASH. L. REV. 393, 399 (2003).

policy on the possibility that some confidential records will be discovered in future litigation.<sup>189</sup>

3. *Shift Perspective.* Lawyerly contentiousness and aggressive unpleasantness need not be the only ways for a lawyer to represent a client. “If a hammer is your only tool, every problem tends to look like a nail.”<sup>190</sup> By consciously thinking of other ways to approach clients’ problems—like collaboration, mediation, or simple discussion—a lawyer can often achieve a more positive and cost-effective result.<sup>191</sup>

4. *Remove Cognitive Barriers.* As pointed out in a recent article, “a lawyer cannot be effectively creative when her decision-making is undermined by cognitive biases that restrict her ability to envision innovative solutions to problems.”<sup>192</sup> To help resolve this problem, a growing movement in legal education called therapeutic jurisprudence, or “T.J.,” attempts to “assess the psychological implications of legal processes” while helping lawyers become more sensitive and proactive in eliminating cognitive barriers in their own ways of thinking about problems, and in assessing and shaping the ways decision makers (like judges and juries) solve problems.

5. *Try Word Play.* Lawyers are trained as law students to use different words and word combinations in researching the law. Reconfiguring the words will often yield different and more pertinent case law, statutory references, or factual leads.

“Word Play” can also be used by lawyers in other creative contexts. For example, experimenting with different language in a client opinion letter may make the advice clearer and more understandable.<sup>193</sup> Likewise, generating different opening statements and summations in a pre-trial moot court exercise can help a litigator hone a message that delivers both logical cohesiveness and emotional resonance.<sup>194</sup>

In sum, the lawyerly virtue of creativity enables a lawyer to adapt to his or her clients’ particular problems in ways that best serve the clients’ interests—in resolving a dispute, in continuing a business relationship, in addressing deep-seated psychological motivations and the like. Being creative, however, requires help and sustenance from other lawyerly virtues. For example, the virtue of compassion is needed to motivate a lawyer to take creative approaches to a client’s problem. Moreover, the virtue of integrity reminds a lawyer that a client should be able to expect his or her attorney to provide

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189. See Daniel J. Gleason & Amanda S. Levine, *Protecting Confidential Information in Business Litigation*, BOSTON B.J., Mar.-Apr. 2003, at 10, 13.

190. J. Kim Wright & Dolly M. Garlo, *Law as a Healing Profession*, OR. ST. B. BULL., Apr. 2003, at 9, 9.

191. *Id.*

192. Joseph W. Rand, *Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-Making*, 9 CLINICAL L. REV. 731, 735 (2003) (footnote omitted).

193. See Janet Weinstein & Linda Morton, *Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education*, 9 CLINICAL L. REV. 835, 854-56 (2003).

194. *Id.*

individualized attention and focused effort in handling the case. Furthermore, because many would denounce the ability of lawyers to solve legal problems in a creative way, the virtues of courage and idealism can fortify the good lawyer to swim against the current.

### 7. Energy

Lawyers and law students require energy to accomplish their busy agendas. The dictionary definition of *energy* informs us of the multiple meanings of the word: “force; vigor; capacity for activity” and “the capacity . . . to do work.”<sup>195</sup> Synonyms for *energy* are more revealing: “force, power, strength, might, . . . drive, dynamism, push, élan, dash, bounce, brio, zip, go, vim, . . . get-up-and-go, pep, zing, . . . zap; vitality, liveliness, vivacity, animation, . . . spirit, . . . exuberance, zest, gusto, enthusiasm, verve, zeal, . . . oomph, [and] pizzazz.”<sup>196</sup>

The word *enervate*, sharing the same root, is an antonym of *energy*, defined as to: “deprive of vigor or vitality.”<sup>197</sup> Indeed, no lawyer or law student wants to be characterized as being enervated or to experience the many forms of enervation: “weaken, . . . weary, drain, tax, exhaust, sap, debilitate, enfeeble, fatigue, wear-out, dull, subdue, devitalize, . . . strain, break, crush, depress [or] dispirit.”<sup>198</sup>

On a deeper level than dictionary definitions, Professor P.M. Forni has articulated a more practical description of what human energy is all about. Forni speaks of energy in social terms—focusing on a coming out of self to embrace the interests and concerns of others. As he explains:

We now live in an age of idolatry of the Self. We have persuaded ourselves that first and foremost we live to realize our own Selves for our own good. Having made the Self the central concern and value in our lives, we should not be surprised if self-centered behaviors have become more prevalent than altruistic ones. We shouldn't be surprised if civility has suffered. The more we focus on our Selves and our self-gratification, *the less moral energy we have available to spend on others and the less attuned we are to others' well-being.*<sup>199</sup>

Two aspects of Forni's description should resonate with those of us who labor in the law: the implication that people should try to be more altruistic than self-centered, and the notion that energy applied by human beings to fellow human beings is moral in nature. In other words, when a lawyer chooses to represent a client or a cause he or she steps outside of themselves

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195. THE OXFORD DICTIONARY AND THESAURUS 476 (Am. ed. 1996).

196. *Id.*

197. *Id.* at 476.

198. *Id.*

199. P.M. FORNI, CHOOSING CIVILITY: THE TWENTY-FIVE RULES OF CONSIDERATE CONDUCT 169 (2002) (emphasis added).

to achieve something of considerable importance to another. The tasks of finding, interpreting, and using legal materials are actually outside a client's *real* concerns in the sense that an attorney should strive to frame a client's problem in *human terms* before he or she defines the client's concerns in legal terms. The virtuous lawyer, therefore, recognizes the challenge of conceptualizing client problems in concrete and practical terms; legal abstractions contained in judicial opinions, statutes, and regulations need to be paraphrased in ways that make sense and that advance justice for flesh and blood individuals.

The philosophy of Henri Bergson helps to clarify the importance of energy in a lawyer's day-to-day existence. Bergson coined the phrase *élan vital*.<sup>200</sup> While a precise meaning of *élan vital* is subject to speculation among philosophers, for our purposes it can be thought of as "life force" or "vital impetus,"<sup>201</sup> what one writer describes as a "basic energy [that] has no specified or specifiable goal; it is a creative and originating force which produces endless variations of forms against which it then has to contend in order to create further variations."<sup>202</sup> Another useful formulation of Bergson's philosophy of energy is that "[l]ife is essentially determined in the act of avoiding [or overcoming] obstacles, stating and solving a problem."<sup>203</sup> A lawyer, then, needs to understand that *problem formulation* is a critical part of his or her job and that searching for ways to describe and map out a client's problem is a difficult and taxing process.

*Power* is a type of energy that roughly combines what we learned in high school physics as *potential energy* and *kinetic energy*. Being physically and mentally fit creates potential energy; this energy is also enhanced by being prepared and conscientious. Making the right moves—communicating with clients and colleagues, crafting the best arguments in a particular case, keeping abreast of new developments in your field—involves the use of kinetic energy to persuade others to give you what you want.

One of America's competitive advantages in the international marketplace is the energetic style of American lawyers and law firms. As explained in a recent law review article:

The United States is involved in more cases at the International Court of Justice and the World Trade Organization than any other state. More American businesses are involved in international commercial arbitration than any other nationality. Americans are involved in significant numbers of international family law disputes. Many U.S. citizens have ties to conflict areas of the world and want their government to play a role in helping resolve those conflicts. Eight out of ten "mega"-firms, firms with 2,000 lawyers or more, are American.

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200. HENRI BERGSON, *CREATIVE EVOLUTION*, at x (Arthur Mitchell trans., 1944) (1911).

201. *See generally id.*

202. DIANE COLLINSON, *FIFTY MAJOR PHILOSOPHERS: A REFERENCE GUIDE* 132 (1987).

203. GILLES DELEUZE, *BERGSONISM* 16 (Hugh Tomlinson & Barbara Habberjam trans., Zone Books 1988) (1966).

These firms market their broad expertise and experience so that even the German and Mexican governments called on American law firms to help prepare cases against the United States government at the International Court of Justice. *The sheer number of American lawyers, their energetic style, and commitment to the use of law in problem solving all account for the trend toward Americanization of dispute resolution.*<sup>204</sup>

Indeed, American lawyers are energized by the prospect of doing well by doing right. Thus, the American tort system, by way of a prominent example, holds out the prospect of lawyers recovering high damages for clients through such procedures as class action lawsuits and by virtue of the allowance of contingency fee contracts; this provides a strong financial incentive (which also is morally beneficial) for lawyers to demonstrate high quality, high powered legal representation for their injured clients.<sup>205</sup>

The American system of adversarial legalism also generates lawyerly energy. As Professor Robert Burns explains, “the energetic and strategic ethos of the trial bar contributes to the emergence of practical truth at trial.”<sup>206</sup> The energy of American lawyers drives the process of truth-seeking and justice in very special ways. Burns demonstrates why this is the case in the following profound excerpt:

The ethos of the trial bar is to make the most impolite, embarrassing, or “politically incorrect” assertions, even if they are offensive to one or other sources of power. The lawyer’s professional responsibility is to violate every code of silence if it is in the client’s interest. The parties’ control over what assertions to make and what issues to raise is an important bulwark against there being only One Big Story. It says, in effect, that there really is quite a bit that can be said on behalf of all persons, and most causes. *It knows that the mental laziness that does not raise uncomfortable questions can be a great enemy of human decency. . .*

The essential tension at trial is . . . between the competing theories and themes of the case, on the one hand, and the enormously detailed presentation of facts through the witnesses’ testimony. *The trial lawyer’s energetic advocacy, pressing far beyond polite conversation or politically correct discourse, is what creates this basic and enormously fruitful tension.* We would be much worse off without it. Self-censoring of the wrong kind would damage it.

*This energy is at work throughout the trial.* The trial lawyer attacks his opponent’s stories on cross-examination, in closing argument, and by the presentation of extrinsic evidence. He suggests that the witnesses’ accounts are

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204. Mary Ellen O’Connell, *Introduction to the Symposium Issue on the Americanization of International Dispute Resolution*, 19 OHIO ST. J. ON DISP. RESOL. 1, 2 (2003) (emphasis added).

205. Robert A. Kagan, *On Surveying the Whole Legal Forest*, 28 LAW & SOC. INQUIRY 833, 851 (2003).

206. Robert P. Burns, *Professional Responsibility in the Trial Court*, 44 S. TEX. L. REV. 81, 92 (2002).

willful and partial constructions that are not completely truthful, that there is another way of looking at it. Finally, he or she argues that the moral-political norms invoked by the opponent . . . do not quite fit here.<sup>207</sup>

The virtue of energy is essential for lawyers engaged in the strenuous practice of law and for law students struggling to absorb and comprehend the oceanic complexity of the law. Indeed, a decent case could be made for ranking the virtue of energy at the top—or close to the top—of a list of lawyerly virtues because without the requisite energy to tackle problems, to interview clients, to research and analyze legal materials, to press for action in the courts, legislatures, and agencies, and to hold up in the face of adversity, a lawyer’s job could never be done. In a way, the virtue of energy is analogous to the virtue of balance (which I have ranked first among lawyerly virtues).<sup>208</sup> I view the virtue of energy, however, as more visceral and physical than the virtue of balance (which I comprehend to be more spiritual and cerebral) and, therefore, of slightly lower importance. So too, the virtues of integrity, idealism, compassion, courage and creativity<sup>209</sup> are ranked prior to the virtue of energy because, as I see it, one must cultivate a robust spirituality to achieve a semblance of these “higher” virtues, whereas the virtue of energy can be, in large measure, accomplished by paying close attention to how one makes choices to act or not to act, to worry or not to worry, to indulge in sensual pleasures (and to what degrees)—matters more physical than spiritual.

#### 8. Justice

As the lawyerly virtue of energy is moderately more physical and visceral than it is spiritual or cerebral,<sup>210</sup> I also contend that the virtue of justice is similarly dominated by physical/visceral characteristics. A compelling book that supports this presupposition is entitled *The Sense of Justice: Biological Foundations of Law*.<sup>211</sup> According to Margaret Gruter, while “law [is] both . . . a creation of the human mind and . . . a product of the biological mechanisms that support and make possible the human quest for order and justice,” the human “sense of justice” seems to be hard-wired into our biological makeup.<sup>212</sup> As Gruter muses on the subject:

The possible universality of a program in the minds of individuals that urges them to strive for balance, for structure, for continuity of established values—all functions of which have legal counterparts—can be supported by scientific data.

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207. *Id.* at 93 (emphasis added) (footnotes omitted).

208. *See supra* notes 95-96 and accompanying text.

209. *See supra* notes 97-193 and accompanying text.

210. *See supra* notes 206-07 and accompanying text.

211. THE SENSE OF JUSTICE: BIOLOGICAL FOUNDATIONS OF LAW (Roger D. Masters & Margaret Gruter eds., 1992) [hereinafter THE SENSE OF JUSTICE].

212. Margaret Gruter, *Preface* to THE SENSE OF JUSTICE, *supra* note 211, at vii.



The same point holds concerning the satisfaction individuals derive from staying within a given framework, which influences their legal behavior.<sup>213</sup>

Professor Roger D. Masters provides the following graphic examples of a visceral sense of justice shared by many:

On the evening of January 24, 1989, convicted mass murderer “Ted” Bundy was electrocuted at the Florida State Prison, thereby ending a prolonged series of legal maneuvers that had been used to forestall capital punishment. Given the notoriety of the case, the nightly TV news covered the event. Outside the prison, a group of citizens had gathered; when a loudspeaker announced that the medical examiner had pronounced Bundy dead, members of the crowd cheered, smiled, and expressed both happiness and relief. These signs of pleasure were confirmed by comments to a journalist. *For at least some witnesses, the death of a convicted murderer elicited strong emotional responses as well as cognitive judgments of satisfaction: Justice was (finally) done.*<sup>214</sup>

What a human being tends to have as a natural component of his or her biological makeup combines “elements of passion and reason, emotion and cognition, or feeling and judgment. Behind these elements . . . is a sense of justice, a sense that is ever present yet manifest in different ways from case to case.”<sup>215</sup> Professor Michael T. McGuire has theorized that humans’ complex social and legal behavior is rooted in the evolved information-processing capacity of the primate brain.<sup>216</sup> From our primate ancestors of millions of years ago we have inherited so-called “Darwinian algorithms” driven by neurochemical and neuroanatomical processes that impact our abilities to assess reciprocal relations with others and to express anger at injustice when others do not reciprocate our good deeds, or reassurance, if the consequences are seen as consistent with expectations and therefore just.<sup>217</sup> Professor Robert Frank elucidates the sense of justice from the viewpoint of cost-benefit calculus and rational choice theory.<sup>218</sup> According to Frank, although Darwinian natural selection theory would predict that animals, including the human animal, would tend not to act against their own self-interest, “human behaviors often have costs to the individual that exceed immediate benefits.”<sup>219</sup> In Frank’s view, “[t]he sense of justice is often invoked to explain such altruistic behavior, particularly when it is consistent with approved

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213. *Id.* at viii.

214. Roger D. Masters, *The Problem of Justice in Contemporary Legal Thought*, in *THE SENSE OF JUSTICE*, *supra* note 211, at 1-2 (emphasis added).

215. *Id.* at 3.

216. See Michael T. McGuire, *Moralistic Aggression, Processing Mechanisms, and the Brain: The Biological Foundations of the Sense of Justice*, in *THE SENSE OF JUSTICE*, *supra* note 211, at 31-46.

217. *Id.* See also FRANS DE WAAL, *OUR INNER APE* 210-14 (2005) (discussing possible evolution of a sense of justice in our primate ancestors).

218. Robert Frank, *Emotion and the Costs of Altruism: The Economic Foundations of the Sense of Justice*, in *THE SENSE OF JUSTICE*, *supra* note 211, at 47.

219. *Id.*

cultural norms.”<sup>220</sup> The implication of Frank’s analysis is that even though an individual’s sense of justice can bring about short-term costs that exceed benefits to the individual, in the long run, a sense of justice can result in the individual reaping benefits from others in the community who recognize the sacrifice a person has made for the larger social good and, thereby, reward the individual’s “selfless” action in some way.

For a lawyer, the virtue of justice would seem to be vital. Some might even say that a just lawyer is a tautological concept—how could a lawyer be *other* than just? And yet, from the lay public’s perspective, the legal profession is viewed by many to be *dominated* by lawyers who lack a sense of justice. Those who espouse such a belief buy-in to the following notions: that lawyers care more about getting money for themselves than doing right for their clients; that lawyers will distort the facts and warp the law in pursuit of wealth maximization for themselves—the very antithesis of seeking justice.

St. John’s University law professor Lawrence Joseph has written a book—a cautionary tale about lawyers who have lost their sense of justice—which every member (or aspiring member) of the legal profession should read and meditate upon. The book is called *Lawyerland: What Lawyers Talk About When They Talk About Law*.<sup>221</sup> Professor Joseph portrays a hodge-podge of grasping, self-absorbed, money-obsessed, petty, vindictive, and hollow attorneys, who sneer at or snort at, or despise the idea that lawyers should be concerned about doing justice. *Item #1*: A lawyer named Robinson, a criminal defense lawyer, who is of the view that “[t]he criminal law represents civilization’s pathology.”<sup>222</sup> *Item #2*: An attorney named Wylie who asks “[w]ho ever reads Supreme Court opinions? I know I don’t.”<sup>223</sup> Wylie does not care about the law, or the Supreme Court of the United States, or the social institution of the law; for him, “chaos” is what matters: “Complexity so intricate no one can fathom it. Large things within small things, small things within large things—things encompassing things which would seem to be beyond them. Chaos.”<sup>224</sup> Anarchy. Lawlessness. Injustice. Pandemonium. Havoc. Bedlam. Babble. Higgledey-Piggledy. Snafu (an American military slang meaning “situation-normal-all-fucked-up”). In Wylie’s world of law, injustice holds sway and lawyers are part and parcel of the whole rotten enterprise. Speaking of another lawyer, Jack, who is consulting a psychiatrist, Wylie says this:

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220. *Id.*

221. LAWRENCE JOSEPH, *LAWYERLAND: WHAT LAWYERS TALK ABOUT WHEN THEY TALK ABOUT LAW* (1997).

222. *Id.* at 22 (internal quotation marks omitted).

223. *Id.* at 32 (internal quotation marks omitted).

224. *Id.* (internal quotation marks omitted). Wylie goes on to pontificate: “Serious—well, serious I am. I take what I do very seriously. I happen to think it’s a very serious business. Blood on the floor sometimes, right? Very seriously ironic—that’s what. Nonlawyers think of lawyers and think corruption, arrogance, pretentiousness—all of which, more of less, of course, are true.” *Id.* at 35 (internal quotation marks omitted).

So what do you think triggers the doctor's prognosis? Jack, during one of his sessions, said that because he's a lawyer he has to constantly split hairs. Isn't that perfect! So what does the mind doctor say? He tells Jack that, as a lawyer, he has to be capable of deep moral compromise. You have to do things, be part of things, you don't want to be part of. You have to pretend to be what you're not. Well, you can't argue with that. We all know there are times when you're working on some deal that, if you were to think it through, you'd realize that it was going to ruin the lives of thousands of people and their families. We all do it—in one size, shape, form, or other. According to the doctor, the split that occurs when we do this is subconscious. It has to be. If it weren't, we couldn't do it. This, for the doctor, is a big, big deal. He says that lawyers, when they do something they really don't want to do, end up subconsciously sublimating their real feelings into – well, money, of course, and success.<sup>225</sup>

*Item #3:* A federal district court judge named Day who refers to what she calls the “lawyer phenotype” which has as “[c]haracteristic number one” the propensity to lie.<sup>226</sup> Incredibly, according to Judge Day, “[i]t's inherent in the process.”<sup>227</sup>

The tone of her voice was matter-of-fact. Those who aren't part of it—who don't do it—are incapable of understanding it. Lawyers know too much. If you know too much, how don't you lie? Everything you say has another meaning. The posturing, the playacting, arguing over the smallest things, the narcissism, the beyond-belief egomania—it's all part of that. Too much meaning.<sup>228</sup>

*Lawyerland* was the subject of a law review symposium.<sup>229</sup> According to one symposium author, Joseph's *Lawyerland* is a bleak, realistic landscape of lost souls with the irony that it describes a “two-dimensional prison that [its] inhabitants construct for themselves out of their torrent of [lawyerly] words.”<sup>230</sup>

Implicit in the view of another contributor to the symposium is the assessment that for many American attorneys pursuing justice is a laughable lie; just a cock-and-bull-story, being that “the overwhelming feelings the

225. *Id.* at 40-41 (internal quotation marks omitted). Another one of Professor Joseph's interlocutors, Urquart, turned his attention to a lawyer of his acquaintance, named Mallorn: “He used to pad—I mean really pad. He'd bill ten hours on days he did virtually nothing. He knew that I knew he did, too.” *Id.* at 54. (internal quotation marks omitted). Mallorn, it seems, also extended the injustice he visited upon his clients to his fellow lawyers. “One time I saw [Mallorn] looking through opposing counsel's briefcase. I learned a lesson,” according to Urquart, “[n]ever leave your briefcase unguarded around a lawyer!” *Id.* (internal quotation marks omitted).

226. *Id.* at 68 (internal quotation marks omitted).

227. JOSEPH, *supra* note 221, at 72 (internal quotation marks omitted).

228. *Id.* (internal quotation marks omitted).

229. Symposium, *The Lawyerland Essays*, 101 COLUM. L. REV. 1730 (2001).

230. David Luban, *The Art of Honesty*, 101 COLUM. L. REV. 1763, 1773 (2001).

lawyers in *Lawyerland* engender are alienation and despair.”<sup>231</sup> Justice is an insider’s joke, then, for lawyers who, like one of Joseph’s real-life characters, muses in the language of Herman Melville that lawyers are “confidence-men.”<sup>232</sup>

But, there is not universal alienation and despair. And, not all lawyers are confidence-men. On a more optimistic note, looking at what lawyers do for clients in the pursuit of justice in a particular case raises the fascinating comparison between the lawyerly duties of justice and the lawyerly duties of generosity and friendship. What am I talking about? Do lawyers have duties of generosity and friendship toward their clients? I contend, most emphatically, *that they do*. I claim that lawyers are expected by various rules of professional responsibility and by assorted informal, but important, norms of the legal profession to fulfill numerous duties of generosity and friendship to their clients as part of the pursuit of justice. Take, for example, the oath that an attorney is required by state law to take before being admitted to practice. I quote Indiana’s rule, by way of illustration, which prescribes the following oath:

I do solemnly swear or affirm that: I will support the Constitution of the United States and the Constitution of the State of Indiana; . . . I will not counsel or maintain any action, proceeding, or defense which shall appear to me to be unjust, but this obligation shall not prevent me from defending a person charged with crime in any case; I will employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth, and never seek to mislead the court or jury by artifice or false statement of fact or law; I will maintain the confidence and preserve inviolate the secrets of my client at every peril to myself; I will abstain from offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged; . . . I will never reject, from any consideration personal to myself, the cause of the defenseless, the oppressed . . . ; so help me God.<sup>233</sup>

The attorney oath that 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. Moreover, consider some other examples of intertwined attorney duties of generosity and friendship toward clients in the pursuit of justice: (1) the professional rule that “[a] lawyer shall act with reasonable diligence and promptness in representing a client,”<sup>234</sup> and (2) the professional rule that “[a] lawyer shall keep the client reasonably informed about the status of the matter” and “promptly comply with

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231. Sara Krakoff, *Does “Law and Literature” Survive Lawyerland?*, 101 COLUM. L. REV. 1742, 1743 (2001).

232. Luban, *supra* note 230.

233. IND. ADMISSION TO THE BAR & THE DISCIPLINE OF ATT’YS R. 22 (2004).

234. *See, e.g.*, IND. RULES OF PROF’L CONDUCT R. 1.3 (2004).

reasonable requests for information,”<sup>235</sup> while “explain[ing] a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”<sup>236</sup>

A friend would not be a slacker in getting back to someone on an important matter (like a dinner invitation, a request for a ride, or a plea for a miscellaneous favor), and a friend would not fail to keep in touch with another. In a similar vein, the lawyer is admonished to be a friend of the client, as well as, a friend of the court. And, as a final example of court rules which expect attorneys to be generous friends in the pursuit of particularized justice for clients, consider the “advisor” rule of professional responsibility which provides as follows: “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.*”<sup>237</sup> Indeed, a generous friend would provide broad, wide-ranging advice to another about a personal problem. A lawyer is expected to do no less. Besides legal, economic, social, and political factors relevant to a client’s problem, a lawyer is explicitly encouraged by this rule of professional conduct to plumb the depths of morality in advising a client. The official commentary to the advisory rule of professional conduct reads like a short essay on how to be a good friend:<sup>238</sup>

A client [and a friend are] entitled to straightforward advice expressing the lawyer’s [and friend’s] honest assessment[s]. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer [and a friend] endeavors to sustain the client’s morale and may put advice in as acceptable a form as honesty permits. However, a lawyer [and, on occasion, a friend] should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.<sup>239</sup>

Finally, every lawyer and law student hoping to apply the virtue of justice to their professional lives should take the time to absorb the lessons on lawyerly friendship offered by San Francisco attorney James J. Brosnahan. According to Brosnahan, some of the greatest lawyers in Anglo-American history have also been wonderful friends to their clients and their fellow lawyers.<sup>240</sup>

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235. IND. RULES OF PROF’L CONDUCT R. 1.4(a) (2004).

236. *Id.* at R. 1.4(b).

237. *Id.* at R. 2.1 (emphasis added).

238. Indeed, to emphasize this point I have taken the liberty of bracketing references to friends and friendship where appropriate in the text of the professional rule.

239. IND. RULES OF PROF’L CONDUCT, *supra* note 234, at Commentary, Scope of Advice, Rule 2.1.

240. JAMES J. BROSNAHAN, GREAT TRIALS AND TRIAL LAWYERS (The Teaching Company 1994).

## 9. Discipline

Stephen R. Covey—the twenty-first century organizational consultant and motivation guru—emphasized the centrality of the virtue of discipline in his classic book, *The 7 Habits of Highly Effective People*. These seven disciplined pathways—(1) “[b]e [p]roactive,” (2) “[b]egin with the [e]nd in [m]ind,” (3) “[p]ut [f]irst [t]hings [f]irst,” (4) “[t]hink [w]in/[w]in,” (5) “[s]eek [f]irst to [u]nderstand, [t]hen to [b]e [u]nderstood,” (6) “[s]ynergize,” and (7) “[s]harpen the [s]aw”<sup>241</sup>—were the foundation for Covey’s eighth discipline: “[f]ind [y]our [v]oice and [i]nspire [o]thers to [f]ind [t]heirs,” discussed in his recent book *The 8th Habit*.<sup>242</sup> As he explains, “[d]iscipline is paying the price to bring . . . vision into reality. It’s dealing with the hard, pragmatic, brutal facts of reality and doing what it takes to make things happen.”<sup>243</sup> Moreover, according to Covey, “[d]iscipline arises when vision joins with commitment. The opposite of discipline and the commitment that inspires sacrifice is *indulgence*—sacrificing what matters most in life for the pleasure or thrill of the moment.”<sup>244</sup> Covey illustrates his conception of a disciplined individual with thumbnail biographical sketches of George Washington, Florence Nightingale, Mohandas K. Gandhi, Margaret Thatcher, Nelson Mandela, and Mother Teresa.<sup>245</sup>

The book and film, *The Legend of Bagger Vance*,<sup>246</sup> speaks to the virtue of discipline. Just as a golfer (depicted in the narrative) must seek his “authentic swing” by the hard work of practice of the right technique and attention to craft, so an effective individual in any of life’s pursuits will try to find his or her authenticity through doing what is difficult and unpleasant, but which becomes second nature with time.

The American poet, Gary Snyder, implicitly suggests a partially-western, partially-eastern definition of discipline as part of what it means to pursue a learned craft when he talks of what is required for an “apprentice.” For an aspiring Japanese potter, for example, “the thing that the apprentice first learns how to do is mix clay. Or Japanese carpentry apprentices who will spend months learning how to sharpen chisels and planes before they ever touch the tools to do work.”<sup>247</sup> According to master poet Snyder, this craft learning is structural and cross-disciplinary:

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241. STEPHEN R. COVEY, *THE 7 HABITS OF HIGHLY EFFECTIVE PEOPLE: RESTORING THE CHARACTER ETHIC* 11 (1989).

242. STEPHEN R. COVEY, *THE 8TH HABIT: FROM EFFECTIVENESS TO GREATNESS* 60 (2004).

243. *Id.* at 65-66 (alteration in original).

244. *Id.* at 66.

245. *Id.* at 68-70.

246. STEVEN PRESSFIELD, *THE LEGEND OF BAGGER VANCE* (1995); *THE LEGEND OF BAGGER VANCE* (Dreamworks 2000).

247. Gary Snyder, *The Real Work (Excerpts from an Interview)*, in *THE POET’S WORK: 29 MASTERS OF 20TH CENTURY POETRY ON THE ORIGINS AND PRACTICE OF THEIR ART* 286 (Reginald Gibbons ed., 1979).

A master is a master. If you saw a man who was a master mechanic you'd do better—say you wanted to be a poet, and you saw a man that you recognized is a master mechanic or a great cook. You would do better, for yourself as a poet, to study under that man than to study under another poet who was not a master, that you didn't recognize as a master.

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Not only a true poet but a master—a *real* craftsman. There are true poets who can't teach because . . . they're not grounded in details. They don't *really* know the materials. A carpenter, a builder knows what Ponderosa pine can do, what Douglas fir can do, what Incense cedar can do and builds accordingly. You can build some very elegant houses without knowing that, but some of them aren't going to work, ultimately.<sup>248</sup>

As Gary Snyder sees it, the true “apprentice”—unlike the showy, brassy, reality television version of the word—should take humble pains to master the details of his or her craft. Snyder's comments call on us to be mindful of details: the details of step-by-step processes for doing tasks; the details of the roots, branches, twigs and leaves of knowledge in a particular field; the detailed exertions of a daily regimen; the details of undoing old, out-dated ways of doing things in favor of newer, more efficient, more effective approaches.

Let us now turn to the topic of the discipline of finding a higher calling in the law. United States Magistrate Judge Carl Horn III, in this regard, has written a sensitive and perspicacious book which, in my judgment, is really an extended meditation on the lawyerly virtue of discipline.<sup>249</sup> Judge Horn starts his book by examining the cold, hard light of reality: lawyers have been disdained throughout American history and are vehemently disliked in the current era.<sup>250</sup> His initial admonition is one of gentle, but serious, reproach:

What we do with this criticism, from the ancient to the most recent . . . may be less important than that we show good faith—and a measure of humility—in acknowledging it. In the eyes of many, the legal profession has lost its way. Have we? What *are* our higher, more-noble purposes in twenty-first-century America, and how might we better demonstrate these to a cynical public, which increasingly sees lawyers as “sharks” preying on the problems of others, or worse, as high-priced whores willing to do almost anything if the money is right?

These are unavoidable questions if we are to achieve what must be our goals: renewed ideals, a sense of “calling” in our work, and proud participation

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248. *Id.*

249. CARL HORN III, *LAWYERLIFE: FINDING A LIFE AND A HIGHER CALLING IN THE PRACTICE OF LAW* (2003).

250. *Id.* at 2-5.

in a profession that has reclaimed—even in the eyes of the fickle public—its “dignity and honor.”<sup>251</sup>

Horn’s second reflection on the need for discipline by lawyers addresses the truth that, despite nostalgia for a “golden age” when American lawyers were cast in a heroic light, there has never been a time when lawyers were angelic or perceived as saints.<sup>252</sup> Third, Horn details the professional need for attorneys to inculcate a middle path in their practice of law. This Aristotelian “golden mean” requires steering between the “complexity of contemporary value judgments,”<sup>253</sup> which may create “complete cynicism and unabashed moral relativism,”<sup>254</sup> and the unrealistic notion that there are always clear-cut, black and white answers to difficult legal problems.<sup>255</sup> Fourth, the wisdom reflected in the pages of *LawyerLife* counsels lawyers to realize that making positive, purposeful changes in their own lives as attorneys and as human beings, while helping to move the legal profession closer to the mountain of “higher ideals,” will not be achieved overnight.<sup>256</sup> Instead, Judge Horn correctly informs us that these tasks “will require decades of arduous effort” and work.<sup>257</sup> A fifth rumination on discipline to seek a higher calling in life and law made by Horn is the counterintuitive thought that lawyers and law students need to “slow down and smell the flowers.”<sup>258</sup> Illustrating this point with a real-life example, *LawyerLife* describes the experience of Texas lawyer John McShane:

As John McShane and others tell it, his transformation from the brink of personal and professional disaster to a successful, balanced life and law practice is equal parts emotional, intellectual, and spiritual. Today he disciplines himself daily to [practice] . . . *la dolce far niente*, which translates [as] the sweet doing of nothing. He has developed a holistic or healing approach to law and life, which encompasses everything from snuggling with his grandson to spending late nights [counseling a divorce client].<sup>259</sup>

Sixth, Judge Horn provides an exemplar of the disciplined life of the law by noting the story of an attorney from Memphis, Tennessee, John McQuiston II, who incorporated the systematic classic religious text, *The Rule of St. Benedict*, into his daily life and even went so far as to rewrite the Rule for his personal use.<sup>260</sup> Indeed, one of the many benefits of taking one’s chosen religion seriously is the restraint and focus that flow from the pursuit of a great

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251. *Id.* at 5-6 (footnote omitted).

252. *Id.* at 6-11.

253. *Id.* at 13.

254. *Id.*

255. HORN, *supra* note 249, at 13.

256. *Id.* at 18.

257. *Id.*

258. *Id.* at 38 (internal quotation marks omitted).

259. *Id.* (emphasis added) (internal quotation marks omitted) (footnotes omitted).

260. *Id.* at 38-39.



spiritual tradition. Horn's seventh point about discipline for lawyers is his account of the philosophical approach of Arnie Herz. Herz had "traveled to Europe and spent two years in India studying yoga and meditation before he attended law school," becoming "one of New York's most gifted mediators before he turned 40."<sup>261</sup> The essence of attorney-mediator Herz's success appears to be helping his clients to "calmly consider what is *really* in their best interest."<sup>262</sup> This approach, of course, requires rigorous and difficult thought and soul-searching that, if successful, culminates in big-picture life purposes being realized.<sup>263</sup>

For another view of the meaning of the virtue of lawyerly discipline, consider an article written by Professor Angela Olivia Burton.<sup>264</sup> For Burton, it is vital to develop the discipline to "think like a lawyer" in order for a professional to "exercise . . . judgment in legal decision-making and problem-solving" inherent in the practice of law.<sup>265</sup> As she explains, for a law student to grow into a lawyer who exercises admirable professional judgment, he or she must bring "discipline to the process of developing intellectual capacities"<sup>266</sup> requisite for effective lawyering. Good lawyer judgment, in turn, is "marked by a number of particularly salient characteristics"<sup>267</sup> which can be reduced to the following:

- (1) attention to a wide range of contextual information along legal, personal, social, and structural dimensions;
- (2) respect for and conscientious consideration of the perspectives of a variety of relevant persons and entities in addition to those of the client;
- (3) the ability to alternate between empathy and impartiality with respect to the client's desires;
- (4) appreciation of and commitment to moral values such as fairness, equity, and justice;
- (5) critical and imaginative action-oriented thinking; and
- (6) the ability to learn from experience.<sup>268</sup>

Professor Joshua D. Rosenberg—in yet another take on the meaning of lawyerly discipline—contends that lawyers need to improve their "interpersonal dynamics."<sup>269</sup> Rosenberg observes in this regard:

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261. HORN, *supra* note 249, at 39 (footnote omitted).

262. *Id.*

263. *Id.* at 39-40. *Cf.* RICK WARREN, *THE PURPOSE DRIVEN LIFE: WHAT ON EARTH AM I HERE FOR?* (2002) (recommends a disciplined spiritual consideration of our key life purposes).

264. Angela Olivia Burton, *Cultivating Ethical, Socially Responsible Lawyer Judgment: Introducing the Multiple Lawyering Intelligences Paradigm into the Clinical Setting*, 11 *CLINICAL L. REV.* 15 (2004).

265. *Id.* at 15.

266. *Id.* at 43.

267. *Id.* at 22.

268. *Id.*

269. Joshua D. Rosenberg, *Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, of Human Relationships in the Practice of Law*, 58 *U. MIAMI L. REV.* 1225 (2004).

Most people in this country do not like lawyers. Most lawyers in this country do not like their jobs. As a law professor, I spend most of my waking hours helping to turn good, likeable people into those disliked and unhappy lawyers. As a result, I have felt some responsibility to at least consider both how the legal academy may be contributing to all of this disliking, and what we can do to change it. . . .

While most law professors, as most lawyers, seem to relish disagreeing with almost everything, we at least approach consensus on one common goal. We all strive to teach students to “think like a lawyer”: to accurately ascertain the relevant facts, and to apply disciplined logic and reason to those facts in order to arrive at a solution to whatever problem it is they are addressing. These skills are essential. *Unfortunately, however, we do not teach people [the discipline of] how to use these skills in the contexts where they are most needed — in interactions and relationships with colleagues, opposing counsel, clients and decision-makers.*<sup>270</sup>

Clinical law professors Cynthia Batt and Harriet N. Katz suggest three discipline-driven qualities that constitute lawyerly professionalism.<sup>271</sup> First, lawyers and novice lawyers need to be “conscientious about the quality of [their] work.”<sup>272</sup> The authors contend that essential characteristics of a conscientious lawyer include the following:

- Meets deadlines, including early deadlines imposed to assure effective review by supervisors;
- Makes an effort to do her best work;
- Demonstrates an understanding of the process of work and may ask for assistance at any stage including defining the assignment, identifying resources, correcting or improving work, preparing and practicing for performance;
- In group settings, recognizes the interdependence of the work group on each person’s contribution, accommodates the need for others’ input, and is respectful of the group’s mission and standards;
- Keeps schedules, reports appropriately;
- Acknowledges mistakes and asks for help to correct the error and its impact.<sup>273</sup>

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270. *Id.* at 1225-26 (emphasis added) (footnotes omitted).

271. Cynthia Batt & Harriet N. Katz, *Confronting Students: Evaluation in the Process of Mentoring Student Professional Development*, 10 CLINICAL L. REV. 581 (2004).

272. *Id.* at 593.

273. *Id.* at 594.

Second, Batt and Katz argue that another, over-arching, discipline-driven quality of attorney professionalism is “[c]uriosity [a]nd [e]mpathy.”<sup>274</sup> According to the professors, key attributes of a curious and empathetic lawyer entail the following:

- Takes advantage of opportunities to observe lawyers and judges in action, alertly considering observed practices, and questioning participants about decisions;
- Seeks out, hears, and responds to constructive criticism concerning her work;
- Is curious about many aspects of the practice setting, seeking out additional information and insights, respecting and learning from peers and co-workers in all positions;
- Is curious about the lives, needs, and perspectives of clients and others affected by the legal system, beyond the apparent presenting legal problem.<sup>275</sup>

Third, Batt and Katz claim a discipline-driven attorney is aware of and abides by “[a]ppropriate [b]ehavior [s]tandards.”<sup>276</sup> They conclude their excellent article with a vital meditation about the virtue of discipline for the good lawyer. They point out that reflecting on what a lawyer hopes to do and, then, actually does is a part of a “career-long enhancement of professionalism” and improvement as a practicing lawyer.<sup>277</sup>

In conclusion, discipline might be thought of as a kind of glue that holds the other lawyerly virtues together. And yet, discipline, alone, is of little moral value. Discipline is a pure instrumental virtue: it helps one achieve other, more substantive, virtuous ends like integrity, compassion, creativity, energy, and justice. And, while some of these latter virtues are impurely instrumentalist in nature—for example, having compassion, creativity, and energy enable one to achieve virtuous ends like integrity and justice—they, nevertheless, have important substantive aspects as well. Therefore, while discipline is a critical lawyerly virtue, I would rank it ninth on the top ten list.

#### 10. Perseverance

A wise man once summed up the meaning of perseverance with a metaphor about a wood chopper: “Many strokes overthrow the tallest oaks.”<sup>278</sup> Thus,

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274. *Id.* at 595.

275. *Id.* at 595-96.

276. *Id.* at 597.

277. Batt & Katz, *supra* note 271, at 609.

278. GRAYLING, *supra* note 111, at 37 (attributed to John Lyly).

one who perseveres continues a task “steadfastly or determinedly”—persisting through what may come.<sup>279</sup> Closely allied terms and phrases for perseverance are “keep going, stand fast *or* firm, . . . stop at nothing, go the distance, keep at it, . . . stick it out, hang on, soldier on, hang in (there); . . . endure,” and “stick to (it).”<sup>280</sup> Synonyms for *persistent* could easily do double duty for *persevere*; the listing of these words almost makes the reader feel more determined than he might otherwise be inclined to be: “tenacious,” “steadfast,” “firm,” “staunch,” “resolved,” “unfaltering,” “unflagging,” “indefatigable,” “dogged,” “stubborn,” “obstinate,” “unrelenting,” “tenacity,” “stamina,” “tirelessness,” and “pertinacity.”<sup>281</sup>

The dictionary listing of related words does not do justice to the meaning of the human virtue of perseverance. I remember a case that I got involved with early in my career as a lawyer involving a marketing company, a disgruntled former employee and a contractual covenant not to compete. Happily, the litigation ended with an amicable settlement between the parties. I do not even remember the precise facts or issues in the case. What I do remember is an inspirational quotation that my client—the owner of the marketing company—had printed up in fancy lettering and made sure each of his sales representatives took on the road to help them through the hard times. My client gave me a sheet of paper with that quotation as a *momento* of the case which I have had affixed to my office wall for the last twenty years. There is no indication of the author or source of the wise saying (though I am still trying to find the author). It states:

Nothing in the world can take the place of persistence. Talent will not; nothing is more common than unsuccessful [people] with talent. Genius will not; the world is full of educated derelicts. Persistence and determination alone are omnipotent.

M. Scott Peck, M.D.—the author of the best-selling *The Road Less Traveled*<sup>282</sup>—has also put together a wonderful “anthology of wisdom” that he calls *Abounding Grace*.<sup>283</sup> An entire part of this book is devoted to the virtue of perseverance. According to Peck’s analysis, perseverance can be broken down into the following “component virtues”: commitment, confidence, constancy, determination, devotion, diligence, endurance, patience, and perseverance.<sup>284</sup>

Peck synoptically refers to the virtue of perseverance as “the great virtue of seeing things through.”<sup>285</sup> He observes that the “predominant theme” of

279. OXFORD DICTIONARY AND THESAURUS, *supra* note 195, at 1113.

280. *Id.*

281. *Id.*

282. M. SCOTT PECK, *THE ROAD LESS TRAVELED: A NEW PSYCHOLOGY OF LOVE, TRADITIONAL VALUES AND SPIRITUAL GROWTH* (1978).

283. *ABOUNDING GRACE: AN ANTHOLOGY OF WISDOM* (M. Scott Peck ed., 1996).

284. *Id.* at 6 (table of contents).

285. *Id.* at 133.

perseverance is “that if we persevere in ways that are not stupid or brain damaged, then we can achieve virtually any goal and succeed at any aim we desire.”<sup>286</sup> Noting that, “we are mysteriously cocreators with God in the development of our souls, that God is always trying to help each of us but doesn’t have sole say in the matter,”<sup>287</sup> Peck goes on to reflect on a critical aspect of perseverance—what he refers to in linguistic terms as “due diligence.”<sup>288</sup> He writes, with self-reflective honesty: “[t]he most frequent reason I have failed—or witnessed others fail—in an endeavor has been a lack of due diligence. We have simply failed to devote to the endeavor the amount of time, energy, thoughtfulness, or simple caring that the endeavor required.”<sup>289</sup> Dr. Peck then cites the Latin phrase by Saint Augustine, “*Dilige, et quod vis fac*” and translates it to mean that “[i]f you are being loving, if you are loving God, and if you are being diligent about it all, then you can do whatever you want. What you do under these circumstances will inevitably be moral and pleasing in the sight of God.”<sup>290</sup>

Scott Peck’s quotations from famous (and not-so-famous) people on the meaning of perseverance are enlightening. I recommend that every lawyer and law student have a copy of *Abounding Grace* on their desktop bookshelf. Among the rich assortment of quotes that Peck has assembled, my personal favorites about perseverance are as follows:

I am seeking, I am striving, I am in it with all my heart. – *Vincent Van Gogh*<sup>291</sup>

The quality of a person’s life is in direct proportion to his commitment to excellence, regardless of his chosen field of endeavor. – *Vince Lombardi*<sup>292</sup>

I’ve always seen myself as a winner, even as a kid. If I hadn’t, I just might have gone down the drain a couple of times. I’ve got something inside of me, peasantlike and stubborn, and I’m in it ‘til the end of the race. – *Truman Capote*<sup>293</sup>

It’s so important to believe in yourself. Believe that you can do it, under any circumstances. Because if you believe you can, then you really will. That belief just keeps you searching for the answers, and then pretty soon you get it. – *Wally “Famous” Amos*<sup>294</sup>

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286. *Id.*

287. *Id.* at 134.

288. *Id.* at 136.

289. *ABOUNDING GRACE*, *supra* note 283, at 136.

290. *Id.* at 137 (internal quotation marks omitted).

291. *Id.* at 138.

292. *Id.*

293. *Id.* at 140.

294. *Id.* at 141.

Let us, then, be up and doing, With a heart for any fate; Still achieving, still pursuing, Learn to labor and to wait. – *Henry Wadsworth Longfellow*<sup>295</sup>

Never give in! Never give in! Never, never, never. Never—in anything great or small, large or petty—never give in except to convictions of honor and good sense. – *Winston Churchill*<sup>296</sup>

Get a good idea and stay with it. Dog it, and work at it until it's done, and done right. – *Walt Disney*<sup>297</sup>

Diligence is the mother of good luck, and God gives all things to industry. Then plough deep while sluggards sleep, and you shall have corn to sell and to keep. – *Benjamin Franklin*<sup>298</sup>

The foot of the farmer is the best manure for his land. – *German Proverb*<sup>299</sup>

Patience can break through iron doors. – *Yugoslav Proverb*<sup>300</sup>

Never think that God's delays are God's denials. Hold on; hold fast; hold out. Patience is genius. – *Comte de Buffon*<sup>301</sup>

The most extraordinary thing about the oyster is this. Irritations get into his shell. He does not like them. But when he cannot get rid of them, he uses the irritation to do the loveliest thing an oyster ever has a chance to do. If there are irritations in our lives today, there is only one prescription: make a pearl. It may have to be a pearl of patience, but, anyhow, make a pearl. And it takes faith and love to do it. – *Harry Emerson Fosdick*<sup>302</sup>

Pray to God, but keep rowing to the shore. – *Russian Proverb*<sup>303</sup>

I never did anything worth doing by accident, nor did any of my inventions come by accident; they came by work. – *Thomas Alva Edison*<sup>304</sup>

A bar of iron, continually ground, becomes a needle. – *Chinese Proverb*<sup>305</sup>

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295. ABOUNDING GRACE, *supra* note 283, at 146.

296. *Id.*

297. *Id.* at 148.

298. *Id.* at 151.

299. *Id.* at 152.

300. *Id.* at 155.

301. ABOUNDING GRACE, *supra* note 283, at 159.

302. *Id.*

303. *Id.* at 161.

304. *Id.*

305. *Id.* at 163.

When you come to the end of your rope, tie a knot and hang on. – *Franklin D. Roosevelt*<sup>306</sup>

You win some, you lose some, and some get rained out, but you gotta suit up for them all. – *J. Askenberg*<sup>307</sup>

Ev'ry day fishin' day, but no ev'ry day catch fish. – *Babamian Proverb*<sup>308</sup>

As we say in the sewer, if you're not prepared to go all the way, don't put your boots on in the first place. – *Ed Norton*<sup>309</sup>

Knowledgeable legal commentators have emphasized the importance of the lawyerly virtue of perseverance. In certain areas of legal practice, for example criminal defense work and immigration practice, being able to hang tough and to endure setbacks and disappointments is critical. I think that perseverance is emphasized in these two practice areas because both a criminal defense attorney and an immigration lawyer face the unpleasant reality of opposing the full powers of government (with its substantial resources, personnel, powerful backing, and inherent prestige). Thus, if you happen to be a criminal defense lawyer or an immigration attorney, you must earn your daily bread by hunkering down, digging in, and tirelessly fighting the Leviathan on behalf of your beleaguered clients.<sup>310</sup>

But, the virtue of perseverance is essential for lawyers in virtually *every* practice area of law. Indeed, the virtue of perseverance has been discussed by authors in the context of: construction law,<sup>311</sup> small business law,<sup>312</sup> civil rights law,<sup>313</sup> communications law,<sup>314</sup> bankruptcy law,<sup>315</sup> class action litigation,<sup>316</sup>

306. *Id.* at 164.

307. *ABOUNDING GRACE*, *supra* note 283, at 165.

308. *Id.* at 166.

309. *Id.* at 168.

310. *See, e.g.*, David J. Kessler, *Learning the Legal Ropes with the Death Penalty*, 35 U. TOL. L. REV. 567, 571 (2004) (the importance of “persistence and follow-up” by a criminal defense attorney in a death penalty case); Jean Coleman Blackerby, Note, *Life After Death Row: Preventing Wrongful Capital Convictions and Restoring Innocence After Exoneration*, 56 VAND. L. REV. 1179, 1203 (2003) (combination of scientific advances and an attorney’s unrelenting effort led to one convicted death row prisoner being finally released after nine years of suffering on death row); David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. 817, 830 (2003) (thanks to the perseverance of a death row inmate’s attorney and luck, the prisoner received a new trial); George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 215 (2001); Sadiq Reza, *Religion and the Public Defender*, 26 FORDHAM URB. L.J. 1051, 1051 (1999); Stephen A. Rosenbaum, *Keeping an Eye on the INS: A Case for Civilian Review of Uncivil Conduct*, 7 LA RAZA L.J. 1, 40-41 (1994).

311. *See, e.g.*, Leslie O’Neale-Coble, *In Memoriam: Erwin L. Corwin (1927-2004)*, UNDER CONSTR. (ABA Forum on the Constr., Chicago, IL.), Mar. 2004, at 5.

312. *See, e.g.*, Ann Southworth, *Representing Agents of Community Economic Development: A Comment on Recent Trends*, 8 J. SMALL & EMERGING BUS. L. 261, 267 (2004).

313. *See, e.g.*, J. Clay Smith, Jr., *Celebrating Fifty Years of Desegregation Jurisprudence: The Road to Brown v. Board of Education and Its Aftermath*, 47 HOW. L.J. 1075, 1076 (2004); Joseph

eminent domain law,<sup>317</sup> international law,<sup>318</sup> torts,<sup>319</sup> identity-based social movements and public law,<sup>320</sup> antitrust law,<sup>321</sup> insurance law,<sup>322</sup> Native American law,<sup>323</sup> disabilities law,<sup>324</sup> social security law,<sup>325</sup> commercial law,<sup>326</sup> “political lawyering,”<sup>327</sup> and tax law.<sup>328</sup>

Abraham Lincoln named perseverance as an essential virtue for aspiring lawyers.<sup>329</sup> Professor Daniel Kornstein explains how lawyers like Oliver Wendell Holmes, Jr. and Wallace Stevens persevered in their study and practice of law by keeping in mind the big picture of the law as a form of literature:

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Bellacosa, *Introductory Remarks to Symposium: Brown v. Board of Education at Fifty: Have We Achieved Its Goals?*, 78 ST. JOHN'S L. REV. 257, 257 (2004).

314. See, e.g., Robert D. Richards & Clay Calvert, *Suing the Media, Supporting the First Amendment: The Paradox of Neville Johnson and the Battle for Privacy*, 67 ALB. L. REV. 1097, 1108 (2004).

315. See, e.g., Brittany E. Powell, Comment, *Eliminating Fee Enhancements: Encouraging Quality Representation in Bankruptcy While Maximizing the Value to the Estate*, 20 BANKR. DEVS. J. 207, 232 (2003).

316. See, e.g., Seth M. Wood, Note, *The Master Settlement Agreement as Class Action: An Evaluative Framework for Settlements of Publicly Initiated Litigation*, 89 VA. L. REV. 597, 616 (2003).

317. See, e.g., James L. Thompson, *Condemnation of Easements*, in A.L.I.-A.B.A. COURSE OF STUDY MATERIALS, EMINENT DOMAIN AND LAND VALUATION LITIGATION 375, 386 (2003).

318. See, e.g., Michael Foster, Book Review, FED. LAW., Aug. 2002, at 53, 53-54. (discussing international litigation against Libya stemming from the destruction of Pan Am Flight 103 over Lockerbie, Scotland).

319. See, e.g., Dan Christensen, *Paving the Way for a Road Hazard Case*, TRIAL, Jan. 2002, at 46, 47.

320. See, e.g., William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 466-67 (2001).

321. See, e.g., Leonard Orland, Essay, *The Microsoft End Game*, 34 CONN. L. REV. 221, 223 (2001).

322. See, e.g., Arnold R. Levinson & Terrence J. Coleman, *Insurance Bad Faith Claims Are Not Preempted*, TRIAL, June 2001, at 30, 35.

323. See, e.g., Ken Bellmard, *Endeavoring to Persevere: Becoming and Being a Tribal Attorney*, 9 KAN. J.L. & PUB. POL'Y 752 (2000).

324. See, e.g., Jeffrey A. Van Detta & Dan R. Gallipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury? A Response to Professor Colker*, 19 REV. OF LITIG. 505, 540-41 (2000).

325. See, e.g., Victor Fusco, *Outline of Attorney Fees in Social Security Cases*, 181 PRACTISING LAW INSTITUTE 201, 212 (1999).

326. See, e.g., Harold A. Segall, *Then and Now: The Commercial Practice of Law for Over Fifty Years*, 24 FORDHAM URB. L.J. 567, 590 (1997).

327. See, e.g., Peter M. Cicchino, *To Be a Political Lawyer*, 31 HARV. C.R.-C.L. L. REV. 311, 313 (1996).

328. See, e.g., James W. Buchanan III, *Valuation and Taxation of Transfers of Oil and Gas Interests to Charities*, 22 REAL PROP. PROB. & TR. J. 561 (1987).

329. See Edward D. Re, *The Causes of Popular Dissatisfaction With the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 106 n.92 (1994) (referring to a list of lawyerly qualities Lincoln considered essential including: “diligence, perseverance, preparedness, poise, peaceableness, morality, honesty and monetary fairness in one’s work”) (internal quotation marks omitted) (citation omitted).



“When I began,” Holmes once wrote, “the law presented itself as a rag bag of details,” and “a thick fog of details.” He went on: “It was not without anguish that one asked oneself whether the subject was worthy of the interest of an intelligent mind.” Elsewhere: “One saw people who one respected and admired leaving the study because they thought it narrowed the mind.” The study of law struck Holmes at the start as finding oneself plunged in “a black and frozen night, in which there were no flowers, no spring, no easy joys.”

It was against this background and experience that Holmes later spoke of art and the law. Holmes here reminds us of how our other law-trained artists reacted to law school. . . . And yet, Holmes persevered. He finished his legal studies, graduated, became a lawyer and practiced for fifteen years before being appointed to the faculty at Harvard Law School. Holmes was able to do so without breaking down psychologically because in a way he, like Wallace Stevens, never abandoned literature.<sup>330</sup>

Richard Peña, a Texas lawyer, encapsulated the importance of lawyerly perseverance by using Atticus Finch—the lawyer made famous by Gregory Peck in the movie, “To Kill a Mockingbird”—as a touchstone. According to Peña: “Take this example [of perseverance and integrity] to heart and, when faced with a [legal] problem, ask yourself this very simple question, ‘What would Atticus do?’”<sup>331</sup> Perhaps Atticus Finch’s perseverance is what Judge Marvin E. Aspen had in mind when he wrote: “An attorney who consistently refuses to fight back [on a petty, personal level] and perseveres in maintaining a civil demeanor may eventually convince opposing counsel that his or her petty behavior is succeeding only in prolonging the case and increasing costs for everyone.”<sup>332</sup>

Both Revolutionary Era lawyers John Adams and John Marshall became known for their perseverance in learning to practice law.<sup>333</sup> Early nineteenth century lawyer, Supreme Court advocate, and United States Attorney General, William Wirt, emphasized perseverance as a key attribute of a good lawyer:

In his letters of advice to those whom he was desirous of assisting, he continually enlarged upon the importance of laborious effort, affirming that, in his opinion, the “paucity of great men, in all ages, has proceeded from the universality of indolence,” and that, “glory is not that easy kind of inheritance

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330. Daniel J. Kornstein, *The Double Life of Wallace Stevens: Is Law Ever the “Necessary Angel” of Creative Art?*, 41 N.Y.L. SCH. L. REV. 1187, 1290-91 (1997) (footnotes omitted).

331. Richard Peña, *What Would Atticus Do?*, 62 TEX. B.J. 14, 14 (1999).

332. Marvin E. Aspen, *Overcoming Barriers to Civility in Litigation*, 69 MISS. L.J. 1049, 1059 (2000).

333. See CATHERINE DRINKER BOWEN, JOHN ADAMS AND THE AMERICAN REVOLUTION 172-73 (1950); Jean Edward Smith, *Marshall Misconstrued: Activist? Partisan? Reactionary?*, 33 J. MARSHALL L. REV. 1109, 1113-14 (2000).

which the law will cast upon you, without any effort of your own; but — *you are to work for it, and fight for it, with the patient perseverance of a Hercules.*”<sup>334</sup>

Daniel H. Burnham, an early twentieth century architect who designed the 1892-93 Chicago Columbian Exhibition<sup>335</sup> and authored a 1908 plan of development for the City of Chicago, talked about “Chicago spirit” as a constant, steady determination to bring about the very best conditions of city life for all people.<sup>336</sup> Indeed, lawyers need to nurture their own “spirit” of constant, steady determination”—called *perseverance*—to seek justice for their clients and to be willing to do the hard, hard work entailed in that enterprise.

Perseverance, then, is an essential virtue of the good lawyer.<sup>337</sup>

## V. CONCLUSION

American lawyers practicing their profession in the twenty-first century face an array of challenges: from the intensifying competitive environment to the increasing expectations of clients; from the proliferation of new laws and relevant legal systems in the milieu of expanding globalization to the pressure of keeping abreast of rapidly changing economic conditions.

On the one hand, it is time for lawyers to reinvigorate the ancient philosophical pursuit of Aristotle and Plato in searching for the meaning of virtue and vice. On the other hand, this ancient tradition needs to be reexamined, reshaped, and resuscitated with an eye toward what is pragmatic—what will yield the greatest net payoff in coping with a volatile profession in a mercurial world.

Some may object to the idea of a *pragmatically* virtuous lawyer because it is ambiguous or, at its worst, “implies the opposite of virtue—the willingness to do whatever needs to be done (ethics aside) to get something done.”<sup>338</sup> Yet, at its best, to be pragmatically virtuous is akin to “prudence or practical wisdom.”<sup>339</sup> While I might have titled this article the “Prudent Lawyer” or the “Practically Wise Lawyer,” I find the word “pragmatically” to be more apt

334. Henry M. Dowling, *William Wirt*, 4 GREEN BAG 303, 306 (2d ed. 2001) (emphasis added) (citation omitted).

335. See ERIK LARSON, *THE DEVIL IN THE WHITE CITY: MURDER, MAGIC, & MADNESS AT THE FAIR THAT CHANGED AMERICA* (2003).

336. See ELMER W. JOHNSON, *CHICAGO METROPOLIS 2020: THE CHICAGO PLAN FOR THE TWENTY-FIRST CENTURY* 151-55 (2001).

337. For another valuable source of advice on perseverance, see JEFFREY J. FOX, *HOW TO BECOME CEO: THE RULES FOR RISING TO THE TOP OF ANY ORGANIZATION* (1998) (discussing, among other tidbits of advice, the importance of continuing to try; that “[g]lory and the [g]lamour [c]ome after the [g]runtwork,” the need to do your “[h]omework,” and other sage pointers. *Id.* at 87, 105).

338. E-mail from Robert Cochran, Professor of Law, Pepperdine University School of Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (April 14, 2006, 18:49 CDT) (on file with the author).

339. *Id.*

because to be pragmatic challenges twenty-first century American lawyers to try to “[see] things clearly and fully as they are,” in Monroe Freedman’s<sup>340</sup> turn of phrase. In other words, I think that traditional virtue ethics is too far removed from the real world and needs a more nitty-gritty, here-and-now focus. To be pragmatically virtuous as an American lawyer, then, means trying to figure out how to be a good and effective attorney in an environment that is full of temptation, evil, and ambiguity.

This article suggests that a pragmatic approach to lawyerly virtue at this uncertain time is for lawyers to pursue ten key virtues. First: *balance*. Second: *integrity*. Third: *idealism*. Fourth: *compassion*. Fifth: *courage*. Sixth: *creativity*. Seventh: *energy*. Eighth: *justice*. Ninth: *discipline*. And tenth: *perseverance*.

The pursuit of these ten lawyerly virtues is an art. The art requires judgment and discretion in combining the virtues in concrete, real-life situations. In the final analysis, the pragmatically virtuous lawyer is one who is constantly applying abstract concepts of the good to specific, fact-intensive problems.

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340. E-mail from Monroe H. Freedman, Professor of Law, Hofstra University School of Law, to Professor Robert F. Blomquist, Valparaiso University School of Law (April 20, 2006, 10:13 CDT) (on file with the author).